THE

Calcutta Weekly Notes

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India.

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NOVEMBER TO SEPTEMBER

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THE
Calcutta Weekly Notes.

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NOTES.

Re-opening of High Court.

The High Court of Calcutta re-opens to-day after the long vacation.

Judicial Committee, October list.

The Judicial Committee of the Privy Council resumed its sitting this term with a list of 39 appeals ready for hearing. Of these 24 are from India and 15 from the Colonies. Of the Colonial appeals, Canada contributes six, Australia four, Ceylon two, and the Gold Coast Colony, Straits Settlements, and the Seychelles one each. Only eight appeals are awaiting judgment, and of these one is standing over for further evidence.

The late Sir Francis Maclean.

In the very first issue of this journal seventeen years ago, we had occasion to welcome Sir Francis Maclean as the Chief Justice of the Calcutta High Court and it is indeed a very sad duty on our part to have to record his death in our first issue on the re-opening of the Court this year. When Sir Francis retired from India at the end of his term of office, his health had no doubt showed signs of a break down, but we had been assured by Indian gentlemen who had seen him in England that his Lordship had rallied greatly and there was nothing to indicate that he would pass away so soon and so unexpectedly.

It is a matter for sincere regret that his Lordship was not spared long to enjoy the rest which he had earned at the close of an arduous and honourable career, and we convey our sincere condolence to Lady Maclean and the bereaved family. As Chief Justice of the Calcutta High Court, his Lordship occupied a position, both on the Bench and in the social and official life of Calcutta, which in many respects was unique. His stately presence and dignified bearing made itself felt in every company or ceremony in which he took part, be it social or official.

Behind his outward reserve and strong sense of decorum, every one who had come to know him either as a Judge or as a man knew that he had a heart instinct with kindliness of feeling which won for him the respect and regard of both lawyers and laymen. The felicity of his expressions and a keen sense of humour made him a most popular speaker on social occasions, and at public dinners and other similar functions, the presence of Sir Francis Maclean came to be considered almost indispensable. Notwithstanding his social popularity, we feel no hesitation in saying that he never allowed any social or official view of any question to influence him as a Judge on the Bench. If his Lordship had erred on any occasion it was through inadvertance and not through any other cause.

In the administration of justice, the ends of of justice were always uppermost in his mind. He meted out equal justice to all, irrespective of class, creed or colour. The Barrackpur murder trial over which he presided at the Calcutta Criminal Sessions established his reputation in this respect. He was incapable of departing from the code of honour that governs the thought and action of a true gentleman in every sphere of life and that is what made him absolutely impartial on the Bench. The Rangpur Special Constable case and several other political cases had come up before him, but on any such occasion if he found that the Government was in the wrong he never felt any hesitation in making the Crown withdraw from an untenable position

and granting relief to those who had been wronged. His judgments were lucid, singularly free from technicalities and seldom marred by redundancies. With this power of clear exposition and lucid expression he combined a capacity for taking broad views which made it unnecessary for him to probe deep into the legal lore.

He had won no less respect by his uniform fairness in his administrative capacity. His recommendations to fill up vacancies on the Bench and his selections for other responsible offices at his disposal were also recognised as being generally unexceptionable. Who amongst us can ever say that he has never erred? But if Sir Francis committed any errors none of them were of any moment and it would be admitted on all hands that he was both a good man and a very impartial and just Judge. We can say with confidence that his Lordship's memory will be long cherished in this Province with high regard as of one who for 12 years presided over the High Court in a manner which served to maintain its dignity, prestige and traditions.

Retirement of Sir Richard Harington.

The retirement of Sir Richard Harington, Bart, the senior Puisne Judge of the Calcutta High Court, at the close of the long vacation will make us miss a Judge who had won the confidence and good opinion of all. He combined in him the best traditions of a typical E[illegible] gentleman and of a member of the Englis[illegible] The warm regard in which he was held [illegible] profession by reason of his even temper, de[illegible] to duty and habitual fairness and breadth o[illegible] bordered almost on affection. It is indee[illegible] too much to say of him that never did [illegible] word or action cause any pain or bitterness [illegible] mind of any person who came in contact [illegible] him. He too was a judge of the fine Englis[illegible] of Sir Francis Maclean. Although not very quick or brilliant, he was always very painstaking and made a thorough study of the facts and the law before pronouncing an opinion. Although in *Clarke* v. *Brojendra Kishore*, he in common with Sir Francis Maclean was overruled by the Judicial Committee of the Privy Council anyone who has taken care to study Mr. Justice Harington's judgment will feel little doubt that it is not he but the Judicial Committee that has erred in the interpretation of the law. It is a matter for congratulation that Mr Justice Asutosh Chaudhuri has been confirmed in Sir Richard Harington's place.

Indian Press Act (I of 1910).

Their Lordships' judgment which we report in this issue in the matter of the petition by Mr. Mahomed Ali under sec. 17 of the Indian Press Act of 1910 leaves little doubt that the so-called safeguards that were said to have been incorporated into the Act to provide against any arbitrary exercise of the wide powers conferred on the executive by the Act to order the forfeiture of books, presses and securities, are after all unmeaning and absurd. Their Lordships the Chief Justice and Mr. Justice Woodroffe are virtually of opinion that once the executive Government has passed an order by notification for the forfeiture of any books, presses or securities deposited under the Act, for any writing printed or published and alleged to be objectionable under sec. 4 by reason of their having in the opinion of the Government a tendency to promote sedition, hatred or contempt against Government or any class or cause annoyance to anyone so as to induce him to do an illegal act or omission, it is final and conclusive under sec. 22 of the Act. The power of so called revision given to the High Court by sec. 17 is of no avail either to the party aggrieved or to the Hon'ble Judges to question the justice or propriety of the order.

Sec. 12 no doubt states that the Government must state the grounds of forfeiture in the notification embodying the order of forfeiture. But if the Government do not comply with the requirements of the statute, as in their Lordships' opinion was the case here, their Lordships can only declare the notification to be not in accordance with the law but they are powerless to annul the order for forfeiture, for sec. 22, as interpreted by their Lordships, has in fact taken away with one hand the power of revision which the Legislature is supposed to have given by sec. 17 with the other. Then his Lordship the Chief Justice says with the concurrence of Mr. Justice Woodroffe that sec. 4 casts an onus on the person aggrieved by the order of forfeiture, which it is almost hopeless for any human being to discharge. His Lordship adds that "it is difficult to see to what lengths the operation of this section might not be plausibly extended by an ingenious mind. They would certainly extend to writings that may even command approval. An attack on that degraded section of the public which lives on the misery and shame of others would come within this widespread net, the praise of a class might not be free from risk. Much that is regarded as standard literature might undoubtedly be caught." There can no more severe commentary on the drastic provisions of the Indian Press law, which after this ought not to be allowed to disfigure the Indian Statute Books.

Then again his Lordship The Chief Justice declares the power of revision purporting to be

conferred on the High Courts in respect of the Government's order for forfeiture as a mere "semblance" and his Lordship asks whether it should not have been withheld as it was by the long since defunct Press Act of 1878. This Act, it will be remembered, was repealed after a severe indictment against it by Mr. W. E. Gladstone. We do not suppose that his Lordship is at all serious in his last suggestion. We presume, what his Lordship means is that if the Act is designed to be put into operation for reasons of state known to the executive alone and which are not intended to be disclosed, the semblance of jurisdiction given to the High Courts ought not to have found a place in the new Act as it can serve no useful purpose. Such unmeaning provisions can only serve to embarrass the judiciary and in reality gives no relief or remedy to the aggrieved parties. The repealed Act of 1878 was certainly more consistent in this respect.

Mr. Justice Stephen's judgment is by no means a less severe indictment on the statute. His Lordship's sense of justice revolts against the suggestion that the Government by their own omission, or to use his Lordship's expression "laches," to conform to the requirements of that statute, can oust the statutory jurisdiction of the High Court or the remedy intended to be conferred under the law to the party aggrieved. His Lordship therefore expresses the opinion that the High Court has the power to go into the merits of the order for forfeiture. The learned Judge is at one with the Chief Justice and Mr. Justice Woodroffe in holding that the provision in sec 12 for stating the grounds of forfeiture in the Government Notification was also intended for furnishing materials for the High Courts to exercise their revisional jurisdiction under sec. 17 of the Act. Their Lordships are all agreed that if the Government do not choose to disclose the grounds they are powerless to make the executive conform to the requirements of the statute.

Mr. Justice Stephen is no less frank in stating that his view that he is entitled to go into the merits of the case does not really carry him any further. He feels with his learned brothers that he is required to perform an impossible task. With his Lordship's characteristic dry humour, he observes: "In attempting to form an opinion on it I find myself in a position which is unfamiliar to me, and in which, as far as I am aware, no Judge in the British Empire has been placed, since the remote days of early English jurisprudence. I have to decide a question of fact on such evidence as is supplied by one document. The side on whom the onus of proving his case is cast is not in a position to give any evidence." And in conclusion his Lordship in the same lighter vein but with no less candour and regard for justice sums up by saying that "acting on such information as I have, I entertain no doubt what my answer would be. But the absence of doubt is probably largely due to the absence of evidence and cannot be taken as going far towards showing that the opinion is correct." Such expression of judicial opinion surely calls for a repeal or amendment of the Act.

CURRENT INDIAN CASES.

(CIVIL.)

Hindu Law—Joint family—Business contract, suit in respect of—Minor members if necessary parties.

LALJI *v.* KESHOWJI, I. L. R. 37 Bom. 340.

It is not necessary in the case of a Hindu family to join in a suit upon a business contract minor members of the family who in fact take no share in the business which is carried on on behalf of the family.—*Ram Shebak* v. *Ramlal*, I. L. R. 6 Cal. 815; *Luchmanen* v. *Siva Porokasho*, I. L R. 26 Cal. 349, considered.

Interrogatories.

BHAGWANDAS *v.* BURJORJI, I. L. R. 37 Bom. 347.

The mere fact that the questions would be admissible in cross-examination of a witness does not make them good as interrogatories which must not be exhibited unreasonably or vexatiously nor be prolix oppressive unnecessary or scandalous where the defence of wagering is set up the party setting up this defence should not be allowed to interrogate his opponent generally as to his business transactions apart from the particular transactions in suit for it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something which will support his case.

Civil Procedure Code (1908), Or. 21, r. 89—Civil Procedure Code (1882), sec. 310A, cl. (b)—Auction sale—Deposit within thirty days—"Decree-holder," meaning of.

GANESH *v.* VITHAL, I. L. R. 37 Bom. 387.

Under Or. 21, r. 89, the deposit must be made within thirty days of the date of sale, not that notice must be given within that period.

"Decree-holder" in sec. 310A, cl. (b) of the Code of 1882 means that person alone for satisfaction of whose decree the sale has been ordered and does not include other persons who would have a right to claim rateable distribution out of the sale-proceeds under sec. 295. *Hari Sundari* v. *Sashi Bala*, 1 C W. N. 195; *Roshan Lal*, I. L. R. 30 Cal. 262, followed.

Auction-purchaser—Compensation for improvements on eviction.

MOITHEENSA *v.* APSA, I. L. R. 36 Mad. 194.

An auction-purchaser is entitled to compensation for improvements *bonâ fide* made while in possession on eviction from the property on the ground of the sale being set aside owing to irregularity. The good faith required does not go beyond an honest belief in the purchaser in the validity of his title.

Succession Certificate Act (VII of 1887)—Certificate if can be granted to a minor.

S. KRISHNAMA CHARLU *v.* R. LAKHMANA CHARLU, I. L. R. 36 Mad. 214.

A succession certificate can be granted to a minor on an application made by him through his natural guardian.

Indian Contract Act (IX of 1872), sec. 74—Penalty.

A. MUTHU KRISHNA IYER *v.* SANKARA LINGAM PILLAI, I. L. R. 36 Mad. 229.

When in an instalment bond no interest is payable until default but interest at an exorbitant rate is payable as from the date of default the latter stipulation can be treated as one by way of penalty within the meaning of sec. 74 of the Contract Act as it now stands after the amendment in 1899.

Civil Procedure Code—Res judicata.

SANYASI BARITYN *v.* ARISSWARO, I. L. R. 36 Mad. 287.

The decision of any matter directly and substantially in issue in a former suit between the same parties would none the less be *res judicata* because the decision was based only on the oath of one of the parties taken under sec. 9 of the Oaths Act.

Hindu Law—Joint family property.

GOVINDA PARRIKKER *v.* NANI, I. L. R. 36 Mad. 304.

No presumption should be made as to whether properties acquired in the name of a junior member of family belong to him or to the family. The decision depends on various circumstances such as the relationship of the member in whose name the title stands to the *karnavan* at the time of the acquisition of the property, the possession of private means by the junior member the existence of any family funds at the time of the acquisition which disappeared thereafter, &c.

Hindu Law—Impartible zemindari.

AVALAPPA *v.* MURUGAPPA, I. L. R. 36 Mad. 325.

A zemindar holding an impartible zemindari can for legitimate family or other necessary purpose make an alienation of the property binding upon his successor, unless there is a special custom to the contrary.

Civil Procedure Code (1882), sec 287 (c)—Execution of decree—Prior encumbrance, notification of—Auction purchaser, rights of.

JAIRAJ MAL *v.* RADHA KISHAN, I. L R. 35 All. 257.

In the course of execution proceedings a mortgagee applied to the Court to have his mortgage notified at the sale of the property. This was done without any enquiry being held and the property was sold but not subject to any incumbrance. The mortgagee subsequently brought a suit on his mortgage against the auction-purchaser who pleaded that the mortgage was a fictitious one.

Held—That the auction-purchaser was not estopped from questioning the mortgage.

Hindu Law—Adoption after marriage if valid amongst Sudras.

JHUNKA PRASAD *v.* NATHU, I. L. R. 35 All. 263.

An adoption in order to be valid even among Sudras must take place before the marriage of the adopted son.

Hindu Law—Marriage of a Hindu girl by maternal relatives against the wishes of paternal relatives—Absence of force or fraud—Factum valet.

KASTURI *v.* CHIRANGI, I. L. R. 35 All. 265.

A Hindu girl of sixteen was married to a suitable person by her maternal grandfather and maternal uncle against the wishes of her paternal uncle and paternal cousins who wanted to make a profit out of marrying her to a rich but one-eyed man. The marriage was not brought about by force or fraud.

Held—That this was eminently a case to which the principle of *factum valet* should be applied and the marriage should not be declared void.

DHANPAL *v.* BUDH SING, I. L. R. 35 All. 271.

A property was sold in execution of a decree obtained in a suit on a registered mortgage. The Plaintiff subsequently brought a suit on a prior unregistered mortgage executed in his favour for Rs. 95.

Held—That the mortgage held by the Plaintiff was not invalid merely by reason of the document not being registered and the debt secured was recoverable from the surplus if any left after the satisfaction of the registered mortgage.

Injunction—Landlord and tenant.

BHAGWAN DAS *v.* MAHAMMAD YAHIA, I. L. R. 35 All. 292.

The Plaintiff was the zemindar of the village in which the Defendants resided. The Plaintiff brought a suit for an injunction to restrain the Defendants from constructing a well in their house and for an order directing them to remove the materials and to restore the land to its original condition. It appeared that the occupiers of the houses had the right to transfer them subject to payment of one-fourth of the sale price to the zemindar. The houses only escheated to the zemindar in case of the family dying act.

Held—That the well was an undoubted adjunct to the convenience of the occupants and did not injuriously affect the Plaintiff's interests and the Court should not grant the injunction.

Civil Procedure Code (1908), Or. 21, r. 88—Pre-emption.

ABDUL GAFUR *v.* GHULAM HUSSAIN, I. L. R. 35 All. 296.

The purchaser at an auction sale of a defeasible title to a share in a property is not competent to maintain a claim for pre-emption as a co-sharer.

JULESHWAR *v.* AURUT, I. L. R 35 All. 302.

In 1892, a decree was passed against the father of a Mitakshara joint family in a suit brought on a mortgage of the joint family property In 1896, the sons who were not parties to the original suit had their shares in the property exempted. In 1897, the father's share was sold and half the mortgage-debt was realised. In 1910, the mortgagees sued the sons to recover the balance.

Held—That the suit was not barred by limitation and was maintainable in the form in which it was brought.

Civil Procedure Code (1908), sec. 60 (c)—House of an agriculturist, attachment of.

JAMNA PROSHAD *v.* RAGHU NATH, I. L. R. 35 All. 307.

The Defendant's house was attached in execution of a simple money decree. The Defendant objected that

he was an agriculturist and his house was exempt from attachment. It appeared that Defendant was both a cultivator of land and a zemindar.

Held—That the burden of proof lay on the Defendant to show that his main source of income was cultivation and he was an agriculturist in the strict sense of the term.

Hindu widow—Transfer of immoveable property.

DURGA KUNWAR, I. L. R 35 All. 311 (F. B.).

The estate of a Hindu widow is more than a mere life interest There is nothing in law to prevent her from transferring her so-called life interest. A transfer by her of the corpus of the estate without legal necessity, and not for a pious purpose is not void but is voidable by the reversioners. If she transfers immoveable property in this manner her transferee would be entitled to hold and possess it during her life-time and to recover possession of it by suit as against a third party wrongfully in possession.

Contract—Supply of goods.

PHAGU MAL v BABU LAL, I. L. R. 35 All. 325.

If goods supplied under a contract are wholly unsuitable for the purpose for which it is supplied it is not the duty of the purchaser to return the goods to the supplier, it is enough for him to notify to the supplier that the goods are lying at the place to which they were sent at the sender's risk.

Hindu widow—Reversioner.

MEGHU RAI v. RAM KHELAWAN, I. L. R. 35 All. 326.

The Plaintiffs sued as reversioners to a property alienated by a Hindu widow for a declaration that the alienation was not binding upon them. It was found that even the nearest of the Plaintiffs could only succeed to the estate if four males and one female died in his life-time.

Held—That the Plaintiff's suit must fail.

Reviews.

THE PRINCIPLES OF THE GENERAL LAW OF MORTGAGE. *By J. A. Strahan, M. A., LL. B., Bar-at-Law. Second Edition. Price 7s. 6d. Published by Messrs. Sweet and Maxwell, Ld., 3, Chancery Lane, W. C, London. 1913.*

The principles of the general law of mortgage are very lucidly explained within a very small compass in this work. The law of mortgage in India is mostly based on the English law of mortgage with savings in respect of the prevalent practices amongst the people in this country. It is, however, by no means an easy matter for an Indian reader to grasp the general principles of the English law of mortgage unless he cares to make a special study of its history and developments in the Common Law and Equity Courts in England. Even then it is not possible always to reconcile all the vicissitudes through which the law passed in course of its interpretation by the Equity and Common Law Judges. Judges and lawyers in England entertain conflicting views of it even to this day. The learned author has made an attempt to reconcile them by reference to the general principles of the law of contract. Indian lawyers will therefore find this work of considerable assistance to them in grasping the general principles of the English law of mortgage. In this edition the author has given reference to all the latest English decisions of importance on the subject and what makes it particularly useful to an Indian reader is that reference has been given in the body of the book to the provisions of the law of mortgage in India as contained in the Transfer of Property Act and the Code of Civil Procedure, the relevant sections of which are also reproduced in the appendix to this work.

THE ALL INDIA DIGEST (CIVIL), 1811—1911. Vol. VII. *By T. V. Sanjiva Row. Published by T. A. Venkasawmy Row and T. S. Krishnaswamy Row. Law Printing House, Madras. 1913.*

The present volume of this popular Digest begins with "Mortgage" and brings the matter down to "Pre-emption." The classification and arrangement of subjects follow on the lines of the previous volumes and leave little to be desired. The get-up of the volume is excellent.

THE INDIAN DECISIONS (NEW SERIES). Madras, Vol. II; Calcutta, Vol. IV; Allahabad, Vol. VIII. *Edited by the Lawyers' Companion Office. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. Law Printing House, Madras. 1913.*

The volumes above noted are reprints of the Indian Law Reports, Madras, Volumes 5 to 7; Calcutta, Volumes 8 and 9; and Allahabad, Volumes 16 to 18 respectively. The special features of the previous volumes of this useful series of reprints are well maintained. We have nothing but praise for the progress made by the enterprising publishers in bringing out these reprints.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*Livingston* v. *Hawker.* Before THE LORD CHANCELLOR, THE EARL OF HALSBURY AND LORDS ATKINSON, MERSEY AND PARKER. 17th October 1913.

In appointing guardian for an infant the Court should be guided by the interests of the infant alone.

The case raised the question of the guardianship of a girl, aged 9 years, who was an orphan. After her mother's death she lived with the Respondent her aunt. The Respondent's sister Mrs. Noyes, however, also wished to have the child, and she proceeded to abduct her from the school. The

child's grandfather intervened and now applied for guardianship. He proposed to send the child to Australia to live with Mrs. Noyes. The Court of Appeal (reversing the order of Swinfen Eady, J.,) refused the grandfather's application. Hence this appeal which was allowed.

The LORD CHANCELLOR said that his duty was to look to the interests of the infant; he was acting in a *quasi*-administrative capacity, and he might interview the child. That had been done in this case. His Lordship wished to say at once that Mr. and Mrs. Hawker's conduct had been altogether admirable. They sent her to an excellent school and took every possible care of her. But they had three children of their own and the burden on them was very considerable. Mr. Noyes was well off and occupied a good position in Sydney. He and his wife were prepared to adopt the child and to settle a substantial sum upon her. Looking at the matter from the point of view of the welfare of the child, apart from the circumstances which he was about to mention, his Lordship was bound to conclude that it was more advantageous to the child that she should go to Sydney, where she would be in the position of an only child and might have considerable expectations. That was said to be a worldly view of the matter, but the Court was bound to look at worldly considerations. He came to the circumstance which gave rise to the difficulty in the case. Mrs. Noyes opened up negotiation with her sister for the care of the child. Both sisters entertained a strong affection for the child. Mrs Noyes was obviously anxious to adopt her, and Mrs. Hawker was unwilling to part with her. Then Mrs. Noyes, overcome by her affection, resorted to proceedings which were altogether wrong. She proceeded to abduct the child from her school, representing to the schoolmistress that she had the authority of the mother to take the child out for the day. That was an utterly illegal and reprehensible act.

That, however, did not conclude the question. An act assumed a very different character, in a Court of morals at all events, according to the motive with which it was done. Motives of religion or of affection often led people to do illegal acts, but it did not follow that they were not persons of high character in other respects. The moral aspect of such an act was very different from the moral aspect of an act done from sordid and base motives. Mr. Justice Swinfen Eady took the view that Mrs. Noyes had been swayed by motives of affection, which did not render her unfit to act as a mother to the child, and he held that there was no inference to be drawn from this illegal act which would preclude the Court from entrusting the care of this child to her. The Court of Appeal took a different view. As Lord Justice Buckley put it, the Court had to choose between integrity and wealth. Stated in that way, the case was disposed of; but so to state the case was begging the question which had to be decided. He (the Lord Chancellor) had come to the same conclusion as Mr. Justice Swinfen Eady. The learned Judge saw the child and ascertained that while she was in Sydney she had been excellently brought up, that she had advantages in the way of education which she could not have here, and that her prospects were likely to be brighter there than they would be here. An undertaking had been given by Mr. and Mrs. Noyes to settle a sum of money on the child. He understood that Mr. Livingston and Mrs. Noyes were prepared to supplement this undertaking by adding an undertaking that reports should be sent periodically to the Judge in this country as to the progress of the child.

Messrs. Buckmaster, K. C., and Pollock for the Appellant.

Hon'ble F. Russel, K. C., and *Mr. Shelden* for the Respondent.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*In re Jean Baxter.* Before the MASTER OF THE ROLLS, AND LORDS JUSTICES HAMILTON AND SWINFEN EADY. 14th October 1913.

A person who is convicted of causing the death of the testator is not entitled to any benefit under the will—Public policy.

Jean Baxter was convicted of the manslaughter of testator Hall and was sentenced to 3 years' penal servitude. She was a legatee under the will of the said testator. It was urged against her that she could take no interest under the will. The President of the Probate Court made the order against her, and her present appeal was also dismissed. THE MASTER OF THE ROLLS in the course of his Judgment said—It had been argued by counsel for the Appellant that there was no statute in existence which deprived her of her rights under the testator's will because she was a felon. His Lordship said that he agreed that the Wills Act, 1837, and the Forfeiture Act, 1870, had nothing to do with it, but in this case the matter was based on public policy, and that was not to be found in any statute, but was part of the Common Law of England. It might probably be said that the decision of the House of Lords in *Fauntleroy's* case (4 Bligh, New Series, 194) really covered the case, but it was not necessary to go back to that case, as the decision of the Court of Appeal in *Clever* v. *The Mutual Reserve Fund Life Association*, (1892) 1 Q. B. 147, clearly covered the present case. That was a case in which the question was whether the executors of a person who had effected an insurance on his life for the benefit of his wife could maintain an action on the policy, although the death of the

insured was caused by the felonious act of the wife. It was held that they could do so, but that the wife would not be entitled to any benefit. All the members of the Court laid down the law applicable to that case in terms which clearly covered this. It was true that that was a case of contract, but Lord Esher then said—"No doubt there is a rule that if a contract would be contrary to public policy, performance cannot be enforced either at law or in equity"; and further on he said—"If, in consequence of the death of the insured having been caused by the crime of a person in whose favour the policy is expressed to be made, or to or upon whom the policy money is left by will or settled, such person is not entitled to insist on its being paid to him, but if he nevertheless claims the money from the executors, they may then vouch the doctrine of public policy and may say that by reason of it such person has forfeited his or her right to the money."

Lord Justice Fry was, if possible, more distinct. He said:—"The principle of public policy invoked is, in my opinion, rightly asserted. It appears to me that no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony"; and, again, Lord Justice Lopes said exactly the same:—"I do not doubt that the principle of public policy would prevent the wife from recovering the amount of the policy money from them, and so reaping benefit from her crime; because no trust can be enforced which contravenes the law."

But it was said that that was a case of murder and not manslaughter. His Lordship said that he was entirely unable to recognize the distinction. The authority in the Appeal Court was binding on them even if they felt any doubt about the present case, which his Lordship did not. *Crippen's* case, [1911] p. 108, was a decision of the learned President, asserting the doctrine laid down in the earlier case.

His Lordship said he thought it would be little short of shocking if Jean Baxter, who was the cause of the testator's death and had been convicted of felony, could come before the Court and claim any benefit under the testator's will.

Messrs. Valetta and Corrie for the Appellant.

Messrs. Barnard, K. C., and Bayford for the Respondent.

B. D, *Appeal dismissed.*

COURT OF APPEAL.—*Rex* v. *The Local Government Board.* Before LORDS JUSTICES VAUGHAN WILLIAMS, BUCKLEY AND HAMILTON. 6th October 1913.

Appeal heard and determined by administrative authority behind the back of the Appellant.—Held, it was not decided according to law because the procedure adopted was contrary to natural justice—Inspector's report if may be treated as confidential—Right to address his Counsel viva vice.

A closing order declaring that the house of Mr. Arlidge was unfit for human habitation was made. He appealed to the Local Government Board which held a public local inquiry before deciding the appeal. It was held by an Inspector whose report was kept confidential, and without giving the owner any information as to the nature of the Inspector's report or inquiry or allowing him any opportunity of being heard, the appeal was dismissed. The owner took out a rule *nisi* for *certiorari* on the ground that the appeal was not heard according to law. The Division Court discharged the rule holding that the Local Government Board were not bound to hear the applicant after receiving the Inspector's report. The owner's appeal was allowed by the majority, LORD JUSTICE HAMILTON dissenting, LORD JUSTICE VAUGHAN WILLIAMS said:—

I do think that in cases where the Board has to ascertain the law and also facts, the Board acting in good faith and fairly listening to both sides must disclose all the evidence of fact placed before them and also the conclusions in law adopted by them as the basis of their decision. This seems to me absolutely consistent with the words of the Lord Chancellor, Lord Loreburn, in the Board of *Education* v. *Rice*, [1911] App. Cas, 179, and also with the judgments of Lord O'Brien, Lord Chief Justice of Ireland, and Mr. Justice Madden in *Rex* v. *The Local Government Board*, 1911, 2 Ir. Rep, Common Law, 331, both of which cases are cited by the learned Judges in the Divisional Court.

What was argued was, that on an appeal to the Local Government Board, at all events when not sanctioned by Act or rule expressly or by constructive implication, the procedure must not be contrary to natural justice. There is certainly nothing express in the Act or rules to authorize the non-disclosure to the Appellant or Respondent who asks for production of documents submitted to the Local Government Board for consideration when making their decision and taken into consideration by them. It is one thing to depart from the procedure adopted at common law, and another, and a very different thing, to adopt a procedure which is inconsistent with the principles of natural justice on which the English common law is based. In my opinion the non-production of these reports is contrary to the principles of natural justice on which English law is based. The fact that the Housing, Town Planning, &c., Act, 1909, is an Act passed to carry out a most useful reform, avoiding expensive litigation in certain local matters, which, in the interests of the

public ought to be disposed of promptly, by transferring jurisdic ion from the Law Courts and vesting it in the Local Government Board, (a Department of the State), does not, in my opinion, jus ify a construction of the Ac which by mere and unnecessary implication au horizes a manifest departure from the principles upon which the English common law is based.

The non-produc ion of documen s was justified by the Local Government Board on the ground that reports, whether of fact or law, made by officers of the Board were, according to a well established practice of the Board, both under this Act and prior Acts, treated as confidential. I invited the Solicitor-General to produce these documents for inspection by the Court, but he (I dare say qui e properly) refused; but, in my opinion, the reports of the presiding Inspector ought not to have been trea ed as confidential.

I will now say a word or two on the point made by the Appellant's counsel, that he was never allowed to know his judge's name or to see him face to face and to address him *viva voce.* This point was undoubtedly s renuously argued by Mr. Upjohn on behalf of the Appellant. I think that the point fails so far as it asserts the right to see the judge face to face or to address him *viva voce*, but I think that the Appellant is entitled, after all the documentary evidence and reports have been received by the Local Government Board, to have placed before the personal judge who is going to pronounce a decision a written argument, and in that sense is en i led to "hearing" before the decision is given; but as I have already said, he cannot do this effectively until he has had the opportunity of seeing and considering the reports and documents which the judge has before him to guide him in coming to a decision.

I have come to the conclusion that the non-disclosure of these documen s when the disclosure was asked for is itself inconsistent with natural justice. In arriving at this conclusion I have, as indeed was suggested by the Solicitor-General, dealt only with the non-production of the Inspector's report after the second inquiry as the strongest instance in support of the claim for a *certiorari.*

Messrs Macmorran, K. C., Upjohn, K. C., and Little for the Appellant.

The Solicitor-General and *Mr. Branson* for the Respondent.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Sutton* v. *Mehta.* Before LORDS JUSTICES VAUGHAN WILLIAMS, BUCKLEY AND KENNEDY. 20 h October 1913.

Indian Pearl Merchant's claim allowed—No title passed to the Defendant because his agent obtained the pearls by fraud.

The Respondents were pearl merchants, trading as Janeri and Co. in Paris. They entrus ed a pearl necklace, worth £2,000 to one Amin in Paris who stated that he knew of a good purchaser for the same. Amin, however, pawned it and it subsequently came in o the possession of the Appellant. The Respondent's claim for delivery up of the necklace or i s price was allowed by Bray, J. He found that Amin intended from the first to misappropriate the pearls that whether the case had to be decided by English or French law, the Defendant obtained no title to the pearls, inasmuch as his agent Mikol had not acted in good faith, that Amin had obtained the pearls from the Plaintiffs by means of larceny by a trick, or by *vol* in French law, and therefore that he did not obtain possession of the pearls with the consen of the Plaintiffs, and Amin was not a mercantile agent within the Factors Ac .

This appeal was dismissed.

LORD JUSTICE VAUGHAN WILLIAMS said that it had only been necessary to argue two questions. The first was as to Mikol's state of mind when he entered into the transaction with Amin—whether Mikol was acting in good faith. Mikol said that it was his practice, when strangers brought him valuable jewelry and invited him to enter into dealings with them on the basis that the property in the jewelry was in them, to ask no ques ions. He said that he was jus ified in adopting this course because it was the practice in Paris so to do. He (the Lord Justice) was by no means satisfied as to the existence of such a practice, and in truth it seemed to him from Mikol's course of conduct that he himself did not really believe in that prac ice. He thought that the learned Judge had been right in coming to the conclusion that the real reason why Mikol refrained from asking questions was because he was afraid that if he did he might get answers which would prevent him from being able to carry through the transaction safely. The second question was whether there was evidence which justified the finding that Mikol was acting as agent of the Defendant. In his opinion there was ample evidence in support of that finding.

Messrs. Langdon, K. C, and Attenborough for the Appellant.

Messrs. Rawlinson, K. C., and White for the Respondents.

B. D. *Appeal dismissed.*

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THE CALCUTTA WEEKLY NOTES.

REPORTS.

[ORDINARY ORIGINAL JURISDICTION.]

JENKINS, C. J.	In the matter of a petition of MAHOMED ALI
STEPHEN, J.	*In re* a pamphlet entitled
WOODROFFE, J.	"Come over into Macedonia and help us."
1913,	
1, September.	

The Indian Press Act (I of 1910), secs. 4, 17, 19, 22—Notification by Government declaring forfeiture of book—Grounds, statement of, if imperative—High Court, if may declare order of forfeiture illegal, because grounds not stated—Recital of the language of statute, if statement of grounds—High Court, if may question the correctness of the order of forfeiture—Executive and judicial acts, respective scope of—Person applying to set aside order of forfeiture, onus of proof on—Evidence, non-production of, by Government—Court, materials upon which it may act—Legislature, intention of—Scope of language used wider than purpose intended—Court's duty to apply terms of statute as found—Proclamation under the Press Act, if necessarily suggests crime or casts slur.

The provision in sec. 12 of the Indian Press Act (I of 1910) requiring the Local Government, in its notification declaring a newspaper, book or other document to be forfeited, to state the grounds of its opinion is mandatory, being intended as a check for the protection of persons whose property may be confiscated and also to enable the High Court to exercise its revisional powers under sec. 17.

A mere citation of the words of the section without setting forth anything in the nature of a fact does not amount to a statement by the Government of its grounds for its opinion required by sec. 12.

JENKINS, C. J. (WOODROFFE, J., concurring)—*But the High Court cannot declare an order of forfeiture passed by the Government to be illegal and void merely because the Government did not state the grounds of its opinion.*

STEPHEN, J.—*The omission on the part of Government to state the grounds of forfeiture as required by the statute does not make the notification void in such a way as to deprive the High Court of its jurisdiction to revise the order of forfeiture under sec. 17 of the Act, and the Government cannot by their own laches deprive the person whose property has been confiscated of the only relief that the law provides.*

The Court has jurisdiction to revise the order of forfeiture on its merits.

Per JENKINS, C. J. (WOODROFFE, J., concurring)—*The High Court has no jurisdiction under the Act as framed to question the action of the executive Government in ordering a forfeiture. Its functions are limited to considering whether the applicant before it has discharged the almost hopeless task of establishing that the forfeited book or paper does not contain words coming within the all comprehensive provisions of sec. 4.*

The Government with all the information at its command being of opinion that the pamphlet may promote hatred against Christians and English subjects in British India, the Court, with no more information than the man in the street, is not in a position to set aside a measure of safety on which the Government had solemnly resolved.

IN THE MATTER OF A PETITION OF MAHOMED ALI.

STEPHEN, J.—*There can be no doubt that the writing may promote hatred against the classes referred to but the absence of doubt on this question is probably largely due to the absence of evidence and cannot go far towards showing that the opinion is correct.*

The question whether a document comes within the description in sec. 4 of the Act must, when no evidence or information is furnished by the Government, be decided by the judges upon such knowledge or information as they may possess of the social or political conditions of the country having relevancy to the enquiry, however unsatisfactory the result may be.

Per JENKINS, C. J. (WOODROFFE, J., concurring)—*The fact that the terms of a statute are being applied to a purpose not intended by the Legislature is no objection to such application if the language of the Act is wide enough to cover the case in question. Therefore the fact that the Act was directed against crime and aimed at its prevention would be no bar to Government declaring the forfeiture of a pamphlet which it admits does not contain seditious libel and in respect of which it attributes no criminal offence to the publisher.*

STEPHEN, J.—*The intentions of the writer and publisher are not directly relevant to an enquiry under sec. 19 which is concerned only with the effect the writing is likely to produce. They may be of importance on the principle that they are not likely to produce an effect which they did not intend and may be considered to that extent only.*

This Petition was heard on the Original Side of the High Court by a Special Bench constituted under Act I of 1910.

The Petitioner Mohamed Ali, then residing at 109, Rippon Street, in the town of Calcutta, is the editor of a weekly newspaper known as *The Comrade* and was the recipient of certain copies of the above-named pamphlet published by Le Comité De Publication, D.A.C.B., 15, Rue Djagal Oglou, Constantinople, and as such became the owner of such copies and held possession thereof.

By a notification of the Government of Bengal, dated the 18th July, 1913, and published in the *Calcutta Gazette Extraordinary*, dated the 22nd July, 1913, the said pamphlet was declared forfeited to His Majesty under Act I of 1910 on the ground that the same contained "words of the nature described in sec. 4, sub-sec. 1 of the Indian Press Act, 1910 (I of 1910), inasmuch as they are likely to bring into hatred or contempt certain classes of His Majesty's subjects in British India." A copy of the said order as published in the said *Calcutta Gazette Extraordinary* is as follows:—

"GOVERNMENT OF BENGAL.

POLITICAL DEPARTMENT.

Notifications.

No. 2296 P.D.—The 18th July, 1913—Whereas it appears to the Governor in Council that a pamphlet, entitled "Come over into Macedonia and help us" contains words of the nature described in sec. 4, sub sec. (1) of the Indian Press Act, 1910 (I of 1910), inasmuch as they are likely to bring into hatred or contempt certain classes of His Majesty's subjects in British India.

Now, therefore, in exercise of the power conferred by sec. 12, sub-sec. (1) of the said Act, the Governor in Council hereby declares all copies of the said pamphlet wherever found to be forfeited to His Majesty."

The Petitioner had on the 22nd day of July last surrendered at Delhi all

IN THE MATTER OF A PETITION OF MAHOMED ALI.

the copies of the abovenamed pamphlet that he then had with him, to the Acting Superintendent of Police, Delhi, in pursuance of a warrant issued by the District Magistrate, Delhi, requiring him to make over all the copies he had to the said Acting Superintendent of Police, Delhi, and on the 4th day of August, 1913, his attorneys addressed a letter to the Commissioner of Police, Calcutta, forwarding the only other copy of the said pamphlet, which he had with him in Calcutta, a copy of which letter is as follows :—

Calcutta, 4th August, 1913.

To

SIR FREDERICK HALLIDAY, KT.,
Commissioner of Police, Calcutta.

SIR,

Our client Mr. Mohamed Ali, editor of the newspaper *Comrade*, has handed over to us a copy of a pamphlet belonging to him and entitled "Come over into Macedonia and help us," published by Le Comité de Publication, D. A. C. B., Constantinople. The said pamphlet has been proscribed by an order of the Bengal Government, dated the 18th July, 1913, published in the *Calcutta Gazette Extraordinary*, dated 22nd July, 1913 Our client disputes the validity of the order ; but so long as it stands, he is bound to obey, and we therefore beg on behalf of our client to forward the said copy to you, but under protest. Kindly inform us if you will seize the copy under the Act.

We have the honour to be,
SIR,
Your most obedient servants,
(Sd.) B. N. BASU & Co.

The pamphlet was confiscated by the said Commissioner of Police, who wrote the following letter to the Petitioner's attorneys.

FROM

SIR FREDERICK HALLIDAY, KT.,
C. I. E., M. V. O.,
Commissioner of Police, Calcutta.

To

MESSRS. B. N. BASU & CO.,
Solicitors,
10, HASTINGS STREET, CALCUTTA.
Dated Calcutta, the 5th August, 1913.

SIR,

I have the honour to acknowledge the receipt of a copy of a pamphlet entitled "Come over to Macedonia and help us" and to state that in accordance with the Government order promulgated in the *Calcutta Gazette Extraordinary*, dated the 22nd July, 1913, the copy is seized and forfeited to His Majesty under sec. 12 of Act, I of 1910.

I have the honour to be,
SIR,
Your most obedient servant,
(Sd.) F. L. HALLIDAY,
Commissioner of Police, Calcutta.

The Petitioner also stated that the pamphlet had a preface by Sir Adam Block, President of the Council of Administration of the Ottoman Public Debt, and contains extracts from English and other European newspapers and the testimony of eye-witnesses referring to the conduct of the Balkan Allies during their late war against Turkey and did not contain any words, expression or illustrations which are likely to bring into hatred or contempt any classes of His Majesty's subjects in British India and did not come under the purview of sec. 4, sub sec. 1 of the said Act. The Petitioner prayed under secs. 17 and 19 of the Act I of 1910 that the said order of forfeiture by the Government of Bengal might be set aside.

Mr. Norton (with *Mr. Mahomed-ul-Huque* and *Mr. J. N. Roy*) for the Applicant.

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The Advocate-General (with *Mr. B. C. Mitter*) for the Respondent, the Government of Bengal.

Mr. Norton in opening said :—This was not an English pamphlet, but really it was the translation of a statement made in French by persons of position and authority. It was addressed not to India but to England and to it was attached a preface by Sir Adam Block, President of the Council of Administration of the Ottoman Public Debt. The object of the pamphlet was to ask the English people at Home to use their influence upon the Government of England to abandon what was called their attitude of apathy towards massacres by the Bulgarians, Servians and the Greeks of a large number of Mahomedans belonging to the Turkish rule. It purported to set out facts which if true would certainly justify an appeal to the British authorities as a Power on the question of humanity to intervene and put an end to the massacres and outrages which were being perpetrated. Some of these pamphlets, five in number, were sent out to Mr. Mahomed Ali from Macedonia, where it was translated into English. He received them in April and proceeded to reprint them in the issues of his English newspaper *The Comrade* of May and June last. Apparently no notice was taken of this until July 16th, when an order was passed by the local authorities in Delhi, under authority of the Supreme Government, forfeiting all those pamphlets. On July 18th, a similar order was issued in Bengal. Only two days intervened between the publication of the Viceroy's order in Delhi and the passing of the order by the Government of Bengal.

There were four copies. In addition to that he also handed over to the District Magistrate all the reprints in *The Comrade* as also in the vernacular paper *The Hamdard*. Those were returned on the ground that those reprints did not fall within the purview of the official order. On August 4th, Messrs. B. N. Basu & Co., Mr. Mahomed Ali's solicitors, surrendered the only other copy of the pamphlet under protest to the Commissioner of Police. In reply, the Commissioner of Police informed Mr. Basu that the copy had been forfeited to His Majesty. Immediately after that Mr. Mahomed Ali moved this Court.

The first point I take is this: The Government has no jurisdiction to issue this order of 18th July 1913, under sec. 12 of the Act.

[STEPHEN, J.—You are applying under sec. 17. We can act only on one ground under this section. I don't think you can raise the question of jurisdiction.]

[JENKINS, C. J.—Sec. 22 bars all jurisdiction except jurisdiction of the High Court ; the question is whether under sec. 17 you can raise the point of jurisdiction.]

Mr. Norton.—This is an enabling Act of an appealing character.

[STEPHEN, J.—The object of the Act is not to punish but to prevent. It is a preventive measure.]

[JENKINS, C. J.—Sec. 22 reproduces sec. 16 of Act 9 of 1878.]

Mr. Norton.—The reason I raise this point is this. Their failure to give the reasons for their order, leaves my client in darkness. I don't know what class of people the pamphlet is supposed to attack, the Christians, the English, the Greeks, the Hindus or Buddhists. What case am I to meet? I am entitled to ask which class or classes under sec. 4 (*c*) of the Act, I am charged with having brought into hatred or contempt.

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[JENKINS, C. J.—The notification does not speak of one class but class.]

Mr. Norton.—I am entitled under sec. 12 to know what class the Government have in their minds.

Advocate-General.—It is on Mr. Norton to shew that the pamphlet does not produce class hatred.

Mr. Norton.—I am entitled to ask the Advocate-General even now to say what classes of people the pamphlet is supposed to attack.

Refers to the speech delivered by Mr. S. P. Sinha, then Law Member of the Government of India at the passing of the Act in Council. In that speech Mr. Sinha indicated the safeguards, and the non-official members relying thereon gave their assent to the passing of the Bill. If it was the intention of the Government not to act upon that promise of Mr. Sinha, which was made on behalf of the Government, it was a distinct breach of faith. The Government was therefore bound to set out their information and their grounds.

Advocate-General.—It is hardly any exaggeration to say that the pamphlet brings about hatred or contempt between Christians and Mussalmans. Antithesis is drawn between Mussalmans and Christians, I mean Christians in British India including Englishmen.

Mr. Norton.—Is that the charge I have to meet?

Advocate-General.—Yes, that is the charge.

Mr. Norton.—I want to know whether the pamphlet is supposed to bring the Christians into hatred or contempt. Which is it?

Advocate-General.—I say hatred and contempt.

Mr. Norton.—I submit there is nothing in the pamphlet that can bring into hatred any class of people in British India. Cites 1907 Punjab Record No. 10. Criminal Judgment. Decision on sec. 153A.

[JENKINS, C. J.—Before we go into the merits, I should like you to see sec. 12. If you look at the notification, you find copies of books. See also sec. 4. I don't know why there is this distinction in sec. 12. See secs. 4, 6, 7, 9, 11, you find in all these "copies." See also 13, 16 and 20.]

Mr. Norton.—I don't know how they could have found that the pamphlet was likely to create hatred and contempt unless they read it. Since I first mentioned the application here, the Delhi Magistrate called on Mahomed Ali to execute a bond and give Rs. 2,000 security on the ground that the *Comrade* had published reprints of a pamphlet which had been proscribed by the Government of India and also had some bearing on the recent Cawnpore riots.

Just at the time we made application here, the reprints were returned because they did not fall within the terms of the notification.

Re-Pamphlet itself, there are two points of view:—The editor of *Comrade* is a Mahomedan. The pamphlet comes from Constantinople. The first point is this: It is wholly alien to the spirit and religion of the Mahomedans to bring Christians into hatred. I will refer first to Gibbon and then to Syed Ahmed Khan. See Vol. II, Sale's Koran, p. 338. Christ is mentioned as one of the six Apostles. The Mahomedans admit the Conception (Immaculate) and Crucifixion of Christ. It is against the religion of Mahomedans to bring Christians into hatred or contempt. The only thing that the Mahomedan denies is the divinity of Christ.

The Koran further says that there is no

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distinction between the Prophets. Refers to Gibbon, Vol. 6, last words of Chap. 50, p. 352, Syed Ahmed Khan's Essays, Vol. I, p. 34.

[JENKINS, C. J.—I assume you are reading in order to shew that Mussulmans reading the pamphlet will not look upon Christianity or Christians with hatred or contempt.]

Mr. Norton.—Yes, my Lord, that is so.

It is no part or parcel of their creed to foment antagonism between Christians and Mahomedans. Explains the name of the pamphlet. At the outset your Lordships find an extract from a revealed book of the Christians and the opinion of Mr. Block that in Turkey the belief in Englishmen is passing away. Am I to have my property forfeited because Sir Adam Block says that the belief in Englishmen is passing away? It is matter for pride that Englishmen have been selected out of all nations in Europe as most "just." (Counsel continuing describes the atrocities committed by the Balkans.) If these facts are true then you cannot help feeling that it is an appeal to the large humanity of the nations of Europe and more particularly, the English nation, because it is considered to be "just."

Think of the appeal by Gladstone. Was it not a laudable thing? If that was praiseworthy, I submit that this appeal is also praiseworthy. If Mahomed Ali's intention is to let Mussulmans in India know as to what is going on in Macedonia and induce the British Government to abandon its apathy with regard to the massacres, then it clearly brings him in the embrace of all that is pure and loveable in Christianity.

Reads Sir Adam Block's preface. Reads Introduction.

"Brutally violated." Does it say by the Christians or Englishmen? Why should the Advocate-General say that it brings Englishmen into hatred? "The savages." Who are they? The troops of the Balkan allies. Refers to "we do not dispute the good faith of the journalists, etc." The object of the pamphlet is to put the facts fair and square before the British public in order to induce them to interfere and stop the atrocities. The object of the book is to shew that these atrocities are committed on the Mahomedans not because they are Mahomedans but because they are not of the same colour.

Is it criminal to say that the Christian nations are strangely silent when the 'Bashibazouks" of the Balkans commit most horrible atrocities?

If there is an attack upon anybody it is upon the Bulgarians.

Refers to Chap. V and different passages and pictures. In the description of these horrible atrocities there is not a word about Christians or Englishmen. The attempt to rouse the indignation of the civilized world is justifiable.

"At Eschekli . . . . ." We had French authorities, war correspondents and now we have Germans. Refers to "Christian Atrocities." The attempt throughout has been to rouse indignation against atrocities which Christ himself would have certainly denounced.

"Incendiarism." This is an indictment of the Servians. "Salonica (Province of)." This refers to Bulgarians.

"It makes one ashamed to be a European and a Christian." This is the whole spirit and tenor of this pamphlet.

"The Greek Metropolitan, etc." Whenever there is an intervention for mercy it is acknowledged by the author.

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Reads—"During the night the Comitadjis, etc., etc."

Reads—"The three massacres," and various parts of the pamphlet.

"Has 'Fair play is a jewel' ceased to be a motto?."

I press it that the concluding words of this chapter are the highest tribute to the righteousness and moral worth of the English people. Upon what justification the Government of Bengal attempts to forfeit this pamphlet when it allows accounts of horrible atrocities by Reuter to be published in the newspaper? Reuter's Telegram. July 1913. What about this telegram?

How does the pamphlet attack Christians or Englishmen.

Except praise there is not a word about Englishmen.

[STEPHEN, J.—Is not there a suggestion that England ought to have interfered, but it has not. Will not this make Mahomedans in India angry with Englishmen? There is no question of the intention of the writer, but the effect of the pamphlet on the public mind]

[JENKINS, C. J.—It is not a protest against Englishmen, but a protest against the attitude of the Government in England, so that people in England may induce the Government to interfere and stop the atrocities. Is not that the drift of this pamphlet?]

Mr. Norton.—Yes, my Lord, that is how I read it.

[STEPHEN, J.—The question is what will be the effect of the publication.]

Mr. Norton.—The Mahomedans who will read this pamphlet are educated. The only effect that the pamphlet may have on them is to persuade the Government here by fair and legal means to interfere in the matter of these atrocities.

Reads from the *Comrade* an answer given to a question by the Under-Secretary for Foreign Affairs.

The purpose of the pamphlet is to induce men in this country and move Englishmen to exert themselves with a view to stopping these atrocities. What is there in the book that Christianity or Christians is or are to be hated for?

[JENKINS, C. J.—The words of sec. 4 are very wide. There need not be any criminal offence. Every day we see accounts in the newspapers that are likely to come within the purview of this section. We have to turn to sec. 17 and see that in our opinion the pamphlet is lik ly to promote hatred or contempt. Is the opinion of the Government that it is likely to promote hatred enough? Sec. 4 really covers the whole range between certainty and impossibility. The use of the word "likely" in the notification is merely a restatement of the Act. Government may have any quanti y of material of which we know nothing.]

Mr. Norton.—Under sec. 17 the onus is thrown on this Court. However impossible it may be your Lordships have to fulfil it. You have to say whether the opinion of the Local Government under sec. 4 is right or wrong.

[JENKINS, C. J.—The onus is on you and not on us. Of course it embarrasses you because you don't know the grounds.]

Mr. Norton.—That is so. I have got only the book and the notification. I submit I have discharged the onus. I have read everything I have got and commented upon the same. How can Englishmen in India be supposed to be implicated in these atrocities? The idea is absolutely absurd.

[STEPHEN, J.—The reading of the book is distressing. It excites certain feelings.

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Anger for instance. Against whom? Against the Servians, Bulgarians, Greeks and Montenegonis. 'What is the common tie? Don't you think that ignorant Mahomedans would think that Christianity is the common tie?]

Mr. Norton.—The appeal being to the Christians, how can it be supposed that they will be looked upon with hatred or contempt. There is no suggestion that Christianity has approved or sanctioned these misdeeds.

[STEPHEN, J.—The charge is that your fellow Christians are behaving like savages.]

[JENKINS, C. J.—You notice that the Local Government follows suit two days after the order of the Government of India. How is it that two governments only have taken action?]

The Advocate-General.—I must be allowed to say that the Bombay Government has also taken action.

[JENKINS, C. J.—All that is necessary under this Act is exicting hatred against any class. By whom? I do not understand that. The Act does not say.]

[STEPHEN, J.—That shews how wide the Act is.]

[JENKINS, C. J.—My difficulty is this: We must be fed with facts and not with law. Law we can supply.]

[STEPHEN, J.—They say in effect that inasmuch as he has committed theft, he is guilty of theft.]

Mr. Norton.—May Government plead their own wrong to escape decision under sec. 17?

[JENKINS, C. J.—If we hold there is no forfeiture, you will get back your single copy of the pamphlet.]

Mr. Norton.—Of course, your Lordship knows that I am not fighting for the pamphlet I am fighting for a decision that I have done nothing that will bring one within the purview of sec. 4.

Advocate-General in reply.—I submit that my friend Mr. Norton has totally failed to discharge the onus which the law casts on him. Reads sec. 4.

The pamphlet certainly comes under sec. 4.

Refers to passage "Perish scores of thousands of innocent Mussalmans .... thousands of women etc. ... these Crusaders were a horde of blood-thirsty and licentious savages, worthy descendants of their ancestors the Huns."

What is the likely result of a passage like this?

This passage does not stand alone.

[JENKINS, C. J.—Would it be fair to read this para. without reading the preceding para.?]

[Refers to the "wirelesses" of the captain of the French cruiser "Bruix."]

[STEPHEN, J.—The mention of the word crusade suggests an antagonism between Christian and Mahomedans. Does not it?]

Advocate General.—Exactly, my Lord.

[JENKINS, C. J.—Look at sec. 20. We should like to have evidence. That would be of help to us. It shews that proof by the Government is contemplated.]

[STEPHEN, J.—Do you agree that grounds ought to have been stated.]

Advocate-General.—Grounds have been stated.

[STEPHEN, J.—You think them sufficient. You don't want to amend them.]

Advocate-General.—That might be a matter for consideration. If you think amendment is necessary, I will consider it.

[JENKINS, C. J.—How can we suggest amendment of an executive order.]

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Advocate-General.—Reads sec. 12 of the the Press Act and says that the expression "stating the words" is only directory and not mandatory. Sec. 12 has been complied with, because the notification says that the pamphlet offends against a certain sub-head of sec. 4.

[STEPHEN, J.—Don't you think that stating grounds implies allegation of facts.]

Advocate-General.—If the Government were to set out all circumstances that require the forfeiture of this book then the Government would be only perpetuating the evil which it seeks to nip in the bud. The Government has stated the particular sub-head of sec. 4 (sub-sec. 1) which the pamphlet offends against.

[JENKINS, C. J.—Suggests how the notification might have been better drawn up.]

Advocate-General.—Sec. 4 embraces an immense variety of matter and the Government has pointed out the particular sub-head or reason for which the forfeiture is necessary. I agree entirely that the notification is not well drawn up.

[STEPHEN, J.—May we ask you how you would have drafted it ?]

[JENKINS, C. J.—If Government took action under sec. 4, it should have set out the words that are offensive.]

Advocate-General.—I submit it is not necessary to set out the circumstances that require the forfeiture.

[JENKINS, C. J.—It is necessary that the Court should know the grounds upon which the case of forfeiture is based.]

Advocate-General.—These pamphlets were reprinted by Mahomed Ali.

Mr. Norton.—That is not the ground of the notification.

Advocate-General.—Mr. Norton said yesterday that the notification was a slur on Mahomed Ali.

[JENKINS, C. J.—What is the meaning of the provision that grounds are to be stated ?]

Advocate-General.—Reads sec. 17.

"Grounds are to be stated." This is only directory. An observation from your Lordships that grounds are always to be stated, will I think be followed in future. Due deference will be attached to it.

[JENKINS, C. J.—"Grounds are to be stated." This is not done by stating a portion of the language of the section. If the words of sec. 12 were more emphatic, would we not be bound to say then that there was no order under sec. 17. If a condition precedent to the validity of the order were not followed, could we act under sec. 17 ? Your view is that if it is manifestly an illegal order then we cannot act under sec. 17 ?]

[STEPHEN, J.—If there was no notification could we act under sec. 17 ? The notification is essential—is it not ?]

Advocate-General.—If there was no notification the Court would have no jurisdiction. There has been an attempt certainly to state the ground. Cites a Punjab Government Notification.

[JENKINS, C. J.—The Punjab Government seems to support you.]

[JENKINS, C. J.—As my learned brother has said grounds of opinion mean the facts and not the law.]

[WOODROFFE, J.—The less particulars are alleged the more difficult it is to say that the publication comes under sec. 4. We are left to guess a lot of things.]

Advocate-General.—The grounds depend on the character of the pamphlet.

[WOODROFFE, J.—According to your argument nothing need be set out at all. The Government may have in possession the grounds of forfeiture but according to

your argument they are not bound to state them. If so, how is this Court to perform its judicial function with regard to cases coming under this Act.]

Advocate-General.—Refers to the reprint of the pamphlet in the paper-book.

[Jenkins, C. J.—Have you got a copy of the original pamphlet ?]

Advocate-General.—Yes. Here it is.

[Jenkins, C. J.—This ought to have been exhibited.]

Advocate-General.—We will file, if necessary, an affidavit by the Commissioner of Police.

Refers to the passage referring to Sir Adam Block's observation. "The oriental and the Turk in particular has always trusted the Englishman because he is known to be a just man. I am afraid that this belief is passing away." It is printed on several pages—"I am afraid that this belief, &c." This is defamatory. It does bring Englishmen to hatred and contempt.

Refers to the passage "If crimes such as these . . . . pass . . . . uncondemned then cleavage between us and our fellow Moslem subjects may eventually become a serious matter."

[Woodroffe, J.—Your argument is that whatever may happen in Europe, no comment on it ought to be allowed in India. If the Turks had committed massacre, no comment on it ought to be allowed here because the Mussulmans might take offence.]

Advocate-General.—Refers to a portion of the pamphlet giving the narrative as given by the Buda-Pesth correspondent of the "Daily Telegraph" in its issue of the 30th December regarding "atrocities in Albania." Reads letter signed D. of 26th December 1912. Then an extract is quoted from the Paris daily paper "*Humanite*" of 2nd February 1913 headed "How the Christian Liberators treat the Mussulmans." Refers to the letter published in the "*Kölnishe Zeitung*" from its Salonica correspondent headed "Christian atrocities."

[Jenkins, C. J.—I don't understand that you attribute anything like criminal offence to Mahomed Ali.]

Advocate-General.—Exactly, My Lord. I don't attribute any criminal offence to him. That there is no slur on Mahomed Ali is apparent from the notification. Cites *King* v. *John Burns* (2), charge to the jury. Your Lordships have to consider the effect of the pamphlet having regard to the immoderate language in which it is written.

[Stephen, J.—Is not the object of the pamphlet to induce Christians to vindicate their religion ?]

Advocate-General.—Refers to para. "*L'Illustration*," 1st March, 1913 Extract from *Humanite* of 2nd February 1913. Refers to the remarks under the illustration "a Turkish woman of Dedeagath (Photograph)." It is obviously meant to rouse angry feeling. Refers also to Ch. VI concluding lines. "Is the honour of a woman less precious to you because she is a Mahomedan."

[Woodroffe, J.—You have to shew that the pamphlet will produce ill-feeling against Christians in India. Don't you think that the prohibition of this pamphlet will have the effect of associating us with the Balkan "Bashi-bazouks ?" If so, then the effect will be bad—won't it ?]

Advocate-General.—I would ask your Lordship to read the statute as it stands and not introduce any foreign matter. I say Mr. Norton's reference to Sir Edward Gray's speech is irrelevant.

(2) 16 Cox. C. C. 355 (1886).

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[JENKINS, C. J.—Not at all, you can go into the history of the matter.]

Advocate-General.—Refers to the preamble of the Act.

[JENKINS, C. J.—The causes of this legislation may throw light upon the kind of class hatred contemplated.]

Advocate-General.—Even the truth of words could not justify their publication if they came under sec. 4.

[JENKINS, C. J.—Can a Local Government forfeit that which is not within its jurisdiction? Forfeiture, so far as Bengal is concerned, would be as a result of the notification by the Local Government. *Mr. Norton* has said that the Government of Bengal could not issue a notification for forfeiture until it saw the pamphlet.]

Advocate-General.—He has given no evidence.

Mr. Norton.—Refers to the supplementary affidavit.

Advocate-General.—I have no information on the matter at all.

[STEPHEN, J.—What is the date of the Bombay notification.]

Advocate-General.—10th July 1913. My learned friend Mr. Norton says that the copies in the possession of Mahomed Ali were the only copies in India. But there is no evidence to support that assertion.

[STEPHEN, J.—Is there anything to shew when the pamphlet was published?]

Advocate-General.—No date is given. It is published in 1913.

Mr. Norton replies.

The Government's notification is not in conformity with the provisions of the Act.

Stating grounds of opinion is not directory but mandatory.

Refers to sec. 153A of the Indian Penal Code. Cites *Khosh Mahomed v. Nasir Mahomed* (3).

This case holds that grounds must be given. No grounds, no order.

Craie's Statute Law, pp. 230 and 234. *Ex parte Stephens* (4), *Reg.* v. *Bertrand* (5). Craie, p. 252.

"Stating its grounds" means shall state grounds.

I am entitled to refer to the debate in the Legislative Council in order to shew the atmosphere in which this Act was passed. Of course, I don't want you to construe the sections of the Act by the help of what was said in the Legislative Council.

Refers to explanation to sec. 121A of the Indian Penal Code.

Cf. Exp. II of sec. 4 of the Press Act.

Refers to sec. 12. The notification not only forfeits the book, but also copies.

[STEPHEN, J.—A book includes copies.]

Mr. Norton.—I rely mainly upon the merits of my case.

I submit that the notification is bad and I am entitled to ask your Lordships to hold that the notification is bad. But then my purpose in bringing this matter here will fail, if I did not get a decision on the merits for which I have come here.

Reads sec. 17.

If that be the law and if we cannot go any further, I will of course be content with a decision regarding the order for forfeiture.

Sec. 17 throws responsibility upon your Lordships to come to a decision one way or another.

(3) I. L. R. 33 Cal. 352 (1905).
(4) 3 Ch. Div. 659 (1876).
(5) L. R. 1 P. C. 520 (1867).

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The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is an application to the High Court under sec. 17 of the Indian Press Act, 1910, to set aside what is described as an order of forfeiture under sec. 12 of that Act.

The order of which complaint is made was published in the *Calcutta Gazette* Extraordinary, July 22nd, 1913, and runs as follows:—

"NOTIFICATION.

"No. 2296 P. D. The 18th July 1913. Whereas it appears to the Governor in Council that a pamphlet, entitled "Come over into Macedonia and help us" contains words of the nature described in sec. 4, sub sec. (1) of the Indian Press Act, 1910 (I of 1910) inasmuch as they are likely to bring into hatred or contempt certain classes of His Majesty's subjects in British India.

"Now, therefore, in exercise of the power conferred by sec. 12, sub-sec. (1) of the said Act, the Governor in Council hereby declares all copies of the said pamphlet wherever found to be forfeited to His Majesty."

This is not the first pronouncement on this phamphlet, for by a similar notification published in the *Gazette of India* on the 16th July 1913 the Governor-General in Council declared the pamphlet to be forfeited.

And even before this there had been notification to the same effect by the Government of Bombay.

"Sec. 12 (1) is in these terms. "Where any newspaper book or other document wherever printed appears to the Local Government to contain any words, signs or visible representations of the nature described in sec. 4, sub-sec. (1), the Local Government may by notification in the Local Official Gazette stating the grounds of its opinion, declare such newspaper, book or other document to be forfeited to His Majesty. The relevant portions of sec. 4 are as follows:—

"Whenever it appears to the Local Government that any printing press in respect of which any security has been deposited as required by sec. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words signs or visible representations which are likely or may have a tedency, directly or indirectly, whether by inference, suggestion, allusion, metaphor implication or otherwise to bring into hatred or contempt any class or section of His Majesty's subject in British India," then the consequences indicated in the Act are to follow.

There is a curious difference between the language of sec. 4 and of sec. 12. Under sec. 4 what may be declared to be forfeited is "all copies of such newspaper book or other document." Under sec. 12 what may be declared to be forfeited is "such newspaper book or other document." Sec. 12 stands alone in this respect and its language may be contrasted with that of secs. 6, 7, 9, 11, 13, 16 and 20 as well as sec. 4. I doubt whether any difference of operation was intended.

Sec. 17 entitles any person having an interest in any property in respect of which an order of forfeiture has been made under sec. 12 to apply to the High Court to set aside the order, but only on the ground that the newspaper book or other document in respect of which the order was made did not contain any words signs or visible representations of the nature described in sec. 4, sub-sec. (1). Together with this section must be read

sec. 22 by which, with a qualified exception in favour of the High Court, all jurisdiction is in effect barred. This section, save for the exception, reproduces sec. 16 of the short lived Press Act of 1878, commonly known as the Vernacular Press Act. Two conditions then are necessary to a forfeiture in accordance with the terms of sec. 12. First it must appear to the Local Government that the publication contains words signs or visible representations of the nature described in sec. 4, sub-sec. (1), and, secondly, the Local Government must by notification in the Local Official Gazette, stating the grounds of its opinion, declare such publication to be forfeited to His Majesty. The first conditions implies that the publication had been seen and read by the Local Government prior to its declaration of forfeiture, for it must first form an opinion. Though there is no evidence as to this, the Advocate-General assured us that a copy must have been in the Local Government's possession before the declaration. I will assume this to be so. The second condition is one which has given rise to considerable discussion. It has been urged that it is a necessary condition of an effective forfeiture that the grounds of the Local Government's opinion should be stated, and that this has not been done in the present case.

On hearing that it appears to the Government in any particular case that there are words of the nature described in sec. 4 (1), the first question that occurs to any one whose duty it is to enquire, is, why does it so appear, what are the grounds of its opinion?

Those responsible for this Act foresaw this, and so they specifically provided that the forfeiting notifications should state the grounds of the Local Government's opinion. But when we turn to the notification no such grounds are stated; nothing in the nature of a fact is set forth, there is merely a citation of those words of the section which are invoked.

The notification amplified to fit the circumstances of this case seems to take this shape; "It appears to the Local Government that these are words likely to bring into hatred or contempt a class or section of His Majesty's subjects in British India and the grounds of its opinion are that the words are likely to bring into hatred or contempt certain classes of His Majesty's subjects in India."

But that repetition of an opinion cannot be its grounds, and yet that is all that the notification furnishes in the shape of grounds. This is obviously insufficient and not a compliance with the terms of the Act.

Moreover I think that this direction in the section is mandatory, and that the Legislature intended to impose, and has imposed, on the Local Government an imperative obligation to state the grounds of its opinion.

The language of sec. 4 may be compared. It requires that the notice forfeiting the copies of the publication should be in writing and state or describe the offending words signs or visible representations. These provisions as to the statements to be contained in forfeiting documents were, I think, designedly inserted and were intended to be a check on the power of forfeiture vested in the Local Government; for it is easy to see that the obligation to state grounds furnishes a valuable safeguard.

The statement of grounds may for another reason to be regarded as an essential part of the Legislature's scheme; for

it might help the High Court to perform the duties cast on it under sec. 17.

And in fact we have in this case been considerably embarrassed, as will appear later, by the absence of grounds.

The notification therefore appears to me to be defective in a material particular, and but for sec. 22 of the Act it would (in my opinion) be our duty to hold that there had been no legal forfeiture.

That section however provides that every declaration purporting to be made under the Act shall, as against all persons be conclusive evidence that the forfeiture therein referred to has taken place. The result is that though I hold the notification does not comply with the provisions of the Act, still we are (in my opinion) barred from questioning the legality of the forfeiture it purports to declare.

This brings me to the question whether the pamphlet under discussion contains words of the nature described in sec. 4, sub-sec. 1.

The provisions of sec. 4 are very comprehensive, and its language is as wide as human ingenuity could make it. Indeed, it appears to me to embrace the whole range of varying degrees of assurance from certainty on the one side to the very limits of impossibility, on the other.

It is difficult to see to what lengths the operation of this section might not be plausibly extended by an ingenious mind.

They would certainly extend to writings that may even command approval.

An attack on that degraded section of the public which lives on the misery and shame of others would come within this wide-spread net, the praise of a class might not be free from risk. Much that is regarded as standard literature might undoubtedly be caught.

It is however urged that even so this pamphlet is outside both the spirit and the words of the section. And now I will notice the argument that has been addressed to us as to this.

The pamphlet, it is said, is an appeal to His Majesty's subjects, followers of Christian faith; and it is an appeal to them as Christians to move the British Government to such individual or collective action as will put a stop to outrages that shock all feelings of humanity, if they in fact occurred.

And so, it is contended this is an appeal to the people of a Christian nation, just because they are a Christian nation, and thus would be the first to protest against the cruel disregard of the principles of its faith, by some who profess to be its adherents, and against acts so abominable as to have earned the scathing denunciation of the Christian Monarch of one of the allied nations. Nor does the argument rest there; for it is brought to our notice that the pamphlet contains passages which show that Christianity as a creed is not attacked, notably that which states (p. 28) that it "was ever the symbol of humanity and mercy"; and that it states that those who were fighting under the cross betrayed it. It is true that it refers to Crusades (p. 3) but this has reference not to any Crusade proclaimed by Christianity but to the proclamation of the King of Bulgaria. On the other hand, there are passages which expressly state that Turkish excesses are not condoned, which shew that the Christians are not attacked as such and narrate the protests made and help given by Christians other than the Balkan allies engaged in the war. There is no racial or political tie between the Balkan allies and the Christian subjects of His Majesty's

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in India which would make it possible that wrongs committed by the former should be considered imputable to the latter. Nor is there really any credal link because it is not suggested that the acts complained of were done in the name of and with the authority of Christianity but in betrayal of it. On the contrary, it is argued, the suppression of this pamphlet might tend in the Mussalman mind to band the Christians of the country with the authors of these wrongs and make it appear that it was desired that these should not be made public lest they might throw discredit on Christian subjects in India.

The pamphlet then, it is said, so far from bringing Englishmen or His Majesty's Christian subjects into hatred or contempt is the highest compliment that could be paid to them.

This is the argument and it may be a very forcible one when addressed to those who can be swayed by it. The executive Government can be moved by such reflections; our investigation is of a more prosaic order.

The Advocate-General has admitted, and I think very properly, that the pamphlet is not seditious and does not offend against any provision of the criminal law of India.

But he has contended, and rightly in my opinion, that the provisions of the Press Act extend far beyond the criminal law; and he has argued that the burden of proof is cast on the applicant, so that however meritorious the pamphlet may be, still if the applicant cannot establish the negative the Act requires, his application must fail.

And what is this negative. It is not enough for the applicant to show that the words of the pamphlet are not likely to bring into hatred or contempt any class or section of His Majesty's subjects in British India, or that they have not a tendency in fact to bring about that result. But he must go further, and show that it is impossible for them to have that tendency either directly or indirectly, and whether by way of inference, suggestion, allusion, metaphor or implication. Nor is that all, for we find that the Legislature has added to this the all-embracing phrase "or otherwise."

And here I may, not inappropriately, invite attention to sec. 153A of the Penal Code which has such affinity to the statutory provision governing this case, that it may be regarded as its basis. That section was added to the Penal Code in 1898, and was directed against the promotion and attempts to promote feeling of enmity or hatred between different classes.

It will be noticed that the feeling here described is one of enmity or hatred: no provision is made for contempt. But the more important divergence is that while the Penal Code requires that the enmity or hatred should be not only towards a class but by a class, there is no such limitation in the Press Act as to the source from which these hostile feelings should proceed; it aims against all hatred or contempt regardless of those by whom it is entertained. Nor is this the only direction in which there is a greater stringency in the Press Act. To sec. 153A there is appended an explanation which declares it not to be an offence to point out, without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce the feelings of enmity or hatred, indicated in the section. And yet no such qualifying words are to be found in sec. 4 of the Press Act, and this

is the more remarkable because the qualifying explanations of sec. 124A are introduced, though they relate to an even graver offence.

It may be that this omission was an oversight; but whether that be so or not the Government insists on the absence of this explanation, though it leads to a curious result.

I think the Government is entitled to stand on the letter of the law, though it deprives Mr. Mahomed Ali of an opportunity of relying on an explanation conceived in the spirit of that which forms part of sec. 153A of the Penal Code.

Had the Press Act incorporated the explanation to sec. 153A, as it has that to sec. 124A, Mr. Mahomed Ali might perhaps have made a very strong case in view of the Advocate-General's admission as to the character of the pamphlet and the applicant's purpose and intentions.

The applicant however contends strenuously that the pamphlet does not come even within these all-embracing terms of the Act, and that the Legislature aimed at something wholly different. The incalculable powers of forfeiture vested in the executive are a sure sign that the Act was called into being by urgent political necessity. And it is of sufficiently recent date to enable us all to remember that the mischief chiefly aimed at was the prevalence of political assassination and anarchical outrage. Comprehensive words were designedly used to catch crime and the incitement to crime posing in the guise of innocence.

The Act was directed against crime and aimed at its prevention. I doubt whether publication with an authorship, a source, and a purpose like those of the present pamphlet were thought of; and I recognise the force of the argument that the Act is now being applied to a purpose never intended. But be that so or not, if the Legislature has employed language wide enough to cover the pamphlet, this lack of reserve affords no answer to the forfeiture now attacked.

I have already dealt with one phase of the absence of grounds in the notification. This defect, and the Government's failure to place before us any materials beyond those furnished by the applicant have sensibly added to our difficulties in discharging the peculiar duties cast on us by the Act.

The notification does not even specify the classes that might be brought into hatred or contempt or which of these two diverse sentiments is apprehended. And so when Mr. Norton rose to address the Court he had to seek this information from the Advocate-General.

The first answer implied that it included Christians, Greeks and Englishmen; but as under the Act the classes are limited to those composed of His Majesty's subjects in India, the Greeks were withdrawn and the first and the last retained. Still the answer in its original form is not without its significance, though it was afterwards modified.

The pamphlet would doubtless bring into hatred the unchristian Christians whose deeds of atrocity are described. The theory presented is that the reflection of this hatred might fall, not indeed on the Government but on His Majesty's Christian and English subjects in British India. If this be the Government's view with all the information at its disposal, the Court, no more informed than the man in the street, cannot (in my opinion) affirm this could not be so, and affirm it with a degree of assurance that would entitle it to set aside a measure of safety

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on which the Government had solemnly resolved.

The Advocate-General has convinced me that the Government's view of this piece of legislation is correct, and that the High Court's power of intervention is the narrowest: its power to pronounce on the legality of the forfeiture by reason of failure to observe the mandatory conditions of the Act is barred: the ability to pronounce on the wisdom of the executive order is withheld: and its functions are limited to considering whether the applicant to it has discharged the almost hopeless task of establishing that his pamphlet does not contain words which fall within the all-comprehensive provision of the Act. I describe it as an almost hopeless task, b cause the terms of sec. 4 are so wide that it is scarcely conceivable that any publication would attract the notice of the Government in this connection to which some provision of that section might not "directly or indirectly whether by inference, suggestion, allusion, metaphor, implication or otherwise apply."

I have said that the ability to pronounce on the wisdom or unwisdom of executive action has been withheld. There was good reason for this. Courts of law can only move on defined lines, and act on information brought before them under limited conditions.

It is not so with the executive authority. It would be paralysed if it had to observe the restrictions placed on the Courts.

Its action can be prompted by information derived from sources not open to the Courts, and based on considerations forbidden to them; it can be moved by impressions and personal experiences to which no expression can be given in a Court, but which may be a very potent incentive to executive action.

The Government may be in possession of information which it would be impossible to disclose in a Court of law, and yet obviously requiring immediate action.

Therefore a jurisdic ion to pronounce on the wisdom or unwisdom of executive action has been withheld and rightly withheld. It may be a question whether even the semblance which this Act provides should not have been withheld as it was by Act IX of 1878.

Political considerations and reasons of S ate are the life-blood of executive action, but they have no place in a Court of law. "The constitution," said Lord Mansfield, "does not allow reasons of State to influence our judgment: God forbid it should—we must not regard political consequences how formidable soever they might be: if rebellion was the certain consequence we are bound to say, *Fiat justitia ruat coelum*" [case of *John Wilkes* (1)].

The fact is that the executive and judicial authorities stand on wholly different planes for the purpose of arriving at a decision as to the propriety of executive action. And the one cannot sit in judgment on the determinations of the other. *Si judicas, Cognosce; si regnas, jube.*

And what then is the conclusion of the whole matter; of the two alleged checks on executive action, supposed to be furnished by the Act, one, the intervention of the Courts, is ineffectual, while the other, for this very reason, can be, and in this case, has been disregarded, without impairing the practical effect of a forfeiture purporting to be under the Act.

One word more, and that is as to the motive of the present application. The applicant, Mr. Mahomed Ali, is by no means unknown in India; he is a journalist of position and repute.

(1) 19 How. St. Trials 1112 (1763—1

Though he is not an accused, he tells us that he regards himself as under the stigma which (he declares) must attach to any journalist who has come under the operation of an Act directed, primarily at any rate, against a criminal movement marked by outrages which so shocked the public sentiment as to call for this drastic legislation. But even if he has not succeeded in proving the negative that fate and the law have thrown in his way, at least his application has not been wholly in vain.

The Advocate-General, representing the Government, has publicly announced, that Mr. Mahomed Ali's forfeited pamphlet is not, in his opinion, a seditious libel, and indeed that he attributes no criminal offence to Mr. Mahomed Ali: he was even willing to concede and believe he was acting in the highest interests of humanity and civilization. In this I think the Advocate-General made no admission which it was not proper for him to make.

Mr. Mahomed Ali then has lost his book, but he retains his character; and he is free from the stigma that he apprehended. And this doubtless will be some consolation to him when we dismiss, as we must, his present application. I think there should be no order as to cost.

Stephen, J.—I agree with the Chief Justice that this application must be dismissed. In view however of its novelty, and of the difficulties to which it gives rise, I consider that I should express my own view of the questions involved. If we take advantage of the statement made by the Advocate-General that the classes whom it is alleged the pamphlet before us is likely to bring into hatred are Englishmen and Christians, and confine our attention to the parts of the Press Act that apply to the present case, the position we are in may be correctly described as follows:—

It appeared to the Local Government that the pamphlet before us contained words that were likely directly, indirectly or (to abbreviate) in any possible way, to bring Englishmen or Christians being His Majesty's subjects in British India, into hatred as a class. They accordingly published a notification in the Local Gazette declaring the pamphlet forfeited, and giving as a ground of their opinion that the pamphlet was likely to bring Englishmen and Christians into hatred, the fact that it was likely to bring them into hatred. The result of this notification was that the police in Calcutta confiscated the pamphlet, and Mr. Mahomed Ali now applies before us to set aside the confiscation on the ground that the pamphlet is not likely to bring such Englishmen and Christians as have been described into hatred, and it is this negative proposition that Mr. Norton seeks to prove on his behalf.

The case he makes before us is twofold. In the first place he says that the pamphlet cannot have the effect ascribed to it. In the second he says that the notification published by the Government is bad because it does not state the grounds of the opinion that the Government have formed about the pamphlet, which it must do according to sec. 12, that therefore the confiscation is illegal, and there is no ground for the application he is making. He naturally presses for a decision on the first ground, but, if he cannot obtain that, he asks for a declaration that the notification and the confiscation are both bad.

Logically however the question of our jurisdiction must be considered first. As to this I am of opinion that the notifica-

tion is not according to law. Looking at the section, and indeed at the Act as a whole, I have no doubt that the provision in sec. 12 that the grounds of the opinion on which the Local Government have acted must be stated, is mandatory and not merely directory. There can be no doubt that it is framed for the protection of any person whose property may be confiscated, and not merely for purposes of administrative convenience. The ground of an opinion must in this case, if not always, be a fact or facts, and no fact is disclosed merely by a specific relations of the elements that the law requires to be present in order for legal consequences to follow. I have already described the statement of the grounds in terms which seem to me to lead to an absurdity; but I have taken pains to make them correct. I cannot say what facts should be stated. I do not think, for example, that it can be the case that the Local Government should state to us all the information on which they have acted, for I cannot suppose that we are to revise their action as a whole. On the other hand we have, it appears, power to revise their action to some extent, and for this purpose some statement of fact seems essential.

But because the law has not been followed in this matter, I cannot hold that the notification is void in such a way as to deprive us of jurisdiction. For, such are the provisions of this Act, that if our jurisdiction to revise the action of the Government under sec. 17 is taken away, no other remedy is open to the person whose property is confiscated, and the Local Government can by their own laches deprive him of the only relief that the law provides. Such a conclusion seems to me so contrary to all principles of justice that I cannot accept it or apply to the present case the general principle that where exceptional powers are conferred on an executive authority and a special procedure for their exercise is provided, a failure to follow that procedure will prevent an exercise of those powers. Also, though I cannot say what facts are to be stated in order to disclose the ground for the opinion on which the Local Government acts, I think it may be the case that a statement of facts too meagre to give an applicant under sec. 17 any real assistance, would be sufficient to satisfy the requirements of sec. 12. Further our jurisdiction is very closely confined by the terms of sec. 19, with which secs. 17 and 22 must be read; and I have doubts whether it may not be that we can only answer the question indicated in sec. 17, assuming that everything else has been rightly done.

I am of opinion, therefore, that we have jurisdiction to consider the question before us on its merits, and it is my duty therefore to do so. It is impossible however to do this without first noticing the point of view from which Mr. Norton has asked us to consider the case. He did not contend that this Act was penal, but he dwelt at length on the intentions of the persons who wrote the pamphlet, apparently in Constantinople, and of the applicant who as I understand published it, or at least proposed to publish it here. With these I conceive that we have nothing to do directly, we have only to consider what effect the publication is likely to produce. The intentions of the writers and publisher may be of importance on the principle that they are not likely to produce an effect they did not intend but otherwise we need not consider them. Nor can I accede to the

argument that this Act was passed only to prevent active crime. I can only judge of its purpose from its contents, and as I read it, its purpose is to prevent the publication of anything that may be dangerous in any of the ways described in sec. 4; and the means supplied to Government for doing this have no relation to the propriety of the conduct, still less to the criminality, of the publisher or the readers. The purpose of the Act as I read it may be to prevent crime: not by detecting or punishing criminals, but by preventing persons now innocent from becoming criminals. Consequently I need scarcely say that I consider that no slur has been cast on Mr. Mahomed's character by the confiscation of his pamphlet. A man may own a mad dog without blame; and no slur is cast on his character if it is confiscated.

This view is in my opinion confirmed by a reference to the provisions of the Penal Code that deal with cognate matters. By sec. 153A of that Code, it is an offence to promote feelings of enmity between different classes of His Majesty's subjects, but it is explained that it is not an offence to point out without malicious intentions, and with an honest view to their removal, matters which are producing or have tendency to produce such feelings of hatred. Thus when the law is dealing with the matter of creating hatred of a class from the point of view of the criminal law, its action is restricted to cases where what is promoted is hatred by one class of another, and words and so forth used without malice and honestly to remove the causes of hatred are not punishable. But in the present case the law applies to hatred by any one, possibly only by one man, and the explanation as to the intention of the person who used them is omitted. It seems that the Legislature must have had sec. 153A in view when it enacted sec. 4 (c) of the Press Act, and I therefore suppose that the omission in the latter of any provision like the explanation in the former was intentional. Again Exlpanation II of sec. 4 (1) of the Press Act excludes from the scope of the Act "comments expressing disapprobation of the measures of the Government . . . . with a view to obtain their alteration by lawful means, or of the administration or other action of the Government . . . without . . . exciting or attempting to excite hatred." This is obviously adopted from two explanations to sec. 124A of the Penal Code, which are applicable here, because if hatred is in fact . . . . excited the explanation does not apply, whatever may have been the intention of the person who excited it.

From the relation of this Act to the Penal Code, I therefore conclude that the scope of this Act has been made far wider than that of the Code. So wide indeed are the powers that the Legislature has conferred on the Government that they would be able to confiscate a newspaper containing words that might cause one man to hate, or even to contemn, a class, if such there should unhappily be, who sought to embarrass the Government of the country by murder and robbery. When such wide powers were conferred on Government, I cannot but suppose that it was intended that they should be widely used.

This brings me to the actual question that I conceive that I have to decide, namely, whether Mr. Norton has shown that the pamphlet before us is not likely to bring Englishmen and Christians into hatred. And in attempting to form an

opinion on it I find myself in a position which is unfamiliar to me, and in which, as far as I am aware no Judge in the British Empire has been placed, since the remote days of early English Jurisprudence, I have to decide a question of fact on such evidence as is supplied by one document. The side on whom the onus of proving his case is cast is not in a position to give any evidence. As the other side has not called any witnesses, no cross-examination has taken place.

The answer to the question I have to decide depends on the social and political state of the Mahomedans in India, or perhaps of certain sections of them. As to this such information as I have is unverified and general to a high degree; it has never been my duty to acquire information on the matter; and absolutely none has been supplied to me on this occasion. Under these circumstances I have no doubt that any opinion I may express will be received by others with the respect that is due to the office I have the honour to hold; but it will be impossible for me to share in this feeling. The question put to us is so framed that any doubtful point is to be decided against the applicant.

Coming to the pamphlet itself I have no doubt that I must answer the question before me against the applicant. Generally speaking I suppose from its contents that it is the work of avowed partisans of the Turks in their war against the Christians Balkan States. The object of the writers, and here their intention becomes relevant, is to put an end to horrible atrocities which they allege to have been committed by the Allies on Mahomedans. To do this they tell Englishmen what is being done by their fellow Christians and appeal to them, as Christians, to stop it. In more detail I find statements that the Moslem population of Macedonia is being practically annihilated, by murder, outrage and pillage: if this passes unnoticed and uncondemned there will a cleavage between Mahomedans and English. Then follows a series of charges of misgovernment and a catalogue of horrible outrages, the detail of which I may pass over, but all of which, I think I am correct in saying, are represented as having been perpetrated by Christians. In conclusion the readers of the pamphlet are informed that the Government of England will do nothing to stop the outrages unless forced to by public opinion, and it is stated that they can stop them if they will. Throughout the whole of the pamphlet the outrages mentioned are imputed to the Allies whose Christianity is constantly referred to. There are cases in which accounts are given of how Christians tried to prevent or mitigate what was going on; but the almost avowed object of the pamphlet is to excite the indignation of Christians in England against the conduct of Christians in Macedonia so as to induce them to bring it to an end.

The disinterested humanity of the writers is beyond question, and they certainly have right to make an appeal to Englishmen as they did. Mr. Mahomed Ali is entitled to a presumption that he acted with like humanity, and it is not suggested that he committed any unlawful act or did anything wrong in publishing the pamphlet in India. But these considerations do not touch the question whether the pamphlet is not likely to make Mahomedans hate Christians. A perusal of the accounts of the outrages is likely to excite anger in the mind of any reader who does not regard the

IN THE MATTER OF A PETITION OF MAHOMED ALI.

pamphlet as a false document, which we have no reason for doing. I can well understand that in the mind of some Indian Mahomedans anger might easily and perhaps justifiably turn to a hatred of the Allies, from which, making allowances for the infirmities of human nature, a hatred of the co-religionists of the Allies would seem but a short step especially for those whose co-religionists are involved in a national disaster.

Such is my opinion on the question I have to answer. Acting on such information as I have, I entertain no doubt as to what my answer should be. But the absence of doubt is probably largely due to the absence of evidence, and cannot be taken as going far towards showing that the opinion is correct.

I agree that costs should not be awarded in this case.

WOODROFFE, J.—I agree with the judgment of the Chief Justice.

Babu Bhupendra Nath Basu, Attorney for the Petitioner.

Mr. Kesteven, Attorney for the Government of Bengal.

Application refused.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL
No. 116 OF 1911.

JENKINS, C. J. MOOKERJEE, J. 1913, 3, July.	SHEIKH SADARUDDIN and others, Defendants, Appellants, *v.* SHEIKH EKRAMUDDIN, Plaintiff, Respondent.

Civil Procedure Code (Act XIV of 1882), secs. 629, 630—Application for review granted, if re-opens whole case or only the special questions found wrongly decided—Final decree, appeal against—Grounds on which order for review may be questioned.

When an application for review is granted and the case reheard, in an appeal against the final decree the propriety of the order whereby the review was granted can be challenged only on the grounds specified in sec. 629 of the Code of Civil Procedure.

Where no such ground can be made out, but the order is sought to be challenged on the ground that it was made without jurisdiction, the proper course for the aggrieved party is to move the High Court in revision.

When an application for review has been granted the Court is not restricted at the rehearing to a consideration of that question alone which has been argued upon the rule for review and found to have been erroneously decided. The whole case is re-opened unless the Court directs under the latter part of sec. 630 that the case is to be heard only upon special points.

What was intended to be decided in DHURONIDHAR SEN *v.* THE AGRA BANK (2) *was that it was competent to the Court in its discretion to refuse to entertain at the rehearing a question which had not been placed before the Court when the review was granted.*

HURRO CHUNDER CHUCKRABURTTY *v.* RAM KISSORE CHUCKRABURTTY (4), BYJNATH SAHOY *v.* WUZEER NARAIN (1) *explained.*

SAINAL RAN CHHOD *v.* DULLAV DVARKA (5), EMPEROR *v.* NARYAN RAGHUNATH PATKI (6), HURBANS SAHYE *v.* THAKOOR PURSHAD (7) *referred to.*

(1) 24 W. R. 427 (1875).
(2) I. L. R. 5 Cal. 86 (1879).
(4) W. R. [1864] 142.
(5) 10 B. H. C. R. 360 (1873).
(6) I. L. R. 32 Bom. 111 (1907).
(7) I. L. R. 9 Cal. 209 (1882).

SHEIKH SADARUDDIN *v.* SHEIKH EKRAMUDDIN.

This was an Appeal from a decision of Mr. Justice Digambar Chatterjee, dated the 5th of May 1911, passed in Second Appeal No. 1101 of 1909, which had been preferred from a decision of Babu Lalit Kumar Basu, Subordinate Judge of Tipperah, dated the 23rd of February 1909, confirming a decision of Babu Joges Chandra Sen Gupta, Officiating Munsif of Brahmanbaria, dated the 28th of May 1907.

The judgment of CHATTERJEE, J., which sets out the facts was as follows:—

D. CHATTERJEE, J.—This was a suit for *bhag* rent. The first Court dismissed the suit holding that the *bhag* settlement was not proved. It was further held that the Plaintiff had co-sharers who should have been made parties. On appeal Babu D. N. Sarkar, Subordinate Judge, decreed the suit holding that the tenancy was made out and on the contract made by the Plaintiff he was entitled to sue. It appears that about the same time the parties litigated their title to the disputed land, and it was held that the Plaintiff was entitled to 13 annas and the Defendants to 3 annas. The Defendants applied for review on this and other grounds and notice was issued by the same officer. His successor granted the review on this ground alone and ordered a rehearing of the appeal. He reheard the whole appeal and without adverting to the ground on which the review had been granted or to the fact of his predecessor having been of an entirely different opinion he dismissed the suit holding that the relationship of landlord and tenant had not been established.

It is contended in appeal before me that the learned Judge was wrong in deciding the whole appeal irrespective of the error or new matter on account of which the review had been granted. I think that this contention is good. The grant of the review was specifically made on the ground that the Plaintiff's share was not 16 annas but 13 annas, the Defendants having been found entitled to 3 annas. If the learned Judge who had originally tried the case had this review before him he would have confined himself to the particular ground or new matter which was made out. I think that the grant of the review was limited to the particular reason on which it was granted and the learned Judge was wrong in re-opening the whole case and overruling the decision of his predecessor by dismissing the whole suit. It has always been held in this Court that a review Court must confine itself to the ground upon which the review is granted. [See *Byjnath Sahoy* v. *Wuzeer Narain* (1) and *Dhuronidhar Sen* v. *The Agra Bank* (2)]. He could in this case grant a decree to the extent of the legitimate share of the Plaintiff but he had no right to ignore that ground and set aside the judgment of his predecessor in office.

A preliminary objection was also taken that the suit was of the nature of suits cognizable by a Court of Small Causes.

As the Defendants according to the plaint was getting a half share of the produce as the price of labour, I think the case has been treated as a rent-suit and objection taken for the first time in this Court is of no value.

The result is that the Plaintiff will get a decree for $\frac{13}{16}$th of his claim with proportionate costs.

[Against this judgment the Defendants preferred the present appeal.]

(1) 24 W. R. 427 (1875).
(2) I. L. R. 5 Cal. 86 (1879).

SHEIKH SADARUDDIN *v.* SHEIKH EKRAMUDDIN.

Mr. Nuruddin Ahmed for the Appellant.
Babu Sasadhar Roy for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the first Defendant under cl. 15 of the Letters Patent against a judgment of Mr. Justice Digambar Chatterjee in a suit for arrears of rent. The question in controversy between the parties was, whether the relationship of landlord and tenant had been proved to exist between them.

The Court of first instance answered this question in favour of the Defendant and dismissed the suit. Upon appeal, the Subordinate Judge reversed this decision on the 30th of April 1908 and made a decree in favour of the Plaintiff. An application for review of judgment was presented to the Subordinate Judge and notice was directed to be issued thereupon. The application, however, came to be heard by his successor on the 28th of November 1908. The latter officer granted the application for review and directed that the appeal be reheard. The appeal was then reheard on the 23rd of February 1909, and the decision of the Court of First Instance was affirmed. The Plaintiff then appealed to this Court and contended before Mr. Justice Chatterjee that it was beyond the authority of the Subordinate Judge to set aside on review the judgment of his predecessor, because that judgment had been attacked on only one ground which might justify its modification but not its reversal in its entirety. This contention has found favour with Mr. Justice Chatterjee and he has based his decision upon the cases of *Byjnath Sahoy v. Wuzeer Narain* (1) and *Dhuronidhar Sen* v. *The Agra Bank* (2). In the view he has taken, Mr. Justice Chatterjee has set aside the judgment of the Subordinate Judge and made a decree in favour of the Plaintiff for a share of the amount claimed as arrears of rent. This decision is now challenged before us on two grounds, *first*, that in an appeal against the final decree, the propriety of the order whereby the review was granted by the Subordinate Judge could be challenged only on the grounds specified in sec. 629 of the Civil Procedure Code of 1882, and, *secondly*, that the Subordinate Judge acted properly in the exercise of his jurisdiction when he set aside the entire judgment of his predecessor.

In our opinion both these contentions are well-founded. Sec. 629 provides that "whenever an application for review is admitted, the admission may be objected to on one or more of three specified grounds, namely, *first*, that the admission has been made in contravention of the provisions of sec. 624; in other words, that the application for review has been granted by a Judge other than the Judge who delivered the original judgment and on a ground other than the discovery of some clerical error apparent on the face of the record or the discovery of new and important matter or evidence, *secondly*, that the admission has been made in contravention of the provisions of sec. 626, namely, that the application has been made without previous notice to the Opposite Party or that it has been granted on the ground of the discovery of new matter or evidence without strict proof that such new matter or evidence was not within the knowledge of the applicant at the original trial, or that the application has been granted by a Judge other than the Judge who delivered the judgment and without the issue of a notice by the

(1) 24 W. R. 427 (1875).
(2) I. L. R. 5 Cal. 86 (1879).

SHEIKH SADARUDDIN *v.* SHEIKH EKRAMUDDIN.

Judge. *Thirdly*, that the application has been granted after the expiration of the period of limitation prescribed therefor and without sufficient cause. In the case before us it cannot be reasonably contended that the ground on which the propriety of the order of the Subordinate Judge is challenged falls within any of the grounds specified in sec. 629. Consequently, the appeal is infructuous.

If the order of the Subordinate Judge was made without jurisdiction the course open to the party aggrieved was to invite this Court to revise the order under sec. 115 of the Civil Procedure Code. That course, however, was not adopted. Consequently it was not open to Mr. Justice Chatterjee to set aside the decree of the Subordinate Judge on the ground that he had granted the application for review without jurisdiction. This view is in accord with that taken in *Gopala Aiyar* v. *Ramasami Sastrial* (3).

Apart from this question, however, the Appellant must succeed on the ground that the order of the Subordinate Judge was right on the merits.

It has been broadly contended before us by the Respondent that when an application for review of judgment has been granted, the Court at the rehearing is restricted to the particular ground on which the review was granted. This view was sought to be supported by reference to the cases of *Hurro Chunder Chuckraburtty* v. *Ram Kissore Chuckraburtty* (4), *Byjnath Sahoy* v. *Wuzeer Narain* (1) and *Dhuronidhar Sen* v. *The Agra Bank* (2). As regards the first and second cases mentioned, it may be a matter for discussion whether they have any application at all. They were decided under Act VIII of 1859, sec. 380 of which provided that "when an application for a review of judgment is granted, a note thereof shall be made in the register of suits or appeals (as the case may be), and the Court shall give such order in regard to the rehearing of the suit as it may deem proper in the circumstances of the case." The view may reasonably be entertained that this authorises the Court either to rehear the case as a whole or to rehear special points in connection therewith. As regards the case of *Dhuronidhar Sen* v. *The Agra Bank* (2), it was decided when the Act of 1877 was in force, and the language of that Code is identical with that of sec. 630 of the Code of 1882. It is consequently necessary to examine what was precisely decided in the case of *Dhuronidhar Sen* v. *The Agra Bank* (2). The case then before the Court was heard by a Full Bench of three Judges under sec. 15 of the Letters Patent, a review of judgment was obtained and the case was reargued before a Full Bench differently constituted. When the case came to be heard, Mr. Justice Jackson observed that the Vakil for the Appellant was not entitled to raise a particular question on the ground that the question had not been raised when the case came up before the Full Bench before; in other words, that the question raised would not be entertained because it had not been pressed at the previous hearing before the Full Bench. Sir Richard Garth, C. J., observed on the other hand that the Vakil for the Appellant was only entitled to go into points on which the rule granting the review was allowed, that the particular matter sought to be pressed

(1) 24 W R. 427 (1875).
(2) I. L. R. 5 Cal. 86 (1879).
(3) I. L. R. 31 Mad. 49 (1907).
(4) W. R [1864] 142.

(2) I. L. R 5 Cal. 86 (1879).

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was not mentioned when the rule was argued and that therefore the Court could not enter into it at that stage. This observation of the learned Chief Justice possibly supports the contention of the Respondent, but we are of opinion that what was really intended to be decided was that it was competent to the Court in its discretion to refuse to entertain a question which had not been placed before the Court when the review was granted. Besides, we do not know the terms of the order by which the rule was made absolute, and it has not been shown to us that by that order the whole case was re opened. On the other hand, we observe that reliance was placed on behalf of the Appellant upon the decision in *Sainal Ran Chhod* v. *Dullav Dwarka* (5). The learned Judges did not express their dissent from this decision. In that case the Bombay High Court observed that it was the invariable rule in that Court that when a review had been admitted the whole case was reopened and this view was recently accepted as settled law in the case of *Emperor* v. *Narayan Raghunath Patki* (6). In our opinion, upon a fair construction of sec. 630 of the Code of 1882, the view cannot possibly be maintained that when an application for a review has been granted the Court is restricted at the rehearing to a consideration of that question alone which has been argued upon the rule for review. Sec. 630 provides that "when an application for a review is granted a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to the re-hearing as it thinks fit." It is plain that the expression "rehear the case" means rehear the whole case. If the case is to be reheard only upon special points, the order must be made under the latter part of the section which authorises the Court "to make such order in regard to the rehearing as it thinks fit." This was the view taken in the case of *Hurbans Sahye* v. *Thakoor Purshad* (7), where, upon the authority of the decision of the Judicial Committee in *Bhugwandeen Doobey* v. *Myna Baee* (8), it was ruled that where a review of judgment is granted on a particular ground, the Court is not bound to rehear the whole case under sec. 630 of the Civil Procedure Code: it is in the discretion of the Court to rehear the whole case or only the particular point on which the rule has been granted." This, however, is a question which does not arise in the case before us. The Subordinate Judge made the application for a rule to grant a review absolute. He set aside the whole judgment of his predecessor and directed the appeal to be reheard. It is contended that he had no jurisdiction to do so. This contention is clearly unfounded and if it were adopted, great injustice might be done to a party litigant. To take one illustration only suppose in a suit for possession, the claim is resisted by the Defendant on two grounds, limitation and *res judicata*. The Court decides the question of limitation in favour of the Defendant, and dismisses the suit. The question of *res judicata* is not determined. An application for a review is made by the Plaintiff on the ground that the decision upon the question of limitation is erroneous, and that application is successful. What is to happen? Is not the case to be reheard, in other words, is not the question of *res judicata* which was left

(5) 10 B. H. C. R. 360 (1873).
(6) I. L. R. 32 Bom. 111 at p. 120 (1907)
(7) I. L. R. 9 Cal. 209 (1882).
(8) 11 M. I. A. 487 (1867).

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undetermined at the previous hearing to be investigated? Take another case: Suppose that in this very litigation the Court decides the question of limitation against the Plaintiff, but the question of *res judicata* in his favour and dismisses the suit. It is not open to the Defendant to appeal against the decree made in his favour, nor is it open to him to apply for a review of that decree. The Plaintiff makes an application for a review, and satisfies the Court that the decision upon the question of limitation is erroneous. Is it not open to the Defendant to argue that the decision upon the question of *res judicata* is also erroneous, and that the suit ought to have been dismissed on that ground alone? The theory that the Court is restricted to the particular point urged in support of the application for review can be supported only on the basis of an entirely untenable theory, namely, that the points that arise for decision in a case are all entirely separable from each other and that they are contained, each in a water-tight compartment. On the other hand it happens in many cases the decision on one issue may be connected with the decision on another issue, and the reversal of the decision upon one issue may seriously affect the decision on another issue. To hold, when a review is granted on consideration that the decision upon a particular point is erroneous, that the Court is restricted to the reconsideration of that point and that point alone, and cannot reconsider the case as a whole, would be to place upon sec. 630 an interpretation which is not justified by the language used by the Legislature and which is calculated to impede the administration of justice.

We hold therefore that the view taken by Mr. Justice Chatterjee as to the authority of the Subordinate Judge to grant the application for review in its entirety cannot be supported. The result is that this Appeal is allowed, the decree of Mr. Justice Chatterjee set aside and that of the Subordinate Judge restored. The Appellant is entitled to his costs in both appeals in the High Court.

Appeal allowed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER NO. 162 OF 1913.

COXE, J.
RAY, J.
1913,
Heard, 27 and 30, June.
Judgment, 15, July

HARI CHARAN DUTTA, Judgment-debtor, Appellant,
v.
MONMOHAN NANDI and another, Decree-holders, Auction-purchasers, Respondents.

Civil Procedure Code (Act V of 1908), sec. 47, Or. 21, rr 2, 95—Decree-holder auction-purchaser, application by, for delivery of possession opposed by judgment-debtor who sets up agreement to postpone taking possession—Agreement whether adjustment—Objection rejected—Order if appealable.

Where upon an application by the decree-holder auction-purchaser for delivery of possession, the judgment-debtor set up an agreement entered into in the course of proceedings for setting aside the sale, by which, he alleged, it had been stipulated that the judgment-debtor would allow the sale to be confirmed but that the decree-holder should not take possession for two years, within which period if the judgment-debtor made certain payments, the decree-holder was to reconvey the property to the judgment-debtor, and he prayed that the agreement should be certified under Or. 21, r. 2 of the Civil Procedure Code, and the Court rejected the judgment-debtor's application on the ground that the agreement

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did not come within the scope of Or. 21, r. 2.

Held—*That the order was appealable as coming within sec. 47 of the Civil Procedure Code.*

MUTTIA *v.* APPASAMI (2), MADHUSUDAN DAS *v.* GOBINDA PRIA CHOWDHURANI (5), SARIATOOLA MOLLA *v.* RAJ KUMAR ROY (6), RAM NARAIN SAHOO *v.* BANDI PERSHAD (7), BHAGWATI *v.* BANWARI LAL (1) *relied on.*

BHIMAL DAS *v.* GANESHA KUER (4), MAHOMED MASRAF *v.* HABIL MIA (8) *explained.*

That the executing Court should entertain and enquire into the judgment-debtor's objection and not relegate the parties to a fresh suit as the matter could be dealt with under sec. 47.

Per COXE, J.—Quære, *whether the agreement alleged was an adjustment within the meaning of Or. 21, r. 2.*

This was an Appeal preferred on the 12th of April 1913 against the decree of Babu Asutosh Ghose, 2nd Subordinate Judge of Dacca, dated the 3rd of April 1912.

The facts of the case will fully appear from the judgment.

Babu Mohini Mohan Chatterjee for the Appellant.

Babus Harendra Narain Mitra and *Brojendra Kumar Chakrabartty* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

COXE, J.—This Appeal is against an order of the Subordinate Judge at Dacca refusing an application by the Appellant who is a judgment-debtor under a mortgage decree. The decree-holder had sold the mortgaged property and had applied for delivery of possession. The judgment-debtor objected on the ground that it had been agreed between the parties that possession should not be taken and asked that that agreement might be recorded.

The learned Subordinate Judge refused the application on the ground that the alleged arrangement did not come within the scope of Or. 21, r. 2.

No enquiry was made into the merits and we must assume for the purposes of this appeal that the assertions in the petition are true in fact. They are to the effect that after the sale and before the confirmation the judgment-debtor applied to have the sale set aside on the usual grounds. That proceeding was compromised by an agreement between the decree-holder and himself to the following effect.

"It was settled between the decree-holders and the judgment-debtor that the judgment-debtor should get the sale confirmed instead of carrying on the suit but that the decree-holders should not take possession of the auction purchased property within 2 years and that on the judgment-debtor paying to the decree-holders the sum of Rs. 9,100 and a moiety share of the income of the property accruing from the date of confirmation of the sale to that of the realisation of the said money, the decree-holders should give up these properties by executing a *kobala* in favour of the judgment-debtor".

A preliminary objection is taken that no appeal lies. This turns on the question whether proceedings under Or. 21, r. 95, do or do not come within the scope of sec. 47, C. P. C. This is a question on

(1) I. L. R. 31 All. 82 (1908).
(2) I. L. R. 13 Mad. 504 (1890).
(4) 1 C. W. N. 658 (1897).
(5) I. L. R. 27 Cal. 34 (1899).
(6) I. L. R. 27 Cal. 709 (1900).
(7) I. L. R. 31 Cal. 737 (1904).
(8) 8 C. L. J. 749 (1904).

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which there is the greatest diversity of judicial opinion which will be found reflected and summarised in the case of *Bhagwati* v. *Banwari Lal* (1). The case which for the most closely resembles the present case is that of *Muttia* v. *Appasami* (2). In that case an assignee of the decree bought the property in execution and asked to be put in possession. The judgment-debtor pleaded an agreement subsequent to the sale. It was held that the matter came within the scope of sec. 244, C. P. C., and that an appeal lay. This decision has not commended unreserved assent in the Court of Madras but in a comparatively late case [*Sultan Sahib Marakayar* v. *Chidambaram Chettiar* (3)], the learned Judges held that though an application for delivery of possession was not an application for execution, they were bound by a number of decisions to hold that it raised a question relating to execution.

In this Court it was held in 1897 in the case of *Bhimal Das* v. *Ganesha Kuer* (4), that an application by a decree-holder auction-purchaser to be put in possession was not a matter relating to the execution, discharge, or satisfaction of the decree and that consequently no appeal lay. With regard to the case of *Muttia* v. *Appasami* (2) cited above, the learned Judges observed that if it affected the question they were unable to agree with it but added—"In that case the judgment-debtor set up an agreement between him and the applicant in bar of the application. It does not appear from the report what that agreement was. It may well be that it was one which operated to affect the execution of the decree."

On the other hand it was held in 1899, in the case of *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (5), that proceedings for the delivery of possession to a decree-holder who purchases at an execution sale are proceedings in the execution of the decree, and in *Sarjatoola Molla* v. *Raj Kumar Roy* (6) it was held that such an application is an application to the Court to take a step in aid of execution.

The next case to which I may refer is that of *Ram Narain Sahoo* v. *Bandi Pershad* (7) decided in April 1904. In that case a Defendant in possession being ousted by a decree-holder auction purchaser applied to be restored to possession. The learned Judges followed *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (5) and held that sec. 244 authorised an enquiry into the question of possession when it arose between the parties to a suit and their representatives, and that proceedings for the delivery of possession to an auction-purchaser, who is himself the decree-holder, are proceedings in the execution of the decree.

However in August of the same year the opposite view was taken in *Mahomed Masraf* v. *Habil Mia* (8), and it illustrates in what uncertainty the matter is involved, that one of the learned Judges was also a party to the decision of the preceding April. In the later case the assignee of a decree-holder auction-purchaser applied for possession and the application was opposed by the judgment-debtor. It was held, following *Bhimal Das* v. *Ganesha Kuer* (4) cited above, that the

(1) I. L. R. 31 All. 82 (1908).
(2) I. L. R. 13 Mad. 504 (1890).
(3) I. L. R. 32 Mad. 136 (1908).
(4) 1 C. W. N. 658 (1897).
(4) 1 C. W. N. 658 (1897).
(5) I. L. R. 27 Cal. 34 (1899).
(6) I. L. R. 27 Cal. 709 (1900).
(7) I. L. R. 31 Cal. 737 (1904).
(8) 6 C. L. J. 749 (1904).

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matter did not relate to the execution, discharge, or satisfaction of the decree and that no appeal lay. It was held that *Madhusudan Das* v. *Gobind Pria Chowdhurani* (5) cited above had no application but no reasons are given for this view and I do not myself perceive why it was less applicable than the case of *Bhimal Das* v. *Ganesha Kuer* (4).

It seems to me that the balance of authority is in favour of the view that the decision of an objection such as that now under review comes within sec. 47 of the Code and is appealable. *Muttia* v. *Appasami* (2) is directly in point and supports that view. The cases of *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (5), *Satiatoola Molla* v. *Raj Kumar Roy* (6) and *Ram Narain Sahoo* v. *Bandi Pershad* (7) also support it. On the other hand, in *Bhimal Das* v. *Ganesha Kuer* (4), the learned Judges thought it possible that an objection pleading an agreement in bar of an application for possession might possibly operate to affect the execution of the decree. And in *Mahomed Masraf* v. *Habil Mia* (8), one of the parties to the dispute was a person who had purchased the property from the decree-holder after the sale. A purchaser of the decree must be regarded as a party to the suit but a purchaser of the property sold in an execution sale from the auction-purchaser might possibly not be so regarded. I think therefore that the balance of authority is in favour of the view that this question comes within the scope of sec. 47 of the Code, and on the question of principle, I agree with the reasoning of

(2) I. L. R. 13 Mad. 504 (1890).
(4) 1 C. W. N. 553 (1897).
(5) I. L. R. 27 Cal. 34 (1899).
(6) I. L. R. 27 Cal 709 (1900)
(7) I. L. R. 31 Cal. 737 (1904).
(8) 6 C. L. J. 759 (1904).

Stanley, C. J., in the case of *Bhagwati* v. *Banwari Lal* (1) cited above. I hold therefore that an apeal lies.

On the question whether the agreement alleged in this case was an adjustment or not within the meaning of Or. 21, r. 2, I find it very difficult to come to a conclusion, because the term "adjustment" is itself so indefinite I am inclined to think however that it was not. The decree was to remain unaltered and the sale under it, and all that was stipulated was that possession should be delayed and that under certain circumstances there should be a reconveyance. There was apparently no provision for a default. But it appears to me that it is of little importance whether this was an adjustment under O. 21, r. 2, or not. If it was, the judgment-debtor's objection contained a prayer that it should be certified and that prayer was in time. If it was not, it did not require certification and the objection to the delivery of possession can be dealt with under sec. 47. I certainly see no reason why this controversy should be relegated to another suit. We are bound as I have said for the present to accept the statements in the petition as true. They are to the effect that the application to set aside the sale should be dropped and the sale confirmed but that the delivery of possession should be delayed to give the judgment-debtor time to pay off the debt. I certainly can see no reason whatever why the parties should not make arrangements of this kind, if they desire to do so, and if they do make them it seems to me unnecessarily technical to insist that the proof of such arrangements should be left to a subsequent suit. Indeed I think it is extremely probable that such a suit would be met with the plea that it was barred by

(1) I. L. R. 31 All. 82 (1908).

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sec. 47 of the Code. If this agreement is true then the judgment-debtor is entitled to a decision upon it. He has raised it in time, supposing that it comes within Or. 21, r. 2, so that it is not excluded from recognition by the 3rd clause of that rule. In these circumstances it seems to me the interest no less of the decree-holder than of the judgment-debtor that the matter should be disposed of without further delay and in the current proceedings. I would accordingly allow the Appeal and send back the case to the Subordinate Judge for decision on the merits. Costs will abide the result.

RAY, J.—I agree. In the present case the decree-holder was himself the purchaser. His prayer for possession has been opposed by the judgment-debtor. It appears to me that this is a question falling within the scope of sec. 47 of the Code. The arrangement pleaded appears to me to be a contract relating to the execution of the decree and as such the matter should be determined under that section. The case is to be sent back for decision on the merits.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 175 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913.
Heard, 12 and 13, May.
Judgment, 13, May.

RADHASHYAM KAR, Auction-purchaser, Petitioner,
v.
DINABANDHU BISWAS and anr., Judgment-debtor, Opposite Party.

Bengal Tenancy Act (VIII of 1885), secs. 174, 185—Application to set aside sale made after 30 days—Allegation of fraud by which applicant kept from knowledge of sale—Extension of time if may be given—Limitation Act (XV of 1877), sec. 29, sub-sec. (1), cl. (b).

A judgment-debtor applying to set aside a sale under sec. 174 of the Bengal Tenancy Act cannot rely on sec. 18 of the Limitation Act for an extension of the period of 30 days allowed for such an application on the ground that he had been kept from the knowledge of the sale by the fraud of the decree-holder.

This was a Rule granted on the 18th of January 1913, against an order of Moulvi N. Huq, Deputy Collector, Kendrapārah, dated the 7th of July 1913

The facts of the case will sufficiently appear from the judgment.

Babus Atul Krishna Roy and Lalit Mohan Chatterjee for the Petitioner.

No one appeared for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside an order made under sec. 174 of the Bengal Tenancy Act. In execution of a decree for arrears of rent, the disputed holding was brought to sale on the 29th November 1912 and was purchased by the Petitioner who was a stranger to the proceeding. On the 7th January 1913, the judgment-debtor applied under sec. 174 of the Bengal Tenancy Act for reversal of the sale. This application, on the face of it was made more than 30 days after the sale had taken place. The judgment-debtor explained the delay on two grounds; namely, first, poverty on his own part, and, secondly, fraud on the part of the execution creditor by reason of which, he alleged, he had been kept ignorant of the sale. The Court did not give notice of this application either to the decree-holder or to the auction-purchaser, but set aside the sale. The Deputy Collector observed that although the application

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had been made after the expiry of the prescribed period, yet in the circumstances of the case, it was just that the application should be entertained and allowed. He was evidently moved by the poverty of the Petitioner and considered that there was no hardship on the auction-purchaser who would get his money back with interest, or on the landlord who would get his tenant back.

... ...-purchaser now invites this Court to set aside the order as made without jurisdiction. There can in our opinion be no room for controversy that the order must be deemed to have been made without jurisdiction, unless it can be held that the Court below had authority to extend the time prescribed by sec. 174 of the Bengal Tenancy Act. It was pointed out by their Lordships of the Judicial Committee in the case of *Brij Mohan Thakur* v. *Rai Umanath* (1), that when a sale has taken place and no ground has been established for its reversal in accordance with statutory provisions, there is only one duty incumbent upon the Court, namely, to confirm the sale in so far as the parties to the proceeding and the auction-purchaser are concerned and, if the Court, under these circumstances, refuses to give effect to the sale, it fails to exercise a jurisdiction vested in it by law, namely, to confirm the sale, and exercises a jurisdiction not vested in it by law, namely, to cancel a valid and operative sale. The only question which consequently requires consideration is, whether upon the facts stated in the petition, assuming those facts to be established, the Court below had authority to extend the time.

The judgment-debtor alleges that the entire execution proceedings have been fraudulent and that in substance he had been kept out of the knowledge of the sale, and consequently, of his right to have the sale set aside within the period prescribed by law. This in substance is an allegation that the judgment-debtor is entitled to the benefit of the provisions of sec. 18 of the Indian Limitation Act. But that section is clearly inapplicable to the case before us. Read with sec. 3 of the Indian Limitation Act of 1908, sec. 18 merely provides that every application made after the period of limitation prescribed therefor by the first schedule to the Indian Limitation Act of 1908, shall be dismissed, unless facts are established to attract the operation of sec. 18. In the case before us, however, the period of limitation is not prescribed by the first schedule to the Indian Limitation Act. There is this further difficulty that cl. (*b*) of sub-sec. 1 of sec 29 of the Indian Limitation Act of 1908 provides that nothing in the Act shall affect or alter any period of limitation specially prescribed for any application by any special or local law now or hereinafter in force in British India. Consequently, sec. 18 by itself has no application to a proceeding under sec. 174 of the Bengal Tenancy Act. This view is in accord with the principle recognised in the cases of *Girija Nath Ray* v. *Patani Bibee* (2) and *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (3).

The only other point which requires consideration is, whether there is any provision in the Bengal Tenancy Act, which authorises the Court to extend the time prescribed by sec. 174. The only provisions in the Bengal Tenancy Act relevant to this subject are contained in secs. 184 and 185. Sec. 184 provides that

(1) I. L. R. 20 Cal. 8 (1892).

(2) I. L. R 17 Cal. 263 (1889).

(3) I. L. R 29 Cal. 813 (1902).

THE

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Contents.

NOTES.

Constitution of Benches.

The following constitution of the Courts and the distribution of business amongst them from Monday the 17th November last have been as follows :—

GROUPS I AND III.—The Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Beachcroft.

GROUP II.—The Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice N. R. Chatterjea.

GROUP IV.—The Hon'ble Mr. Justice Carnduff and the Hon'ble Mr. Justice Richardson.

GROUPS V AND VI.—The Hon'ble Mr. Justice Coxe and the Hon'ble Mr. Justice D. Chatterjee.

CRIMINAL BUSINESS.—The Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice Sharfuddin.

CRIMINAL DEFENDED REVISION CASES.—The Hon'ble Mr. Justice Imam and the Hon'ble Mr. Justice Chapman.

SPECIAL APPEALS OF THE VALUE OF Rs. 1,000 AND UNDER.—The Hon'ble Mr. Justice Teunon.

PRIVY COUNCIL DEPARTMENT AND APPEALS FROM THE ORIGINAL SIDE.—The Hon'ble Chief Justice, the Hon'ble Mr. Justice Stephen and the Hon'ble Mr. Justice Woodroffe.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Chaudhuri sitting singly.

The late Sir Francis Maclean.

We publish in another column the appreciative notice that was made from the Bench and Bar regarding the death of Sir Francis Maclean, the late Chief Justice of the Calcutta High Court. It may not be generally known that Sir Francis was strongly in favour of the separation of the executive and judicial functions. It was chiefly through his exertions that the salary of the Puisne Judges of the Calcutta High Court was raised to Rs. 4,000 a month, and their number also increased. The posts of the Master and Official Referee and Assistant Registrars on the Original Side and the strengthening of the ministerial staff were sanctioned by the Government of India on the representation of the late Chief Justice. As was to be expected, his death has evoked a genuine and spontaneous appreciation of his past services by the profession and the public.

Legal Obituaries.

It is with a deep sense of regret that we have to record the premature death of Babu Harendra Narayan Mitra, M. A., B. L., Vakil of the Calcutta High Court. He was one of those who were early associated with this journal. His natural intelligence, independence and sterling merit marked him out at one time as one of the rising juniors who it was expected would make their mark in the profession. Unfortunately his health broke down at a comparatively early part of his promising career and it was not given to him to fulfil expectations that his friends entertained regarding him. His honesty of purpose, professional ability and force of character were always recognised and appreciated by all who knew him. It is very unfortunate that a career of such promise was thus abruptly brought to a close last week. We also notice with regret the death of Babu Baikuntha Nath Das, Vakil, who was a gentleman of the good old type and was universally respected as much on account of his character as for his standing in the profession, and also of Babu Krishna Prasad Sarvadhikari, Vakil, a member of the Sarvadhikari family who have for long made their mark in the different branches of the learned profession in this city. We convey our sincere condolences to the bereaved families.

The Lord Chief Justice of England and sentences in criminal cases.

The work of the new Lord Chief Justice of England on the Court of Criminal Appeal has already met with much public appreciation. His Lordship was a distinguished criminal lawyer and as is to be expected he is by no

means an advocate of any harsh administration of the criminal law. In the case of *Rex* v. *George Bruce*, the prisoner was convicted of theft of brass taps and was given nine months' hard labour evidently because he refused to assist the Police in tracing his previous record and it was presumed that he had a bad career to conceal. After conviction the Police found out various facts to his credit and counsel for the Prosecution very properly brought these to the notice of the Court at the hearing of his appeal. The Court reduced the sentence to three months. The discovery of new facts has always been treated as a ground of reducing sentence. (*Rex* v *Francis*, 1 Cr. App. R. 259; *Rex* v. *Ethidge*, 1 Cr. App. R. 62, 66; *R.* v. *Bradshaw*, 6 Cr. App. R. 222.) His Lordship, therefore, made no innovation in the law in this respect. But in another case, *Rex* v. *John Martin*, the prisoner had been sentenced to five years' penal servitude upon a conviction for theft and receiving stolen property valued 14*s.* and 15*s.* respectively on the ground that his previous record of crime was particularly bad. Their Lordships reduced the sentence to 18 months' hard labour having regard to the small value of the articles. This sentence is considered severe enough and the reduction of the sentence on the ground of smallness of value is said to have created a new precedent and the recognition of this principle is attributed to the influence of the new Lord Chief Justice.

In another case, *Rex* v. *Brown*, His Lordship the Lord Chief Justice observed that the Prevention of Crimes Act of 1908 is a grave interference with the liberty of the subject and that, therefore, the Legislature must be taken to have intended that the prisoner should be given every opportunity of showing that he is not a habitual criminal and subject to its provisions. We presume the same principle would be applicable to all extraordinary measures passed by the Legislature for the prevention of crime. In this particular case the prisoner had after his release from prison led a dishonest life for six months and after being arrested for an offence he escaped and took to service and kept to an honest course. This fact was taken into consideration and the sentence of preventive detention under the Act of 1908 was cancelled. The Lord Chief Justice expressed his concurrence in the observation of Mr. Justice Darling that escaping arrest would not necessarily imply persistence in crime and the fact that the accused had taken to an honest career should certainly be considered as a fact in his favour.

Post-dated Cheques really Bills of Exchange.

In a recent case, *Hutley* v. *Peacock*, before Mr. Justice Scrutton in the King's Bench Division in England it was held on the 25th October last following the old decision in *Foster* v. *Mackrell* of the Exchequer Division (1867) that a post-dated cheque was not a cheque at all but a bill. In the earlier case the partner of a solicitors' firm had given a post-dated cheque to a party and he sued thereon. The firm repudiated liability on the ground that the partner in question had authority to draw cheques but had no authority to draw bills and a post-dated cheque was in fact a bill payable after a specified time. The judgment was given in their favour and Chief Baron Kelley observed that "a post-dated cheque was the same thing as a bill of exchange was at so many days' date as intervene between the day of delivering the cheque and the date marked upon the cheque." In the case before Mr. Justice Scrutton an infant had given a cheque some days before he attained majority and post-dated it for presentation after he had attained it. It was held that no suit can be brought on it even by a *bonâ fide* holder for value on the same principle that a bill of exchange given by an infant cannot be sued on under similar circumstances.

Statement of accused if absolutely privileged.

In *Re Venkata Reddy*, I. L. R. 36 Mad. 216, the question referred to the Full Bench was:—Is the statement of a person charged with an offence in answer to a question by the Court trying him "what have you to say" an absolutely privileged statement so as to make him not liable to be punished for defamation under sec. 499, I. P. C., in respect of the statement? In other words the question really was whether the English common law doctrine of absolute privilege that "no action for libel or slander lies whether against Judges, Counsel or witnesses or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal" is recognised as part of the law of this country. The Court answered the question in the affirmative.

It was argued that on the true construction of sec. 497, I. P. C., the law of defamation as laid down in that section excludes the application of this doctrine of English law inasmuch as the law of defamation so far as this country is concerned was created by sec. 499, I. P. C., and when that section contains no reference to the rule of English law it should be inferred that it was the intention of the Legislature that it should form no part of the law of this country. The Court did not accept this contention and it was pointed out that the provisions of the Indian Penal Code and those of the Evidence Act were mainly based on English law and whenever the Legislature in this country intended to depart from the English

law they made their intentions clear by express enactment (*see* secs. 132, 167, Evidence Act). As regards sec. 499, I. P. C., the Legislature in certain respects departed from the English law of libel and slander but it was not left to be a matter of negative inference but made clear by express enactment. The object of sec. 499, I. P. C., was to constitute defamation a criminal offence on lines which generally speaking follow the English law of libel and slander and it was not intended to codify existing law but to create new law so far as this country was concerned.

This identical question came up for consideration before the Calcutta High Court in two cases *Kori Sing* v. *Mr. Macpherson*, 17 C. W. N. 297, and *Kori Sing* v. *Mr. Finch*, 17 C. W. N. 449. The accused was the same in both cases and was convicted of defamation for having made a statement regarding two different persons in a petition filed before the District Magistrate for the transfer of a case pending in the Court of a Subordinate Magistrate. In one case (17 C. W. N. 449) Chitty and Richardson, JJ., set aside the conviction and sentence chiefly relying on the decision of the Full Bench of the Madras High Court and holding that the conviction was at least open to serious doubt. In the other case Sharfuddin and Coxe, JJ., upheld the conviction and sentence holding that the English Common Law had no application to the Indian Mofussil and the doctrine of absolute privilege was not the law in this country. It is to be noted that in the Madras case under review the conviction and sentence which the High Court revised was by a Magistrate in the Mofussil. In this state of conflict of authority on the point which is one of considerable importance it is desirable that so far as this Presidency is concerned the matter should be settled by a decision of the Full Bench as it has been in Madras.

Succession certificate granted to minor.

In *Krishnama Charlu* v *Venkammah*, I. L. R. 36 Mad. 214, the question raised before the Court was whether a succession certificate can be granted to a minor on an application made by him through his natural guardian. The learned Judges observed that they had no hesitation in answering the question in the affirmative and indeed the question is not much involved in difficulty. It is pointed out that under sec. 4 of the Succession Certificate Act no Court shall pass a decree against a debtor of the deceased person in favour of a person claiming to be entitled to the effects of the deceased except on the production by the person so claiming of a certificate issued under the Act. Now if no certificate is granted to a minor the result would be that no suit at all can be instituted during the minority of the heir. The only section in the Act which at first seems to present some difficulty is sec. 9 which provides for the Court taking security from the applicant when necessary and requiring him to execute a bond with two sureties. No doubt a minor is incompetent to execute such a bond but their Lordships held that the execution of the bond by the guardian on behalf of the minor applicant would bind the minor and thus satisfy the provisions of sec. 9. This decision of the Madras High Court is in conflict with *Gulab Chand* v. *Moti*, I. L R. 25 Bom. 523, and *Mohadeo* v. *Gangadhar*, I. L. R. 28 Bom. 344.

Marriage of Hindu girl without guardian's consent.

In *Kasturi* v. *Chiranji*, I. L. R. 35 All. 265, the Court had to consider the legality of the marriage of a Hindu girl of sixteen under the following circumstances. After the death of her father the girl lived with her paternal relatives (an uncle and two cousins) with whom she came to the house of one Chiranji Lal where she lived for some time. Her maternal relatives (grandfather and uncle) had her married to this person without the consent of the uncle and the cousins who intended to make some profit out of marrying her to a not very suitable bridegroom. There was no force or fraud in bringing about the marriage. The paternal uncle and the cousins on coming to know of the marriage took away the girl from the house of her husband who brought a suit for restitution of conjugal rights. Their Lordships observed that there was no case in which the marriage of a Hindu girl effected without force and fraud by her relations was, after it had actually taken place, declared to be invalid for want of the consent of the legal guardian and the present case was pre-eminently one to which the principle of *factum valet* should be applied and the marriage could not be declared void.

Interest amounting to penalty.

In *Mutner Krishna Iyer* v. *Sankara Lingam Pillai*, I. L. R. 36 Mad. 229, a Full Bench of the Madras High Court has held that when on an instalment bond no interest is payable until default but interest at an exorbitant rate is payable as from the date of default the latter stipulation can be treated as one by way of penalty within the meaning of sec. 74 of the Indian Contract Act.

The Plaintiff sued on an instalment bond for Rs. 71 payable at ½ a rupee per month in 142 monthly instalments. The Defendant paid up 29 out of the 142 instalments regularly. He made default in paying the 30th instalment of 8 annas. The instalment bond provided that on

such default the Defendant should pay interest at 3 pies per diem on the 8 annas for the 7 days of grace allowed to him to pay up the defaulted instalment. As he did not pay up the defaulted instalment the total amount of all the remaining instalments became at once payable according to the terms of the bond with the exorbitant interest of 1 pie per rupee per day. The Plaintiff accordingly sued to recover Rs. 51-8-0 for the 103 defaulted instalments plus Rs. 153-12-0 as interest for about 19 months.

The Defendant raised the defence that the rate of interest was penal and should be relieved against. The question which came up before the Full Bench was answered in the negative in *Vadyar* v. *Ayyar*, I. L. R. 25 Mad. 343, and the decisions in *Chinna* v. *Pedda*, I. L. R. 26 Mad. 445, and *Periasami* v. *Subramanian Asari*, 14 M. L. J. 136, were also to the same effect but as stated above the Full Bench after an elaborate discussion of the whole law on the subject took a contrary view. As has been pointed out it is well established by the English authorities that such stipulations are penal but they did not fall within sec. 74 of the Indian Contract Act as originally enacted and this was the view taken by the Legislature when it amended the section in 1899 by introducing the words "or if the contract contains any other stipulations by way of penalty" and added an explanation dealing with this very stipulation. The use of the word "other" shows that the Legislature uses the word penal in a very wide sense so as to include stipulations falling within the earlier part of the section for liquidated damages which according to the English decisions are not penal.

Adoption of Sudra after marriage,

The validity of an adoption after marriage of the adopted son amongst Sudras came up for consideration before the Allahabad High Court in *Jhunka Prosad* v. *Nathu*, I. L. R. 35 All. 263. The Plaintiff sought to establish his title to the property of his paternal uncle who he alleged had adopted him over six years ago. The *factum* of adoption was not challenged but the defence was that it was invalid for the reason that when the adoption took place the Plaintiff was a married man and had a daughter of his own. It was contended for the Plaintiff who was the Appellant that in the first place the Ahirs were Sudras and secondly among the Ahirs of the United provinces there was a special custom permitting the adoption of a nephew at any age. On the other side it was argued that according to the Dattaka Chandrika Upanayan is the limit of age for adoption among the twice-born classes and marriage is the limit for Sudras. The Court held that such an adoption is invalid even amongst Sudras and in taking this view reliance is placed on *Pichuvayyan* v. *Subbayyan*, I. L. R. 13 Mad. 128.

SIR FRANCIS MACLEAN, KT., K. C. I. E., THE LATE CHIEF JUSTICE OF THE CALCUTTA HIGH COURT.

On the reopening of the Calcutta High Court on the 17th of November last, all the Judges and members of all sections of the legal profession assembled in the Chief Justice's Court room as a mark of respect to Sir Francis Maclean, the news of whose death had been received in the week preceding the reopening of the Court.

THE HON'BLE THE ADVOCATE GENERAL on behalf of the Bar said.—My Lord Chief Justice and my Lords,—Within the last few days we have heard with sorrow of the death of Sir Francis Maclean, who formerly held the high and responsible office of Chief Justice of Bengal. With commanding presence and personal dignity he presided over these Courts from the year 1896, on the retirement of Sir Comer Petheram, until so recently as March, 1909, worthily maintaining the traditions of British judicial office. Some few of your lordships were his contemporaries on the Bench, others practised before him at the Bar—and all who came into association with him in any way ever found him, with a dignified manner, to be an affable, genial and courteous gentleman. We grieve that he was spared for so short time to enjoy a well earned leisure after long and useful service to the State in more than one capacity. He has gone—but long will he be remembered with esteem and regard by all branches of the legal profession and by his many friends in Calcutta. On behalf of the Bar it is my privilege to offer a tribute of respect to his memory—coupled with an expression of deep regret at his loss, and of sympathy with his family in their bereavement.

BABU RAMCHARAN MITTER, SENIOR GOVERNMENT PLEADER, on behalf of the Vakils said:—My Lord,—On behalf of the vakils of your lordships' Court I fully sympathise with all that has been said by the learned Advocate-General. It is a matter of great regret that Sir Francis Maclean did not live long to enjoy his well earned rest. As a judge, Sir Francis Maclean's decisions were free from racial prejudice and executive bias, and he dealt out justice in an even-handed manner, taking a broad and equitable view of all questions and avoiding technicalities. At the very commencement of his career in this country he enjoyed a reputation as a fair and impartial judge, by his charge to the jury in the Barrackpore Murder Case, and to avoid delay in the disposal of cases he got the number of judges increased and also the clerical staff. Sir Francis Maclean knew very well that the secret of the popularity of British rule in India was its impartial and independent administration of justice and accordingly did all he could to attain that end. But Sir Francis Maclean's good work was not confined to the precincts of this Court. He was a man of wide sympathy and promptly took an active part in all that was calculated to promote the welfare of the people. As President of the Famine Relief Commission his services were very valuable and were appreciated as such by the Government and the public. He took a great interest in the education of our youths as was evidenced by his prompt acceptance of the honorary office of Vice-Chancellor of the Calcutta University and by his presiding on many occasions over the distribution of prizes to meritorious students. In social gatherings also Sir Francis Maclean was every affable though he always kept himself at a respectful distance from those with whom

by virtue of his unique position he could not mix familiarly. The whole country now mourns his loss and we also share in their grief.

BABU GONESH CHUNDER CHUNDER, on behalf of the Attornies said :—My Lords,—On behalf of the Incorporated Law Society of Calcutta, I beg to associate myself with the expression of regret which has been made by the learned Advocate General, and I have to endorse every word that has fallen from him. I would only wish to add that it was in Sir Francis Maclean's time that the Incorporated Law Society was started, and it was through his kind assistance that we came into existence, and we all owe a debt of gratitude to him for this.

The HON'BLE THE CHIEF JUSTICE (SIR LAWRENCE JENKINS) said: Mr. Advocate-General, Senior Government Pleader and Babu Gonesh Chunder Chunder,—The sad event to which you have referred carries my mind back to the welcome which seventeen years, almost to a day was given by his colleagues and the Bar to Sir Francis Maclean when he first took his seat as Chief Justice in this very court-room; and the memory of the occasion must be fresh in the minds of many here to-day. The dignity of his presence, his courtliness of manner his strong common sense and his experienced grasp of equity principles and procedure fitted him in an eminent degree for the post he was selected to fill—a post he held with distinction for a longer period than any of his predecessors. Nor were his interests and activities confined to the narrow limits of this court; for during his term of office he took a leading part in the social and public life of Calcutta, where his kindliness, his generous hospitality, and his happy gift of speech will long be remembered. It is barely six years since he retired, and it was then hoped and believed that he had many years before him in which to enjoy the repose he had so worthily earned. But it was not to be, and to day, we and his many friends here and elsewhere mourn the loss of one who had gained our regard, respect and affectionate esteem.

Their lordships then rose and took their seats in their respective Courts and business was resumed.

CURRENT INDIAN CASES.

(CIVIL.)

Transfer of property in consideration of payment to third persons.

RAGHUNATH v. SADAGOPA, I. L. R. 36 Mad. 348.

The Plaintiff instituted a suit for the recovery from the Defendant of a sum of money which the latter had agreed to pay to two persons A and S as consideration for the transfer to him by the Plaintiff of two decrees in two suits. The Plaintiff alleged that the Defendant failed to pay the amounts due to the two persons named above and that he himself had to pay them.

Held—That the Plaintiff was entitled to recover the amount which the Defendant agreed to pay to third parties.

Civil Procedure Code (Act V of 1908), sec. 104 (d)—Order filing an agreement to arbitrate if appealable and if an adjustment of suit.

VENKATA CHALA REDDI v. RANGIAH REDDI, I. L. R. 36 Mad. 353.

An order filing an agreement to arbitrate presented by the parties to a suit is a decree and is appealable.

An agreement to refer coupled with the award resulting from the reference may be treated as an adjustment but a simple agreement to refer cannot be so treated.

Civil Procedure Code, Act (XIV of 1882), sec. 231—C. P. C. (Act V of 1908), Or. 21, r. 15.

BADRUDDEEN v. GULAM MOIDDEEN, I. L. R. 36 Mad. 357.

Sec. 258 of the Civil Procedure Code of 1882 corresponding to Or. 21, r. 2 of the present Code lays down that unless a payment or adjustment has been lawfully certified it cannot be recognised as a payment or adjustment of the decree by any Court executing the decree. When an adjustment has been made it is no doubt the duty of the decree-holder to certify the adjustment to the Court; if he fails to certify it is open to the judgment-debtor to take steps to compel him to do so and the law allows him 90 days within which to take such steps.

Negotiable instrument.

VEERAIYAM CHETTIAR v. PONNUSAMI CHETTIAR, I. L. R 36 Mad. 362

A suit was instituted by the endorsee of a negotiable promissory note against the maker. The note was executed by the latter in favour of "C, agent of P." The endorsement in favour of the Plaintiff was signed merely 'C.'

Held—That the note being executed in favour of C in his character as agent of P the endorsement by him in his individual capacity and not as agent of P would not entitle the Plaintiff to maintain the suit.

(CRIMINAL.)

Indian Penal Code, sec. 499—Defamation—Absolute privilege.

In re P. VENKATA REDDY, I. L. R. 36 Mad. 216.

The statement of a person charged with an offence in answer to a question by the Court trying him. "What have you to say" is an absolutely privileged statement so as to make him not liable to be punished for an offence under sec. 499, I. P. C, in respect of the statement.

Criminal Procedure Code, sec. 145.—Jurisdiction.

T. KAMAL KIRTTY v. UDAYAVARMA, I. L. R. 36 Mad. 275.

The essential requisite to give a Magistrate jurisdiction under sec. 145 is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure and not jurisdiction.

Omission to state in the preliminary order the grounds on which the Magistrate is satisfied as to the likelihood of a breach of the peace does not make the final order without jurisdiction.

Criminal Procedure Code, sec. 405—Autro fois acquit.

In re GANPATHI BHATTA, I. L. R. 36 Mad. 308.

The petitioner gave a false information of theft to the police stating that he suspected two persons. He was tried and convicted under sec. 211, I. P. C, but acquitted by the High Court which observed that the act committed amounted to an offence under sec. 182, I. P. C. Sanction was thereupon obtained from the Superintendent of Police and the petitioner was placed upon his trial under sec. 182, I. P. C.

Held—That under sec. 403, Cr. P. C., the prosecution under sec. 182, I. P. C., was barred.

Cl. (4) of sec. 403 refers, to the character and status of the tribunal when it refers to competency to try the offence. A sanction under sec. 195, Cr. P. C., is not a condition of the competency of the tribunal.

Criminal Procedure Code, secs. 107, 145, 403, 495.
In re MUTHA MOOPAN, I. L. R. 36 Mad. 315.
Secs. 403, 495 do not apply to proceedings under sec. 107.
An order under sec. 107 is not bad because a previous order under sec. 145 was made relating to the same dispute.

Criminal Procedure Code sec. 208 (3).
IMMUDI KUMARA, I. L. R. 36 Mad. 321.
Cl. (3), sec. 208, contemplates the intervention of the Magistrate to secure the attendance of witnesses and in regard to this evidence the Magistrate has a discretion for reasons to be recorded to refuse to issue process if he deems it unnecessary to do so.

Indian Penal Code, secs. 463, 471—Using a forged document—Criminal Procedure Code, secs. 177, 213—Commitment
ASSISTANT SESSIONS JUDGE, NORTH ARCOT *v.* RAMAMMAL, I L. R. 36 Mad. 387.
The production of a document in obedience to an order of the Court does not amount to using it as genuine. An involuntary production of a document in Court cannot be said to amount to any user of it.
The expression 'the Court of Session' in sec. 213, Cr. P. C., can only mean the Court of Session having jurisdiction to try the case under sec. 177, Cr. P. C.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—*R.* v. *Rodley.* Before JUSTICES LAWRENCE, BANKES AND ATKIN. 19th July 1913.

Irrelevant evidence of subsequent conduct, rejected in a trial for a charge of attempted rape.

This was an appeal from a conviction for burglariously entering a house at night with intent to ravish Miss Jones. The story for the prosecution was that one night between 12 and 1 A. M. the prisoner entered into her house by forcing a back door and when she got up to look for him he attempted to commit the offence.

Before the Magistrates a woman was called as a witness who deposed to the fact that about 2 o'clock on the same morning as that deposed to by Annie Jones, the Appellant had come to her house where she lived alone, and had gained access to her bed-room by coming down the chimney, and that he had then had connexion with her with her consent. Her house was about three miles from that of Annie Jones.

At the trial this evidence was also produced and conviction was obtained—The defence was that the Appellant had been invited by the girl and that he did not commit any offence. On appeal it was contended that the evidence of the second woman to show that he was raging with lust that morning was irrelevant and ought not to have been admitted. The Court gave effect to that contention and quashed the conviction. In the course of the judgment the law on the subject was thus summed up:—

In *Rex* v. *Mean* (21 T. L. R. 173), Mr. Justice Wills called attention to a fact which is sometimes overlooked, that the laws of evidence are the same in civil and in criminal cases. In *Rex* v. *Fisher* ([1910] 1 K. B., 152), Mr. Justice Channell puts the point thus:—"The principle is clear, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged it is admissible, because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence." As here pointed out by Mr. justice Channell, the governing rule must always be that any evidence to be admissible must be relevant to the issue.

The most recent decisions which lay down rules by which the relevancy of evidence which tends to prove offences other than those covered by the indictment may be tested are the following:—*Makin* v. *Attorney-General for New South Wales* ([1894] A. C, 65), where the Lord Chancellor lays down the rule in these words:—"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. In *Rex* v. *Bond* ([1906] 2 K. B, 389), Mr. Justice Darling, at page 409, and Mr. Justice Bray, at page 417, call attention to the fact that Lord Herschell's last words quoted above must have been intended to apply only to a defence which is really in issue,

and that the words of the Lord Chancellor should be read with that limitation. In the same case Mr. Justice Bray, at page 414, says that a careful examination of the cases where evidence has been admitted shows that they may be grouped under three heads:—(1) Where the prosecution seeks to prove a system or course of conduct; (2) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake; (3) where the prosecution seeks to prove knowledge by the prisoner of some fact. In their judgments in this case it is pointed out by several of the learned Judges who formed the majority of the Court that a single prior act of a like criminal nature would in general not be admissible as evidence of a system. Then the more recent case of *Rex* v. *Ball* [(1911] A. C. 71) was referred to.

In summing up to the jury in the present case the learned Judge, in referring to the evidence which is now objected to, puts the case in this way. He says:—"Then the Appellant goes away, and the next thing that is heard is that hardly a stone's throw off the farm lives a woman with whom he has already had immoral intercourse. The suggestion of the prosecution is that he is raging with lust, and that, being foiled as regards the prosecutrix Miss Jones, he immediately went to gratify his passion upon the woman who he knew would not be unwilling to yield."

Is the evidence objected to admissible upon the ground thus indicated by the learned Judge, or under any of the rules formulated in the cases above referred to? This Court is of opinion that the evidence is not admissible. At the point in the trial at which the evidence was tendered the defences really in issue were:—(1) That the appellant never broke into the house at all; (2) that the appellant did not break into the house with any intention of committing a rape; (3) that the prosecutrix's story as to what occurred in the house was not true. The evidence which was objected to was not, in the opinion of this Court, relevant to any of those issues and was not, therefore, admissible to rebut any of the above defences. . . . .

Mr. Longman for the Appellant.

Mr. Samson for the Crown.

B. D. *Appeal allowed.*

KING'S BENCH DIVISION. *The King* v. *Judge Mellor and anr.* Before JUSTICES RIDLEY, SCRUTTON AND BAILHACHE. 20th October 1913.

Costs awarded against a Judge of the County Court who refused to comply with the order of the High Court.

An action was commenced in the High Court, but the master remitted it to the County Court of Manchester. The Judge of that Court His Honour Judge Mellor instead of obeying the order of the High Court which he was bound to do refused to try the action on the ground that his Court was already congested and that the action ought not to have been sent to him. This rule *nisi* was then obtained against the said Judge to show cause why he should not proceed to try the action. The Court held that the Judge should have obeyed the order of the High Court and made the Rule absolute with costs against the Judge personally.

MR. JUSTICE RIDLEY then said they had come to the conclusion, though with great reluctance, that they must order the Judge to pay the costs. The order of this Court went down to him, and he refused to obey it. If he had adjourned the case and reported it to this Court the circumstances would have been different. But on his own affidavit it was clear that the Judge had refused to obey the order, so he must take the consequences.

B. D.

KING'S BENCH DIVISION.—*Gibson & Co., Ld.*" v. *Gibson*. Before MR. JUSTICE ATKIN. 9th July 1913.

Judgment of a foreign Court, when enforceable in England—Rule of domicil.

This was an action for recovery of money alleged to be due under a judgment of the Supreme Court of Victoria or on an account stated. The Defendant pleaded that the said Supreme Court had never had any jurisdiction over him. The Plaintiff contended that the judgment was enforceable for three reasons, namely, (1) that the Defendant was domiciled in Victoria, (2) that the Defendant was born in Victoria and (3) that the Defendant having instructed an agent in Victoria to instruct a Solicitor there to defend the action was estopped from denying that he had submitted to the jurisdiction. The learned Judge decided in favour of the Defendant's contention. In the course of his judgment he said:—

The third point was shortly disposed of. The solicitor did not defend the action, and he could see nothing in the facts alleged which would give rise to the estoppel relied on. As to the second point, the facts as proved by the answers to interrogatories, which were the only evidence available under the order of the Court of Appeal, were that the Defendant was born in Victoria, and lived at Melbourne for 20 years until 1890, when he came over to England. Since this time he had lived chiefly in London, but had visited Victoria at the periods stated. Neither of the Defendant's parents was born in Victoria, but both lived there a good deal, paying visits to England. From these facts he could not draw the inference that the Defendant's domicil of origin was Victoria, or that he had acquired there a domicil of choice. It was therefore unnecessary to consider whether if the Defendant's domicil had been in Victoria

the Court would have been bound to give effect to a Victorian judgment against him.

The remaining question was whether the fact that the Defendant was born in the colony of Victoria entitled the Plaintiff to contend that the jurisdiction of the Victoria Court over him would be recognized when he was sued in this country on the Victorian judgment. The rule was that all jurisdiction was properly territorial. *Extra territorum jus dicenti impune non paretur.* The principles upon which the Court would enforce here a judgment of a foreign Court were stated in the judgment of the Judicial Committee in *Sirdar Gurdyal Singh* v. *Raja of Faridcote* (1894, A. C. 670). Three decisions were cited in which the fact of the Defendant's being a subject of the country in which the foreign judgment was pronounced was treated as one of the conditions which would entitle the foreign judgment to recognition here. In *Schibsby* v. *Westenholtz* (L. R. 6 Q. B. 155), the Defendant was not a French subject, and the decision of the Court was that the French judgment could not be enforced against him. In *Rousillo* v. *Rousillo* (14 Ch. D., 351), Mr. Justice Fry, in stating the circumstances which he said had been held to impose upon the Defendant the duty of obeying the decision of a foreign Court, stated as first in the list, "When he is a subject of the foreign country in which judgment was obtained," but in that case the judgment was a French judgment obtained against a Swiss subject resident in England; and the decision of Mr. Juctice Fry was in favour of the Defendant. It was apparent that in none of these cases was the Defendant in fact a subject of the country where the judgment sued on was pronounced, and the judicial expressions he had referred to were therefore in the nature of *obita dicta.* They were, however, of so great weight that he would probably feel compelled to follow them and therefore had to consider in this case whether the Defendant was a subject of the country in which the judgment was obtained. In the ordinary use of the word it would appear to him that he was not. Being born within the British Dominions he became a British subject, and in respect of nationality his position was precisely the same as that of any of his fellow-subjects born in any other part of that wide and varied territory.

Nationality was based on the tie of allegiance: a personal duty to a Sovereign. There was one King of the British Dominions, one uniform tie of allegiance binding all persons born within the Dominions. On that point, as a Court of first instance, he was bound by the decision of Mr. Justice Farwell in the case of *Re Johnson—Roberts* v. *The Attorney-General* ([1903] 1 Ch, 821). It was, however, contended before him that though in the ordinary meaning of the word the Defendant was not a subject of Victoria, yet for the purpose of investigating whether the jurisdiction of a Colonial Court would be recognized in this country the word must be given an artificial meaning; and it was strongly urged that the case of *Douglas* v. *Forrest* (4 Bing. 686) was an authority to this effect that a Scottish judgment obtained against a Defendant resident abroad would be enforced in this country if the Defendant were a native of Scotland. It was, however, apparent that neither in the argument nor in the decision was it suggested that it would be sufficient for the Plaintiffs' case that the Defendant was a native of Scotland. The judgment belonged to a period when the law relating to foreign judgments had not been investigated as fully as at the present time, and unless precisely similar circumstances were to recur it appeared to him to be of little value. The only other authority which was referred to, or which he could discover, was the case of *Turnbull* v *Walker* (67 L. T., P., 767 [1892]). In that case the Plaintiff sued on a judgment obtained in the Supreme Court of New Zealand against the Defendant, who was not at the time resident in New Zealand. Mr. Justice Wright held that the judgment was not binding on the Defendant.

In the absence, therefore, of any express authority compelling him to hold that a person born in one of the British colonies became a subject of that colony, so that the judgments of its Courts obtained against him in his absence were binding upon him in all other Courts, he declined to accept so far-reaching a proposition. By the principles of the English law of nationality, not only the native, but his sons and his son's sons might be subjects. There were statutory means by which a British subject could put off his British nationality, but he knew of no statute by which a Victorian subject, if such there be, could cease to be a Victorian subject, and become a South African, Canadian, or English. At common law, *nemo potest exuere patriam.* As far as he could ascertain, the alleged principle had never been established or even contended for in any Colonial Court.

It was not argued before him that the judgment was binding in that Court because the judgment would be binding in Victoria—see *Astbury* v. *Ellis*, 1893 (A. C., 339)—or because the Defendant was a British subject. These points would, in his view, in no case have availed and were disposed of in the reasoning in the first part of the judgment of Mr. Justice Scrutton in the recent case of *Phillips* v. *Batho*, with which he respectfully agreed. He therefore decided the question raised by the second paragraph of the defence in favour of the Defendant.

Messrs. Gregory, K. C., and Dowson for the Plaintiffs.

Messrs. Sankey, K. C., and Bell for the Defendant.

B. D.

RADHASHYAM KAR v. DINABANDHU BISWAS.

the limitation applicable to certain specified suits, appeals and applications are to be found in the third schedule annexed to the Act. Sub sec. (1) of sec. 185 excludes the operation of secs. 7, 8 and 9 of the Indian Limitation Act of 1877 to suits and applications mentioned in sec. 184. Sub-sec. (2) of sec. 185 then lays down that, subject to the provisions of Chap. XVI of the Bengal Tenancy Act, the provision of the Indian Limitation Act shall apply to all suits, appeals, and applications mentioned in sec. 184. The application with which we are now concerned was made under sec. 174, and is not an application mentioned in the third schedule to the Bengal Tenancy Act. Consequently, sub-sec. (2) of sec. 185 is of no assistance to the applicant under sec. 174. The position, therefore, is that notwithstanding the fraud alleged by the Petitioner, he is not entitled to protection under sec. 18 of the Indian Limitation Act. Whether he had any remedy under r. 90 of Or. 21 of the Code of 1908 read with sec. 18 of the Indian Limitation Act of 1908, it is needless to consider now, nor is it necessary to consider whether he may still have a remedy by a regular suit, if the proceedings are fraudulent as alleged by him. On the present application, we are constrained to hold that the order of the Court below was made without jurisdiction.

The Rule is made absolute and the order of the Court below discharged. The sale will stand confirmed. There will be no order for costs either in this Court or in the Court below.

Rule made absolute.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 661 OF 1909.

JENKINS, C. J. 1913, 18, August. and 1, September.

COXE, J. RAY, J. 1913, 26, May. and 22, August.

MAHAMMAD GAUHAR ALI, Plaintiff, Appellant,
v.
SAMIRUDDIN SHEIKH and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), sec. 98—High Court Judges, difference between—Practice as to reference to third Judge, change of—Case to be conditionally decided and point only to be referred—Bengal Tenancy Act (VIII of 1885), sec. 153—Suit by lessee of landlord for rent against tenants, making landlord party—Tenants contesting validity of lease—Decree, if appealable—Ex parte *rent decree, if* res judicata *on the question of relationship of landlord and tenant.*

JENKINS, C. J.—*The intention of sec. 98 of the C. P. Code is that the Judges hearing the appeal should come to a complete decision with the reservation on the point of law on which they differ, and they should by their judgments make it clear that if the point of law is decided in one way it will have a certain final result and if it is decided in another way it will have another and a different final result.*

Where the Plaintiff claiming to have derived title under a lease from Defendant No. 3, the landlord, sued the tenants on the land for rent, but the tenants contested his claim on the ground that the lease given to him by Defendant No. 3 was invalid, though Defendant No. 3 himself did not appear or

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oppose Plaintiff's claim, and the lower Appellate Court sustained the tenants' plea and dismissed the suit :

Held by JENKINS, C. J. (agreeing with RAY, J., contra COXE, J.)—*That the decree decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, within sec. 153, Bengal Tenancy Act, and an appeal lay.*

Held per COXE AND RAY, JJ.—*An* ex parte *decree for rent obtained by the Plaintiff against Defendants in a previous suit is* res judicata *in a subsequent rent-suit, unless the Defendants can establish that the relationship of landlord and tenant established by the decree ceased since the passing of the decree.*

This was a Reference made by Coxe and Ray, JJ., under sec. 98 of the Civil Procedure Code in connection with an appeal preferred on the 20th of April 1909 against the decree of S. N Huda Esq , District Judge of Pabna and Bogra, dated the 16th of January 1909, affirming the decree of Babu Jnan Chandra Bannerji, Additional Munsif of Bogra, dated the 14th of September 1908.

The Appeal was originally heard by Coxe and Ray, JJ., on 12th May 1913, and the following dissentient judgments were delivered by them on 26th May 1913.

COXE, J.—A preliminary objection has been taken in this case that no appeal lies. The suit was one for rent, valued at less than Rs. 100. The Plaintiff claimed to be a lessee under the Defendant No. 3. The contesting Defendants, who were the raiyats, pleaded that the lease was invalid, and that consequently the relation of landlord and tenant did not exist between them and the Plaintiff. They also alleged that they were tanants under the Defendant No. 3, though clearly it was quite unnecessary for them to do so. The Defendant No. 3 did not appear.

The Courts below held that the lease of the Plaintiff was invalid, and accordingly dismissed the suit.

The Plaintiff appeals to this Court.

Under sec. 153 of the Bengal Tenancy Act an appeal does not lie unless the decree decides a question relating to title to land as between parties having conflicting claims thereto. The decree in this case may be said to decide a question relating to title to land ; but it does not appear to me that it decides it as between parties having conflicting claims thereto, because even if it can properly be said to decide it as between the Plaintiff and the Defendant No. 3, yet it is neither alleged nor proved that the Defendant No. 3 has a conflicting or any claim to the land. If the Defendant No. 3 had not been made a party, it is conceded that no appeal would lie. In such a case the decree, just as in the present case, might decide a question relating to title to land, and no appeal would lie, simply because it would not decide it as between parties having conflicting claims thereto. If in the present case the Defendant No. 3 had disputed the lease, or even if it had been alleged by the Plaintiff that she disputed the lease, and that statement had not been traversed by the Defendant No. 3 it might be held that conflicting claims existed. But here the Plaintiff does not allege that the Defendant No. 3 disputes the validity of the lease or has obstructed him in realizing rent, or colluded with the tenants, or in any way has put forward any claim to the landlord's interest. The Defendant No. 3 does not appear or put forward any claim at all. It would seem

was not

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therefore that there is neither conflict nor claim, that the Plaintiff and the 3rd Defendant are in entire accord and that the latter is endeavouring to transfer to the former property which she has no power so to transfer. I cannot see, therefore, how it can justly be said, on the pleadings, that the Plaintiff and the Defendant No. 3 have conflicting claims to the landlord's interest; and if they have not conflicting claims, the section clearly does not admit an appeal. If there is any conflict at all as to the proprietary interest it would seem to exist between the Plaintiff and the Defendant No. 3 on the one side, and the beneficiaries of the 3rd Defendant's trust on the other. They however are not parties to the suit. The suit is resisted only by the tenants; and there is nothing to show that they resist it at the instance of the Defendant No. 3, or that she has anything to do with their case. In these circumstances, I cannot see why the Plaintiff should have a right of appeal against the tenants merely because he has made the 3rd Defendant, who is supporting him, a party to the suit.

Reference has been made to the cases which are quoted on page 436 and the following pages of the 8th volume of the Calcutta Weekly Notes though the learned pleader for the Appellant did not cite them or rely upon them. Nor was it his argument that the case was appealable because the Plaintiff and the contesting Defendants laid conflicting claims to the land. It is somewhat difficult to reconcile all these cases with each other, but, in any case, they are, in my opinion, clearly distinguishable. In them the parties both claimed the same position under the superior landlord with respect to the same land; and in some of the cases it was held that the decision was therefore between parties having conflicting claims to the land. But here the Defendants are cultivating tenants of the land, while the Plaintiff has been given a *mokurari* lease of a large amount of land in two villages, of which the land in suit forms a portion. It is not quite clear whether the lease comprised all the land of the Defendant No. 3; but, in any case, it is clear that the Plaintiff and the Defendants are not claiming the same interest or the same position at all. The Plaintiff is the tenure-holder of the whole or a large portion of the 3rd Defendant's estate, while the contesting Defendants are mere raiyats of a holding said to be within the tenure. It is true, as I have said, that the Defendants allege that they are the tenants of the Defendant No. 3. It was not necessary, however, for their case, to put forward this plea. It was sufficient for them to plead that the Plaintiff's title was defective; and too much stress should not I think, be laid on this point.

In my opinion, therefore, the decree does not decide any question as between parties having conflicting claims, and an appeal does not lie. As my learned colleague does not assent to this view let the case be laid before the Chief Justice for reference to a third Judge.

RAY, J.—It appears to me that the judgment of the Court of Appeal below decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. It cannot be distinguished from the case of *Sita Nath Pal* v. *Kartick Gharmi* (1), decided by Rampini and Wilkins, JJ. This case was followed by Mitra, J., in *Ram Kanai* v. *Fakir*

(1) 8 C. W. N. 434 (1900).

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Chund (2). The Plaintiff alleges that he has acquired a mokurari right from the Defendant No. 3 and is entitled to treat the Defendants as his tenants and the Defendants in denial of the Plaintiff's right assert that they hold directly under the Defendants. I do not see how it can be said that the claims of the parties do not conflict and the question certainly relates to some interest in land. If it were necessary to be very precise I would say that the particular interest about which there is conflict, is who is the tenant under the Defendant No. 3.

In the present case there is another aspect of viewing at it. The Plaintiff bases his right to receive the rents from the Defendants 1 and 2 on the mokurari grant which he obtained from the Defendant No. 3. That is the foundation of his claim. That grant he has sought to have established as against not only the tenants but also against the Defendant No. 3. This he may have done to avoid future trouble or to allay all anxiety on the part of the tenants. It is every day done and I do not think there is anything in the law to forbid it. I do not think it was necessary for the Plaintiff to allege or prove that the Defendant No. 3 had in any way questioned the grant in order to establish his competency to add the Defendant No. 3 as a party to the suit. He did not receive his rents and he might well have desired his right to receive them adjudicated in the presence of the party interested to dispute it. It appears to me that sec. 153 of the Bengal Tenancy Act itself contemplates such cases. Then there is undoubtedly a conflict of claim as between the Plaintiff and the Defendant No. 3 as to who is entitled to receive the rents from the tenants. The claim of the Plaintiff to receive those rents conflicts with the right of the Defendant No. 3 to receive them. Now this question has been raised though not by the Defendant No. 3 but by the tenant Defendants and the Courts below have decided it. The fact that the Defendant No. 3 did not raise the contest and did not appear in the suit, does not appear to me to be very material. I would quote here some observations of their Lordships of the Privy Council, though they were made in an appeal case:—"It was said that that appeal was heard *ex parte*. Mr. Doyne candidly admitted that he could not on that ground dispute the effect of it. It is in their Lordships' opinion quite clear that it is impossible to allow the Appellant to take advantage of her absence on that occasion, in order to re-open any question which either was expressly decided or might have been raised and determined on that appeal." *Juggodumba Dossee* v. *Tarakant Bannerjee* (3). I therefore hold that the appeal lies.

[Owing to this difference of opinion the learned Judges made a reference under sec. 98, Civil Procedure Code, stating the point of law as follows:—

"In the circumstances of this case, does an appeal lie?"

His Lordship the Chief Justice who took up the reference was of opinion that the reference was not in order, and on the 18th August 1913 returned the case to the Division Bench with the following observations:—]

JENKINS, C. J.—The reference to a third Judge is under the proviso to sec. 98 of the Code of Civil Procedure. This section with certain variations reproduces sec. 575 of the former Code. But there is a difference between the two Codes which makes a very important difference for the pur-

(2) 8 C. W. N. 435 (1903).

(3) 6 C. L. R. 121 (1880).

poses of a reference such as that now before me. Under the old Code the appeal was referred to one or more of the other Judges. Under the present Code it is a point of law that is to be heard by one or more of the other Judges. The result is that whereas under the old Code I could have disposed of this appeal on a reference, under the present Code I cannot. The intention of sec. 98 is that the Judges hearing the appeal should come to a complete decision with the reservation on the point of law on which they differ, and they should by their judgments make it clear that if the point of law is decided in one way it will have a certain final result, and if it is decided in another way it will have another and a different final result. That has not been done here and the result is that if I express my opinion on this point of law at this stage the appeal will be left in a condition of suspense and my decision will not decide the appeal. It may be that while the Judges differ in their opinion on this preliminary point, they are in accord on the merits of the case and so the reference may be unnecessary.

In view of these circumstances, it appears to me that the reference is premature and it is impossible for me to deal with it at this stage. The case will go back to the Division Bench for decision in the manner that I have indicated.

[The Division Bench thereupon on the 22nd August 1913 passed the following order.]

COXE and RAY, JJ.—This case has been returned by the learned Chief Justice for a further finding. We are both of opinion that if any appeal lies the appeal should be decreed. It is found by the Courts below that the Plaintiff has no title to the land inasmuch as the Defendant No. 3 had no power to transfer it to him. It does not appear to us however that this question is still open to controversy but has been finally decided. The Plaintiff sued the predecessors of the Defendants for rent and obtained a decree. That decree establishes that when it was passed the relationship of landlord and tenant existed between the parties. Under sec. 109 of the Evidence Act it is incumbent on the Defendants to prove that that relationship has ceased to exist but it is not their case that it has ceased to exist since the passing of the decree. Both the Courts below ignore this decree, on the ground that it was passed *ex parte.* But in our opinion an *ex parte* decree is just as effective as any other decree until it is set aside or proved to have been obtained by fraud. And in this case it may be added, though the addition does not really carry the case any further, that the decree was executed.

In our opinion, therefore, when it is not pleaded that any change has taken place in the position of the parties since the former decree, it must be taken to be finally determined between the parties that the relationship of landlord and tenant exists between them, and the question whether the lease to the Plaintiff was or was not valid becomes irrelevant. We think therefore that the learned District Judge erred in law in deciding the case on that point and that if an appeal lies his decision should be reversed and the Plaintiff should obtain a decree for the rent claimed with costs throughout. Let the papers be returned to the Chief Justice.

Babu Braja Lal Chuckerbutty for the Appellant.

Babus Birdj Mohun Mojumdar and *Ramakant Bhattacharya* for the Respondents.

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The REFERENCE WAS DISPOSED OF BY his Lordship the Chief Justice as follows :—

JENKINS, C. J.—This is a reference to me as a third Judge under the provisions of the Code, occasioned by a difference of opinion between two learned Judges of this Court. The case came before them by way of second appeal, and, on the merits they both agreed that the Appellant ought to succeed : but while one of the learned Judges was of opnion that an appeal would lie, the other considered that it would not. This is the only question that remains unsettled. The determination of this question turns upon the construction of sec. 153 of the Bengal Tenancy Act, for this was a suit instituted by a landlord for the recovery of rent, under that Act, and no second appeal would lie unless the decree has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. The only question then is whether the decree has had this effect. It appears to me that it undoubtedly has. The Plaintiff claims to be the lessee under Defendant No. 3, and the point determined adversely to the Plaintiff by the lower Appellate Court was that this lease was invalid and that he had no title. That has been decided by the decree in a suit to which they both were parties : and not only was it a decision relating to title to land or to some interest in land, but the Plaintiff and the Defendant No. 3 appear to me to be parties having conflicting claims thereto. The claims certainly are not identical claims to the extent of the Plaintiff's alleged interest— they are in conflict with one another, and none the less because the Plaintiff claims under Defendant No. 3. This does not appear to me to require the authority of cases but it seems to me to be fully illustrated by the accepted principle that as between a vendor and a purchaser, or a lessor and lessee, under instruments which are for some reason ineffective, the purchaser in one case and the lessee in the other, can, where the conditions permit, set up and successfully establish the plea of adverse possession, if there be adverse possession. It appears to me then that the rights are conflicting rights.

For these reasons I think that the Appeal should be allowed with costs as was determined by the two learned Judges in the event of my coming to the conclusion to which I have just given expression.

There will be no order as to the costs of this reference.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL
No. 76 OF 1912.

JENKINS, C. J.
MOOKERJEE, J.
1913,
10, July.

SHEIKH ELAHI, Defendant, Appellant,
v.
SHEIKH HUKUM, Plaintiff, Respondent.

Registration Act (III of 1877), sec. 17, cls. (d), (h)—Amalnamah, *if must be registered when lease intended to be granted a lease in perpetuity—Agreement to lease, which contemplated execution of* patta *and* kabuliyat, *but nevertheless intended passing title upon delivery of possession, if a document merely creating a right to obtain a subsequent document.*

Where a document described the land intended to be demised and set out the boundaries thereof and proceeded to say that "according to your prayer I grant this amalnamah *to you for erecting houses after reclaiming the said homestead. You will dwell thereon on payment of rent Rs. 15-1-0 gds. from year to year to our*

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Sarkar. You will abide the survey and settlement. Within a month on executing a kabuliyat *you will take a* pattah *which I shall grant.*"

Held—*That the document was plainly an agreement to lease and the lease being apparently a lease in perpetuity the document was compulsorily registrable.*

SYED SUFDAR REZA *v.* AMZAD ALI (1) *followed.*

DWARKA NATH *v.* LEDU SIKDAR (2) *distinguished.*

That it was not a document merely creating a right to obtain a subsequent document within cl. (h) *of sec. 17 of the Registration Act as the parties intended that as soon as possession was taken under the document, the title of the grantee would commence and it was not contended that the title of the grantee did not yet commence by reason of his failure to tender a* kabuliyat *to the landlord and obtain from him a* pattah.

NARAYANAN CHETTY *v.* MUTHIAH SERVAI (3), CHAMPAKALATIKA MITRA *v.* NAFAR CHANDRA PAL (4) *referred to.*

This was an Appeal preferred under sec. 15 of the Letters Patent against a decree of Mr. Justice N. R. Chatterjea, dated the 6th of August 1912, in Second Appeal No. 1602 of 1910 which had been preferred against a decree of Babu Kishori Lal Sen, Subordinate Judge, 1st Court of Zillah Dacca, dated the 4th of February 1910, modifying a decree of Babu Jnanendra Chandra Banerji, Munsif, 3rd Court of that District, dated the 15th of February 1909.

The Plaintiff sued for declaration of his title to and recovery of possession of 3 plots of land as forming parts of his holding. The Defendant claimed the said lands as appertaining to his homestead land. Both the parties adduced evidence in support of their claim. There were possessory suits in respect of these lands and they were dismissed. The result was that the Defendant No. 5 was maintained in possession. The principal piece of evidence on the Plaintiff's side was a document purporting to be an *amalnamah* dated 13th Bhadra 1296. The Court of first instance decreed the suit in part. The Defendant appealed in respect of the lands decreed and the Plaintiff cross-appealed in respect of the plot dismissed. The Subordinate Judge found that the document purporting to be an *amalnamah* was not admissible in evidence, being a lease for an indefinite period and unregistered and further found that the Plaintiff failed to prove his title in respect of the plaint lands. He decreed the appeal and dismissed the cross-appeal.

The document purporting to be an *amalnamah* was in the following terms:—

"Sheik Menu, son of late Sheik Julmat of Duaripara, P.S. Keraniganj, District Dacca. This is a deed of *amalnamah.* Within tappe Ichapur Ph. Sahanjial taluk No. 6060 in the name of Sheik Khayerulla Mouza Murul and others, Estate Ainuddin Haider Khan Saheb, the owner in possession as Matwalli is Nawab Ashanulla Khan Bahadur. You having applied for settlement of the homestead land and Aman land within the boundaries given below within that taluk and in Kismat Duaripara which is mudafat Sheik Keramat in ordinary rayati right for dwelling purposes, according to your prayer, I grant this *amalnamah* to you for erecting houses, after reclaiming

(1) I. L. R. 7 Cal. 703 (1881).
(2) I. L. R. 33 Cal. 502 (1906).
(3) I. L. R. 35 Mad. 63 (1910).
(4) 15 C. W. N. 536 (1910).

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the said homestead. You will dwell therein on payment of rent Rs. 15-1-10 gundas from year to year (san basan) to our Sarkar. You will abide by the survey and settlement. Within a month on executing a *kabuliyat* you will take a *pattah* which I shall grant. Finish. Dated 23rd Bhadra 1296 B. S."

On second appeal the High Court held that the *amalnamah* was admissible in evidence but the case was remanded for a finding upon the evidence in the record as to whether the Tehsildar of the landlord had power to grant the *amalnamah*. On the return of the findings of the lower Appellate Court the Second Appeal was heard by Mr. Justice N. R. Chatterjea who passed the following judgment.

This case was remanded for a finding upon the evidence on the record as to whether the Tehsildar of the landlord had power to grant the *amalnamah* which have been rejected by the lower Appellate Court as inadmissible in evidence and which this Court by its order dated the 9th February 1912 held to be admissible. There was a further direction that if the Court find that the Tehsildar had no such power no other question would have to be gone into but that if it be found that the Tehsildar had power to grant the *amalnamah* then it will come to a finding as to the title of the Plaintiff upon the whole evidence after taking the *amalnamah* into consideration. The lower Appellate Court has now returned its findings and I have heard both parties upon these findings. The learned Subordinate Judge has found that the Plaintiff could give no evidence as to any written authority from the landlord empowering the Tehsildar to grant *amalnamah* or lease nor is there any oral evidence that on the occasion of this particular settlement with the Plaintiff the landlord gave any authority verbally. He finds however that 'there is ample and very reliable evidence that various Tehsildars of the landlord who came to the service subsequently acted upon the settlement of the *amalnamah*. The settlement was accepted and one's rents were realized from the Plaintiff for series of years' He again says —"Thus there is satisfactory evidence that several Tehsildars accepted the settlement of the *amalnamah* and realized rents which were entered in the landlords' collection papers. All these evidence and circumstances afford materials in favour of a finding that the power of the Tehsildar was ratified and acquiesced in. If this acquiescence and ratification be taken as sufficient authority the *amalnamah* which is otherwise unimpeachable is a good evidence in favour of the Plaintiff's title and taking the *amalnamah* and the evidence of the witnesses into consideration he has come to the conclusion that there can be no doubt as to the Plaintiff's title to the lands in suit except plot No. 3 and thus agreed with the finding of the Munsif as to the title of the Plaintiff.

It is contended on behalf of Respondents that the learned Subordinate Judge has gone beyond the order of remand made by this Court; that having found that the Tehsildar had no written or verbal authority to grant *amalnamahs* he ought to have stopped there and ought not to have tried the case upon the merits. The learned pleader on behalf of the Appellant contends that the Subordinate Judge has not really gone beyond the remand order and he has practically come to a finding that the Tehsildar had the authority. It has no doubt been found that there was no evidence to show that the Tehsildar had any written authority or any verbal authority at the time of granting the *amalnamah*, but reading the finding of the learned Subordinate Judge as a whole I think he meant to find, having regard to the fact that the settlement under the *amalnamah* had been acted upon and rents realized thereunder and that the act of the Tehsildar was ratified and acquiesced in, that the Tehsildar had sufficient authority. The Court could on the facts have inferred that the Tehsildar had power to grant *amalnamah*; and though the learned Subordinate Judge does not say in so many words this is what he really meant to find. The *amalnamah* being admissible in evidence and the lower Appellate Court having found that taking it with the evidence of the witness it proves the title of the Plaintiff the decree of the lower Appellate Court must be set aside and that of the Munsif restored with costs.

Babu Gopal Chandra Das for the Appellant.

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Babus Karunamoy Bose and *Harendra Narain Mitra* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal under cl. 15 of the Letters Patent against a judgment of Mr. Justice Nalini Ranjan Chatterjea in a suit for recovery of possession of land by which he has reversed the decision of the Subordinate Judge, and restored the decree of the Court of first instance.

The substantial question in controversy between the parties is whether a document described as an *amalnamah* and granted by the landlord to the tenant on the 28th of August 1889 was admissible in evidence. The Appellant contends that the document is in essence an agreement to lease and is compulsorily registrable under sec. 17 of the Indian Registration Act. The Respondent contends, on the other hand, that it is not an agreement to lease but is a document of the description mentioned in cl. (*h*) of sec. 17 of the Indian Registration Act, 1877.

Now, the document first describes the land intended to be demised and sets out the boundaries. It then states that "according to your prayer, I (that is, the landlord) grant this *amalnamah* to you for erecting houses after reclaiming the said homestead. You will dwell thereon on payment of rent Rs. 15-1-10 gundas from year to year to our Sarkar. You will abide the survey and settlement. Within a month on executing a *kabuliyat* you will take a *pattah* which I shall grant." It is plain that this is an agreement to lease. The land to be demised is accurately defined ; the rent is settled and is made payable from year to year, and the lease is apparently a lease in perpetuity ; under these circumstances we must hold as was ruled by a Full Bench of this Court in *Syed Sufdar Reza* v. *Amzad Ali* (1), that the document was compulsorily registrable.

Reliance, however, has been placed upon the case of *Dwarka Nath* v. *Ledu Sikdar* (2), in which it was held that an *amalnamah* was not compulsorily registrable. The terms of the document in that case, however, were very different from the terms of the instrument now before us, and it is not necessary for us to express an opinion upon the question whether or not upon the terms of that document the case was correctly decided.

As regards cl. (*h*) of sec. 17 of the Indian Registration Act, we observe that it is clearly inapplicable. That clause lays down that a document not itself creating any title of the value of one hundred rupees and upwards to immoveable property but merely creating a right to obtain another document which will, when executed, create such title, is not compulsorily registrable. The document mentioned there is one which does not create title, but merely creates a right to obtain a subsequent document upon the execution and registration of which the right is to commence. In the case before us there is no room for controversy that the parties intended that as soon as possession was taken under the document of the 28th August 1889, the title of the grantee should commence. As a matter of fact no subsequent document has been executed and it is not the contention of the Respondent that his title has not yet commenced by reason of his failure to tender a *kabuliyat* to the landlord and obtain from him a *pattah*.

The view we take is supported by the

(1) I. L. R. 7 Cal. 703 (1881).
(2) I. L. R. 33 Cal. 502 (1906).

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decision in *Narayanan Chetty* v. *Muthiah Servai* (3) and is not opposed to the decision in *Champakalatika Mitra* v. *Nafar Chandra Pal* (4), where an *amalnamah* was produced at the instance of the landlord and no question was raised as to its admissibility.

The result therefore is that this Appeal is allowed, the decree of Mr. Justice N. R. Chatterjea reversed and that of the Subordinate Judge restored. This order will carry costs throughout.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 334 OF 1909.

N. R. CHATTERJEA, J. WALMSLEY, J. 1913, Heard, 2, 5, 8 and 9, May. Judgment, 1, August.	HITENDRA SINGH and ors., Plaintiffs, Appellants, *v.* RAMESHUR SINGH and ors., Defendants, Respondents.

Babuana *property—Darbhanga Raj—Government revenue and cesses whether payable to Raj—Revenue not paid to Raj—Debt whether a joint family debt—Mitakshara family—Decree against father personally—Debt not proved to be illegal for immoral—Whether the interest of the sons passes.*

Holders of Babuana *property in the Darbhanga Raj are liable to pay Government revenue and cesses to the Raj.*

Where the income of the Babuana *property was appropriated by members of the family, and the Government revenue and cesses payable were not paid, the liability to pay the Government revenue and cesses should be considered as a joint family debt and not the personal debt of the holder for the time being.*

Even if it were considered to be a personal debt of the father, in execution of a decree against the father alone the entire family property could be sold and not merely the personal interest of the father, as the debt could not be attacked as an immoral debt.

Every debt incurred by the father in a Mitakshara family not for illegal or immoral purposes is of a nature to support a sale of the entirety of the family property. In execution of a money decree against the father alone for a personal debt of the father, the whole family property may be sold, if the debt was not contracted for immoral purposes and it is not absolutely necessary that the son should be a party either to the suit itself or to the proceedings in execution.

Where it appears from the form of the suit or of the execution proceedings or from the description of the property put up for sale that only the interest of the father in the property was intended to be sold and was put up for sale, the interest of the sons would not pass by such a sale, and in such a case, the absence of the sons from the suit or execution proceedings would be a material element for consideration.

Where, on the other hand, the proceedings show that the intention was to sell the entire property and the same was sold and bargained for, then the purchaser would be entitled to the whole, and the sons though not parties to the proceedings cannot claim their shares against the purchaser except by proving that the debt was contracted for immoral purposes.

The words "right, title and interest" of the judgment-debtor may either mean the share which the father might have sold to satisfy his debt or the share which he would have obtained on partition, and the ques-

(3) I. L. R. 35 Mad. 63 (1910).
(4) 15 C. W. N. 536 (1910).

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tion what was intended to be sold or was sold in each case will depend upon its own circumstances.

Where in the sale proclamation the property to be sold at an auction sale was described as "7 as. 8 gds. 3 karas of Pandaul . . Touzi No. 6473 . ." i.e., the entire family property, and the property was purchased by the decree-holder for Rs. 55,000, and an application for setting aside the sale was rejected on the ground that the evidence in proof of the insufficiency of price could not be deemed good and satisfactory, and the sale was confirmed with the following order: "whereas M purchased for 55,000 the rights and interests in the properties specified below, and thirty days have expired, and an application for setting aside the sale has been rejected the sale is hereby confirmed;" but in the certificate of sale, the description of the property was to the same effect as that in the sale proclamation, and finally it was not suggested that the price paid was not the full value of the property purchased:

Held—*That the words "rights and interests" in the order confirming the sale do not raise any ambiguity, or induce the Court to hold that only the personal interest of the father was sold and that under the circumstances the entire family property passed to the purchaser.*

DEENDYAL *v.* JUGDEEP (4), SURAJ BANSI KOER *v.* SHEO PROSAD SINGH (8) *explained.*

BAIJUN DOOBEY *v.* BRIJ BHOOKUN (6), SHIMBHOO *v.* GOLAP (11), HARI NARAIN *v.* RUDAR (9) *referred to.*

MUDDUN THAKOOR *v.* KANTOO LALL (7), MINAKSHI *v.* IMMUDI (10), NANOMI BABUASIN *v.* MODUN (3), BHAGBUT *v.* GIRIJA (12), DAULAT *v.* MEHR (13), MAHABIR *v.* MOHESWAR (14), KAGAL *v.* MANJAPPA (15) *followed.*

Held, further, *that the words "rights and interests" in the order confirming the sale could not override the terms of the sale proclamation.*

This was an Appeal preferred on the 29th of July 1909 against a decree of Babu Kanti Chandra Mukerjee, Subordinate Judge of Zillah Darbhanga, dated the 18th of March 1909.

The facts of the case will appear from the judgment.

Mr. C. R. Das, *Babus Umakali Mukerji* and *Chandra Sekhar Banerjee* for the Appellants.

Mr. S. P. Sinha, *Dr. Rash Behary Ghose*, *Babus Ram Chandra Mitra* and *Jogendra Nath Mukherjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiffs-Appellants sued to recover possession of 7 as. 8¾ gds. share of Mouzah Pandaul, on establishment of their rights thereto, under the following circumstances. The Plaintiffs and their father, Babu Durga Dutt Singh, Defendant No. 4, are a branch of the family of the Maharaja of Darbhanga. It appears that Pergana Jabdi was granted as *Babuana* to Kirat Singh, the father of Durga Dutt

(3) L. R. 13 I. A. 1 (1885).
(4) L. R. 4 I. A. 247 (1877).
(6) L. R. 2 I. A. 275: s. c. I. L. R. 1 Cal. 133 (1875).
(7) L. R. 1 I. A. 321 (1874).
(8) L. R. 6 I. A. 88 (1879).
(9) I. L. R. 10 Cal. 626 (1883).
(10) L. R. 16 I. A. 1: s. c. I. L. R. 12 Mad. 142 (1888).
(11) L. R. 14 I. A. 77: s. c. I. L. R. 14 Cal 578 (1887).
(12) I. L. R. 15 Cal. 717 (1888).
(13) I. L. R. 15 Cal. 70 (1887).
(14) I. L. R. 17 Cal. 584 (1889).
(15) I. L. R. 12 Bom. 691 (1888).

Singh. The Maharaja of Darbhanga obtained a decree for Rs. 27,186, on the 18th February 1893, against Defendant No. 4, in respect of arrears of Government revenue and cesses payable for Pergana Jabdi the *Babuana* property, which, it is alleged by the Raj, were payable by the holders of the property but were not paid. In execution of the decree obtained in that suit the 7 as. 8¾ gds. share of Mouzah Pandaul which was the joint family property of the Plaintiffs and the Defendant No. 4 was sold and purchased by the Raj on the 20th March 1895.

The Plaintiffs allege that the Government revenue and cesses for Pergana Jabdi *Babuana* property are payable by the Raj and not by the holder of the property, that the claim in the suit in which the decree was passed, was not a just or equitable claim against Defendant No. 4, and that in any case the alleged liability for which the suit was instituted and for which the said decree was passed was not a liability of, or affecting, the joint property of the Plaintiffs and Defendant No. 4, that the decree being only a personal decree against Defendant No. 4, and the share of Mouzah Pandaul sold being the joint property of the Plaintiffs and Defendant No. 4, and in which they had an equal interest with the latter, their interest in the property sold was not liable to be sold and could not be sold under the said decree. The Plaintiffs, accordingly, prayed that a decree might be passed awarding them possession of the property sold or, at any rate, to the extent of their interest in the same. The defence of the Maharaja of Darbhanga *inter alia* was that the grantee and his heirs in the male line are liable to pay the Government revenue and other public demands in respect of the said *Babuana* property to the Darbhanga Raj, that the decree obtained against Defendant No. 4 was a valid decree passed in respect of a just claim, that the Plaintiffs were legally bound by the said decree, that the property in suit was legally attached and sold in execution of the said decree, and the Plaintiffs are not entitled to impugn the said sale which was legally binding upon them. The Subordinate Judge of Darbhanga dismissed the suit and the Plaintiffs have appealed to this Court. Four contentions have been raised on their behalf in this appeal :—

First, that the Government revenue and cesses of the *Babuana* property are payable by the Raj, and not by the heirs of the grantee ; *secondly*, that even if the Government revenue and cesses were payable to the Raj they were not payable by the Plaintiffs, but by Defendant No. 4, the holder of the *Babuana* property for the time being ; *thirdly*, that the decree was passed against Defendant No. 4 personally and not as *karta* of the joint family ; and *fourthly*, that the decree and the execution proceedings not being against the entire joint family, what was sold, was the mere personal interest of the Defendant No. 4 and not the interests of the Plaintiffs.

As regards the first contention, the Plaintiffs have examined some witnesses, who said, that the Government revenue and cesses for the *Babuana* property were never paid to the Darbhanga Raj and that no demand for them was ever made by the Raj. But the documentary evidence adduced by the Defendant is conclusive to show that the revenue and cesses were payable by the grantee, and had all along been realised from his heirs. The original *sanad* by which Pergana Jabdi was granted to Babu Kirat Singh, the ancestor of the Plaintiffs, does not appear to be in existence. But the *sanad*

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is recited in a later document dated 1807 executed by Maharaj Madho Singh, the father of Babu Kirat Singh, in favour of Maharaj Kumar Chhatar Singh, the eldest son of the former. After reciting that Pergana Jabdi had been granted to Babu Kirat Singh as *Babuana* maintenance property, and other Perganas to his other brothers, the deed states that the said Babus "will enjoy the Malikana Dustoors and profits of the said Perganas, and will pay to you the Government revenue, payable on account (of those Perganas), and you will pay the same to the Hakim (Government) along with the Government revenue of the Raj properties. Then it appears that in the year 1879 an application was made by the Manager of the Court of Wards of the Darbhanga Raj for the registration of the name of the minor, Maharaja Lachhmishwar Singh in respect of the Mouzahs in Pergana Jabdi. Thereupon a petition of objection was filed on behalf of Babu Durga Dutt Singh (the Defendant No. 4 in the present suit) in which he relied upon the said *sanad* of 1807 and distinctly stated that he and his brother Giridhari Singh had been paying the Government revenue of Pergana Jabdi through the Maharaja Bahadur. The deed of sale dated 1873 and the mortgage bond dated the 15th December 1890 executed by Babu Durga Dutt Singh show that large sums of money, which were due to the Raj for Government revenue and cesses, were paid by him. Then there are decrees for Government revenue and cesses for Pergana Jabdi passed against the Defendant No. 4; and even so far back as 20th October 1841 a decree was obtained by the Raj against Babu Kirat Singh himself for Governmnt revenue of Pergana Jabdi. The above documents and the judgments and decrees conclusively establish that the holders of the *Babuana* property are liable to pay the Government revenue and cesses for Pergana Jabdi to the Raj. The learned Counsel for the Appellants argued that they do not establish a custom; but it is really an incident of the grant and there can be no possible doubt that the Government revenue for the Pergana is paid by the Raj and realised from the holder of the Pergana. In the case of *Babu Gunesh Dutt Singh* v. *Mokeshur Singh* (1), the Judicial Committee of the Privy Council observed, that where an estate is granted to a younger son as a *Babuana* allowance, he continues to pay the rent and assessment to the Raja; the property is never separated from the zemindary at all. The first contention, therefore, must be overruled.

As regards the second contention, it is argued that even if Government revenue and cesses are payable to the Raj, the Defendant No. 4, the holder of the Pergana as *Babuana* for the time being, was liable to pay and that the Plaintiffs who are his sons and grandsons were not liable to pay. It is contended that the petition of Durga Dutt dated the 12th March 1879 (exhibit 2) referred to above shows that so long as Babu Kirat Singh was alive, he alone was in possession of the Pergana and that on his death his sons Giridhari and Durga Dutt were in possession. The right, therefore, accrues on the death of the last male holder, which is inconsistent with the case that the sons have joint interest with the father during his lifetime and reliance has been placed upon the case of *Durgadut Singh* v. *Rameshwer Singh* (2), in which it was held that *Babuana* property is impartible

(1) 6 M. I. A. 164 (1855).

(2) I. L. R. 36 Cal. 943 : s. c. 13 C. W. N. 1013 (1909).

and alienable. But the question, whether the sons and grandsons have interest in the property during the lifetime of the father and the grandfather in the *Babuana* property does not require any discussion in the present case, as the Plaintiffs themselves state in the fourth paragraph of the plaint that Pergana Jabdi is a *Babuana* property of the Plaintiffs and Babu Durga Dutt Singh, Defendant No. 4. It was never suggested in the pleadings or in the arguments before the lower Court, so far as it appears from the judgment of the Court below, that the Plaintiffs had no present interest in the *Babuana* property. Their contention in the Court below was that the Government revenue and cesses were not payable by the holders of the *Babuana* property, but were payable by the Raj. It is contended, however, on behalf of the Appellants that they are not bound by an admission on a point of law, and that according to the view taken by the Privy Council, in the case cited above, the property belongs to Defendant No. 4 alone, so long as he is alive, that the debt for which he was sued (namely, the Government revenue and cesses) was his personal debt and that it was not a debt for which the joint family was liable. It was contended on behalf of the Respondent that the decision of the Judicial Committee proceeded upon a confession made by the learned Counsel for the Appellants in the case before the Privy Council; that the object of the *Babuana* grant being the maintenance of the grantee and his descendants in the male line, the property granted as *Babuana* becomes the joint property of the family, and that, otherwise, it would be open to the first holder of the property to alienate it altogether and thus frustrate the very object of the grant and that *Babuana* property cannot have the same incidents as the Raj itself out of which it is carved. It appears, however, that the judgment of the Judicial Committee did not proceed entirely upon the admission of Counsel, and their Lordships pointed out that if the holder of the *Babuana* property for the time being failed to pay the stipulated Government revenue to the Maharaja, and the latter himself was obliged to discharge the claim of the Government, he might sue the former for the amount so paid and, if necessary, recover the amount decreed to him by the sale of the *Babuana* property, and an involuntary alienation of this kind would as effectually defeat the claim of all the members of the family, who were at the time or might thereafter become entitled to maintenance out of the property, as would any voluntary alienation of it. But although *Babuana* property may be alienated by the person to whom it descends, it is held or managed by him for the maintenance of the family so long as it is not alienated, and the family has the benefit of it. It appears from the evidence of Amarendra Singh (the Plaintiff No. 2) that all the members of the family appropriated the income of the *Babuana* property. The revenue payable for the property, but which was not paid, therefore was enjoyed by all the members and it may in that sense be considered as a joint family debt. In the view, however, we take on the fourth point, it is unnecessary to discuss the matter any further.

Then comes the third question, namely, whether the decree was passed against Defendant No. 4 personally or as *karta* of the joint family. It appears from the plaint in the suit by the Raj against Babu

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Durga Dutt Singh (Ex. 2) that the Raj prayed for a decree against the person and properties of the Defendant to be recovered from the person and the properties of the Defendant. The decree directed the Defendant to pay to the Plaintiffs the amount decreed. The liability in one sense was a common liability of the family, and the Defendant, no doubt, was the *karta* of and represented the family, but the decree was not passed against him expressly as *karta*. The question would have been important, had the certificate of sale and the proceedings in execution raised any ambiguity as to the property sold. Having regard to the view we take on the 4th point this question also need not be discussed further.

The last question is whether in execution of the decree against the father alone, the father's interest only or the entire property was sold; and this involves the question whether the creditor in a judgment against the father in a Mitakshara joint family even though it is for a personal debt of the father is entitled to sell not only the interest of the father in the family property but the interest of the sons also in the property.

It has been contended on behalf of the Appellant that where the debt is a personal debt of the father and the decree is against him alone, all that can be sold in execution of such a decree is the personal interest of the father only. As a general proposition the contention on behalf of the Appellant that under a decree against one person (unless where he is sued in a representative capacity) the interests of others who are no parties to it cannot be sold is correct, but the position of a son under the Mitakshara is very peculiar. The father can sell any portion of the ancestral estate even for a personal debt, provided the debt was not contracted for illegal or immoral purposes. Now, under sec. 266 of the Code of Civil Procedure, the execution creditor can levy execution not only against property belonging to the judgment-debtor but also against property over which he has a disposing power, which he may exercise for his own benefit. So that, if the father in a Mitakshara family has the power to dispose of any property to discharge his debt, the creditor can avail himself of the right which the father himself may exercise for his own benefit. It was next contended on behalf of the Appellant that even if the creditor can realise the debt due by the father alone from the property of the entire family, he cannot do so unless the suit is so framed and the sons are made parties to the proceedings, and a large number of cases were cited as supporting the contention. The decisions, as pointed out in *Nanomi Babuasin's* case (3), are not on all points in harmony either in India or in the Privy Council. We must however see whether the cases support the contention of the Appellant. The first case relied upon is that of *Deendyal Lal* v. *Jugdeep Narayan Singh* (4). In that case their Lordships observed:—"Whatever may have been the nature of the debt, the Appellant cannot be taken to have acquired by the execution sale more than the right, title and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than

(3) L. R. 13 I. A. 1 (1885).
(4) L. R. 4 I. A. 247 (1877).

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what was seized and sold in execution, *viz.*, the right, title and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugendra Chander Ghose* v *Kaminee Dossee* (5), and *Baijun Doobey* v. *Brij Bhookun Lal* (6)." But the observations in that judgment must be read with reference to the circumstances of the case and not as laying down an invariable rule that in no case will the sons' interest pass in an execution sale, unless they are joined in the suit. Such a view will be in direct contradiction of the rule laid down in *Muddun Thakoor* v. *Kantoo Lall* (7). In the latter case where ancestral property had been sold in execution of a decree against the father alone, it was held, in a suit by the son to recover the property, that if the decree was a proper one, the interest of the sons as well as the interest of the father in the property, although it was ancestral, were liable for the payment of the father's debts and that in such a case, a purchser under an execution is not bound to go further back than to see that there was a decree against the father and if he *bonâ fide* purchases the estate under the execution and *bonâ fide* pays a valuable consideration for it, he is protected against the suit of the sons seeking to set aside all that has been done under the decree in execution, and recover back the estate as joint ancestral property. Sir James Colville who delivered the judgment of the Judicial Committee both in the cases of *Deendyal Lal* v. *Jugdeep Narayan Singh* (4) and *Suraj Bansi Koer* v. *Sheo Prosad Singh* (8) observed in the latter case as follows:—"This case [referring to the case of *Muddun Thakoor* v. *Kantoo Lall* (7)] then, which is a decision of this tribunal, is undoubtedly an authority for these propositions:—

First.—That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had no notice that they were so contracted; and, *secondly*, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings." The principles so laid down were held inapplicable to the case of *Suraj Bansi Koer* v. *Sheo Prosad Singh* (8), as in that case the debt was found to have been incurred for immoral purposes and the purchasers were held to have purchased with knowledge of the Plaintiffs' claim which was preferred before the sale, and subject to the result of the regular suit, by which the execution Court held, they could obtain their remedy. The next case relied upon was the case of *Hari Narain* v. *Rudar Perkash* (9), where a money decree was made against the father of the family and the decree-holder caused the family estate to be attached, and brought to sale the father's right, title and interest therein,

(4) L. R. 4 I. A. 2[illegible] (1877).

(5) 11 M. [illegible] 241 (1867).

(6) L. R. 2 I. A. 27[illegible] I. L. R. 1 Cal. 133 (1875).

(7) L. R. 1 I. A. 321 (1874).

(8) L. R. 6 I. A. 88 (1879).

(9) I. L. R. 10 Cal. 626 (1883).

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it was held, following *Deendayal Lal's* case (4) that only the father's rights and interests passed by the sale and not the interests of the family. But the decision in that case turned upon the construction of the sale certificate and the other proceedings, and the question whether a creditor, in execution of a decree against the father alone, can sell the entire family estate was neither raised nor decided. As pointed out in *Minakshi Naidu* v. *Immudi Kamaka* (10), all the documents in *Hari Narain's* case (9) showed that the Court intended to sell and that it did sell nothing but the father's share—the share and interest that he would take on partition and nothing beyond it—and the Privy Council in that case put it entirely upon the ground that everything showed that the thing sold was "whatever rights and interests the said judgment-debtor had in the property" and nothing else. The case of *Minakshi Naidu* v. *Immudi Kamaka* (10) is a clear authority for the proposition that in execution of a decree for money against the father alone, the debt not being contracted for immoral purposes, the property of the family can be sold and will pass to the purchaser. In that case the decree-holders obtained a decree for money upon a note against the father and attached a zemindary in execution thereof. The son intervened and sought by petition an order that his interest in the zemindary should be excluded from the sale, and that the sale should be made subject to his right. It does not appear what order, if any, was made on that petition; but notwithstanding that petition, the sale took place and it was held upon the documents in that case that the thing professed and intended to be sold and actually sold was not the father's share but the whole interest in the zemindary itself. The son impeached the debt as having been made for illegal and immoral purposes and that impeachment failed. Their Lordships held "that being the case there might have been a sale of this estate under this decree including the whole interest or of so much as was necessary. Upon the documents their Lordships have arrived at the conclusion that the Court intended to sell and that the Court did sell the whole estate and not any partial interest in it." It is true in that case the son does not appear to have even contended that no more than his father's interest was sold. His case was that the whole zemindary was sold out and out; he impeached the debt which led to the sale and asserted that the decree founded on it could not bind his interests. But the judgment of the Privy Council shows that the interest of the son may pass by a sale held in execution of a decree for money against the father alone where the debt is not one for immoral purposes, although the son is not a party to the decree or the sale. It is contended that in that case, the father contracted the debt as *karta* of the family, but it does not appear that he either contracted the debt or was sued as *karta* of the family.

That the entire family property may pass by a sale in execution of a money decree against the father alone was also established in *Nanomi Babuasin* v. *Modhun Mohun* (3), where in execution of a decree for mesne profits, against the father alone, ancestral family property was sold,

(4) L. R. 4 I. A. 247 (1877).
(9) I. L. R. 10 Cal. 626 (1883).
(10) L. R 16 I. A. 1: s. c. I. L. R 12 Mad. 142 (1888).

(3) L. R. 13 I. A. 1 (1885).

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and the sons brought a suit in which they contended that nothing passed by the sale except such share as the father would have taken on partition. Their Lordships said as follows :—

"There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case. It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority." Then their Lordships said that they did not think that the authority of *Deendyal's* case (4) bound the Court to hold that nothing but Giridhari's (the father's) coparcenary interest passed by the sale. If the debt was of a nature to support a sale of the entirety, he might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in *Deendyal's* case (4) there certainly was an ambiguity of that kind) the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which could have justified a sale if the sons had been brought in to oppose the proceedings." It is clear from the above decision that *Deendyal's* case (4) does not lay down an invariable rule, that in no case will the sons' interests pass in an execution sale against the father, unless they are joined in the suit, and it is also clear, that if the debt is of a nature to support a sale of the entirety of the property the creditor may legally procure a sale of it by suit against the father alone. In that case, the debt was found by the High Court to be a joint family debt, because the joint family presumably benefited by the mesne profits for which a decree was made against the father. The Privy Council held that the High Court was right and observed that if it was a joint family debt, a sale to answer it, effected either by the father, or in a suit

(4) I. R. 4 I. A. 247 (1877).

(4) L. R. 4 I. A. 247 (1877).

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against him could not be successfully impeached, that learned Counsel for the Appellant strongly relied upon the fact that there was a joint family debt as distinguishing that case. But their Lordships did not lay down that the interests of the sons would pass by a sale against the father, only where the debt is a joint family debt, meaning thereby that the debt is one which is incurred for the benefit of the joint family. What was laid down is that if the debt is of a nature to support a sale of its entirety, the father may legally sell it without suit, or the creditor may legally procure a sale of it by suit. Now, every debt incurred by the father not for illegal or immoral purposes is of a nature to support a sale of the entirety of the family property. The debt in the present case was revenue due for *Babuana* property which the evidence shows was enjoyed by the whole family. The debt therefore was as much a joint family debt as the debt in *Nanomi Babuasin's* case (3). But assuming that the debt was a personal debt of the father, there could be no doubt that the father could sell family property for discharging that debt, and if he could do so, his creditor might legally procure a sale of it by suit. Then their Lordships say—"But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale, if the sons had been brought in to oppose the execution proceedings" Now, apart from the question whether the purchaser bargained and paid for the entirety of the property in the present case, which we will deal with later, could it have made any difference, had the sons been brought in to oppose the execution proceedings? All that they could show is that the debt was not such as to justify the sale, in other words that the debt was incurred for illegal or immoral purposes which in the present case it was not.

The next case to be considered is that of *Shimbhoo Nath Pandey* v. *Golap Singh* (11). There the question was whether the whole estate belonging to a joint family living under the Mitakshara, including the shares of sons, or the share of their father only passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right, and it was held that as the mortgage and decree as well as the sale certificate expressed only the father's debt, the *prima facie* conclusion was that the purchaser took only the father's share, a conclusion which the circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract but supported. But their Lordships did not in that case lay down any principle different from that laid down in *Nanomi Babuasin's* case (3). Lord Hobhouse, who delivered the judgment of the Judicial Committee in both the cases, observed—"Each case must depend upon its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying, if there was no conveyance, but only a sale in execution of a money decree."

The subsequent decisions of the Privy Council follow these principles. In *Bhagbut Persad* v. *Girija Koer* (12), the sale in execution of a decree against the father

(3) L. R. 13 I. A. 1 (1885).

(3) L. R. 13 I. A. 1 (1885).

(11) L. R. 14 I. A. 77: s. c. I. L. R. 14 Cal. 573 (1887).

(12) I. L. R. 15 Cal. 717 (1888).

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was found to be not merely of the right, title and interest of the debtor, but a sale of the property being right, title and interest of the debtor. The sons were no parties to the suit or the proceedings in execution, and before the sale, notice was given on behalf of the sons that the property was ancestral and joint. It was held that the sons could not set up their rights against the sale in execution of the decree against the father unless they could establish that the debt had been contracted for any illegal or immoral purpose. In *Daulat Ram* v. *Mehr Chand* (13), the mere fact that the other members of the family were no parties to the action, was considered not to be a ground for holding that their shares in the family property did not pass at a sale held in execution of a decree against the managing members of a joint trading family, upon mortgage executed by the managing members alone, and their Lordships quoted with approval the principles laid down in *Nanomi Babuasin's* case (3).

In the case of *Mahabir Pershad* v. *Moheswar Nath* (14), it was held, that it is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara. In the absence of such proof, whether the entirety of the family estate has been transferred at the sale in execution, or not, is a question of fact, in each case dependent on what was understood to be brought, and has been brought, to sale.

Lord Hobhouse in delivering the judgment of the Judicial Committee observed—"There have been of late years a great number of suits of this kind, and some difficulties have been felt as to the proper mode of treating them. It is to be hoped that recent decisions by this Committee have lessened these difficulties. At all events, their Lordships feel none in this case, treating it on the principles laid down in the cases of *Nanomi Babuasin* v. *Modun Mohun* (10) and *Bhagbut Persad Singh* v. *Girija Koer* (12); and addressing themselves to the question of fact whether the thing meant to be sold and brought was the entirety of the estate or only a share in it."

Reliance was placed on behalf of the Appellants upon the fact that the decrees in the above case and some of the other cases cited above were based upon mortgages. But as pointed out by Sargeant, C. J., in *Kagal Ganpaya* v. *Manjappa* (15), in the case of an execution sale, the mere fact that the decree was a money decree against the father, as distinguished from one passed in a suit for the realisation of a mortgage security directing the property to be sold, is not a complete test, and we need only point out that the decrees in *Minakshi* v. *Immudi* (10) and *Nanomi Babuasin* v. *Modun Mohun* (3) were money decrees. The Appellants also relied on the fact that in some of the cases where the interest of the sons also was held to have passed by the sale, the purchaser was a stranger and not the decree-holder himself as in the present case, but that fact can make any difference only where the question arises whether the

(3) L. R. 13 I. A. 1 (1885).
(13) I. L. R. 15 Cal. 70 (1887).
(14) L. R. 17 Cal. 584 (1889).

(3) L. R. 13 I. A. 1 (1885).
(10) L. R. 16 I. A. 1 : s. c. I. L. R. 12 Mad. 142 (1888).
(12) I. L. R. 15 Cal. 717 (1888).
(15) I. L. R. 12 Bom 691 (1888).

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purchaser had notice of the debt being immoral. No such question arises in the present case.

We do not think it will serve any useful purpose to discuss the decisions of the Courts in India, which were cited at the Bar. Each case turned (as it must) upon its own circumstances and the decisions are not uniform on all points, and in some cases different views are taken of the effect of some of the Privy Council decisions. Some of the cases were decided before *Nanomi Babuasin's* case (3), and in so far as they lay down that the sons must be made parties to a suit against the father in order to bind them, they must be taken to have been overruled by the later decisions of the Privy Council.

The decisions of the Privy Council cited above show that the whole family property may be sold in execution of a money decree against the father alone for a personal debt of the father, if the debt was not contracted for immoral purposes, and that it is not absolutely necessary that the son should be a party either to the suit itself or to the proceedings in execution.

They further show that if it appears from the form of the suit or of the execution proceedings or from the description of the property put up for sale, that only the interest of the father in the property was intended to be sold and was put up for sale, the interest of the sons would not pass by such a sale and in such a case, the absence of the sons from the suit or execution proceedings would be a material element for consideration.

If, on the other hand, the proceedings show that the intention was to sell the entire property and the same was sold and bargained for, then the purchaser would be entitled to the whole and the sons, though not parties to the proceedings, cannot claim their shares against the purchaser except by proving that the debt was contracted for immoral purposes.

And lastly the words "right, title and interest" of the judgment-debtor may either mean the share which the father might have sold to satisfy his debt or the share which he would have obtained on partition; and the question what was intended to be sold or was sold in each case will depend upon its own circumstances.

We are now to apply the above principles to the facts of the present case. The decree against the Defendant No. 4, Babu Durga Dutt Singh, the father of the Plaintiffs, was, as we have already stated, for the recovery of arrears of Government revenue in respect of the *Babuana* property which was enjoyed by the family.

Even if it was not a family debt, it could not possibly be attacked on the ground of immorality, and there was no allegation even of any immorality on the part of the father. That being so, the father could have sold the share which the family had in the property, to satisfy the debt and the creditor, therefore, could sell the property and not merely the personal interest of the father in execution of the decree, although it was passed against the father alone. Now in the second paragraph of the plaint in the present suit the Plaintiff distinctly stated 'that the decree-holder caused the 7 as. 8¾ gds. share of Mouzah Pandaul to be sold by auction declaring it to be the property of the Defendant 2nd party (the father), and in the 5th para-

(3) L. R. 13 I. A. 1 (1885).

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graph of the plaint they stated, "that the said share sold is the ancestral property of the joint family of the Plaintiffs and the Defendant 2nd party and the Plaintiffs have each of them an equal interest in it as the Defendant 2nd party has. The right and interest of the Plaintiffs in the property sold was not liable to be sold and could not be sold under the said decree and the said late Maharaja acquired no legal right or interest to or in the Plaintiffs' right and interest to the said property under the said auction sale." The fact that the 7 and odd annas share in Mouzah Pandaul, belonging to the family, was sold, is not only not denied, but is admitted by the Plaintiffs in the plaint. All that is stated is that their interests were not liable to be sold and could not be sold. Having regard to the statements in the plaint, the question whether only the personal interest of the father or the entire interest of the family in the property was sold does not arise at all; and we are of opinion that it is not open to the Appellants, under those circumstances, to raise the question in appeal. But even assuming that it is open to them to raise the question, let us see what was intended to be sold and was sold. In the sale proclamation the property belonging to the judgment-debtor to be sold at auction was described as "7 as. 8 gds. 3 karas of Mouzah Pandaul, within Thana Barampore, the former Touzi Number whereof is 2417 and the present Touzi Number 6473 and the area of the entire mahal is 2925 acres 3 roods 1 pole and the Sudder Jama of the entire mahal is Rs. 2,554-11." The sale took place on the 20th March 1896 and the property was purchased by the decree-holder for Rs. 55,000. The judgment-debtor, the father of the Plaintiffs, applied for setting aside the sale on the ground of irregularities in conducting the sale; but the Court held that the sale was properly proclaimed, the process was actually served and that the evidence in proof of the insufficiency of price could not be deemed good and satisfactory; and the application was rejected. The sale was confirmed on the 13th July 1896. The order confirming the sale states "whereas Munshi Udit Sahay, Mukhtear for the decree-holder, purchased for Rs. 55,000 the rights and interests in the properties specified below sold by the bailiff of the Court on the 20th March 1896, in execution of the decree in Suit No. 3 of 1892 by this Court and thirty days have elapsed since then and a petition made by the judgment-debtor for setting aside the sale was rejected on the 2nd July 1896, it is ordered that the sale be and the sale is hereby confirmed." Then follows the inventory which is exactly the same as in the sale proclamation, namely, 7 as. 8 gundas 3 kouris share of Mouzah Pandaul, &c., &c. On the 7th September 1896, a certificate of sale was granted which states "This is to certifiy that Munshi Udit Sahay, the Mukhtear, has been declared purchaser for decree-holder for and in consideration of Rs. 55,000 in Suit No. 3 of 1892 at a sale by public auction on the 20th March 1896 of the undermentioned property, *viz.*, 7 as. 8 gundas 3 kouris in Mouzah Pandaul (the further description being the same as in the sale proclamation) in execution of the decree in this suit and that the sale has been duly confirmed by the Court."

It will appear from the sale proclamation, which is the most important document, that what was intended to be and was going to be sold was the 7 and odd annas share of Mouzah Pandaul which

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was the only share belonging to the family in the Mouzah. The certificate of sale which is the title-deed of the purchaser also shows the same thing. There is nothing whatever to show in either of these two documents that only the right, title and interest of the judgment-debtor was going to be sold or was sold.

It was contended on behalf of the Appellant that in the order confirming the sale, the words "rights and interest" in the property give rise to an ambiguity. We do not think, however, that they do. The words "rights and interests," we think, mean the entire rights and interests in the property; and even if these words mean the rights and interest of the judgment-debtor we think having regard to the terms of the sale proclamation and the certificate of sale, the words "rights and interests" in the order confirming the sale (which, moreover, could not override the terms of the sale proclamation) do not raise any ambiguity or induce us to hold that only the personal interest of the father was sold. The certificate of sale was followed by delivery of possession and the purchaser obtained delivery of possession of the entire 7 and odd annas share of Mouzah Pandaul belonging to the family without any objection on the part of his sons who were adults at the time, and the purchaser was in possession for ten years of the entire property when the present suit was brought in 1906.

It was not even suggested that the price paid was not the full value of the property purchased but only of the personal interest of the father. The only evidence we have on the record (the order refusing to set aside the sale) shows that the price was not insufficient; and the Appellants cannot complain that the matter was not gone into in the lower Court when they admitted that the sale was of the entire property and not merely the personal interest of the father.

Under the circumstances, we are of opinion that the interests of the Plaintiffs in the property in suit passed by the sale and that they cannot succeed as the debt for which the property was sold was not a debt incurred for immoral purposes.

We, accordingly, confirm the decree of the Court below and dismiss the Appeal with costs.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE
No. 1170 OF 1911.

MOOKERJEE, J.	DURGA CHARAN MAHTO,
BEACHCROFT, J.	Plaintiff, Appellant,
1913.	*v.*
Heard, 28, March and 7, April.	RAGHUNATH MAHTO and others, Defendants,
Judgment, 7, April.	Respondents.

Hindu Law—Succession—Custom of primogeniture—Allegation of family or local custom—What must be proved—Continuity and immemorial user—Onus—Finding that custom proved, if finding of fact—Record-of-rights pending suit—Judgment of revenue officer in settlement proceedings if evidence in suit—Attestation proceeding, finding in favour of custom recorded at, and based upon hearsay.

Whether certain facts found by the lower Appellate Court (and as such binding on the High Court) do or do not establish an alleged custom of primogeniture is a question of law.

Where a party relies upon a special custom of a family to take the succession out of the ordinary Hindu Law such custom

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must be proved to be ancient and continuous.

The alleged custom must be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom.

Where subsequently to the institution of the suit, and at the attestation stage of proceedings for preparation of record-of-rights, an Assistant Settlement Officer found upon information gathered from the tehsildar of the Raja's estate that the custom of primogeniture prevailed amongst Kurmi Mahtos in 82 out of 84 of the villages within the estate and the lower Appellate Court relying upon this judgment found the custom established in the village in suit, the parties being Kurmi Mahtos:

Held—*That apart from the circumstance that the fact of the record of-rights having been completed since the institution of the suit affected the value and importance of the decision of the Settlement Officer, his judgment had been used for a purpose for which it was not admissible in law.*

That reliance might possibly have been placed upon it to show that the custom was recognised by the revenue authorities, but the findings of the Settlement Officer could not be incorporated into the evidence in the case and treated as practically conclusive between the parties.

That whether the Assistant Settlement Officer was competent or not to act upon information gathered from the Raja's tehsildar (which was clearly not legal evidence) that statement of the tehsildar was inadmissible in evidence in the Civil Court.

This was an Appeal preferred on the 15th of May 1911 against a decree of D. H. Kingsford, Esq., Judicial Commissioner of Chota Nagpur, dated the 13th of February 1911, reversing a decree of Babu Manmotha Nath Mullik, Munsif of Ranchi, dated the 12th of May 1910.

The Appeal arose out of a suit for partition in which the Defendant, Raghunath, claimed exclusive title under an alleged custom of primogeniture. Whilst the suit was still pending in the first Court, settlement proceedings were also going on in the village in dispute and neighbouring villages, and the Assistant Settlement Officer before whom at attestation the parties urged their respective claims held that a general custom of primogeniture prevailed amongst the Kurmi and Majhi tenure-holders in Nagedi, the village in dispute, and the neighbouring villages, and that Raghunath alone was in possession of the village and that Raghunath alone was to be recorded sole landlord. In the course of his judgment, he observed that the family was a Kurmi family, that he himself had attested more than 10 villages belonging to such Kurmi families and in all of them he had found the law of primogeniture to prevail. How it came to be introduced he could not say but he believed that it had been adopted from the family of the Raja of Silli. He had examined many Kurmis and was satisfied that the eldest son invariably succeeded to the estate of the father. He had asked the tehsildar of the Raja of Silli and had been informed that out of 84 villages under the Raja only in two villages it was found that all the brothers got shares. Even in this village of Nagedi he found that the younger sons got *khorposh* and not shares. It was alleged that even Kisto Charan, the eldest son of Ram Charan, who had predeceased him had got *khorposh.* But even that fact did not, in his view, go to prove that the younger sons got shares.

The Court of first instance decreed the

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suit but on appeal this decision was reversed and the suit was dismissed.

The Plaintiff preferred this Second Appeal.

Babu Kshetra Mohun Sen for the Appellant.

Babu Probodh Chandra Mukerjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Plaintiff in a suit for declaration of title to immoveable property and for recovery of possession thereof. The parties are descended from a common ancestor Satrughna Mahto who was governed by the Mitakshara School of Hindu Law and died in 1846. He had three sons, Chandi, Nageshwari and Radha Nath, of whom the second Nageshwari succeeded to the estate upon the death of his father. Nageshwari died about the year 1804 and left two sons Ram Charan and Sridhar. Ram Charan died in 1904. He had four sons, Krishna who predeceased him in 1899, Narayan, Guru Charan who died in 1906 and Durga Charan who is the present Plaintiff. The first two Defendants are the sons of Krishna and the next three Defendants are the sons of Narayan. The Court of first instance overruled the contention of the Plaintiff that the parties were subject to the Dayabhaga School of Hindu Law but found in his favour that he was entitled to an one-third share in the family estate. This in fact negatived the defence that the family was governed by the rule of primogeniture. Upon appeal, the Judicial Commissioner has reversed the decision of the Court of first instance and dismissed the suit on the ground that the Plaintiff as the youngest son of his father was not entitled to claim any share in the family properties. The substantial question in controversy between the parties, consequently, is whether this family is or is not governed by the rule of primogeniture.

On behalf the Respondents, it has been contended that the question is essentially one of fact and consequently not liable to be examined in Second Appeal. This proposition is in our opinion too broadly formulated. Whether certain events did or did not happen is no doubt a question of fact upon which the decision of the lower Appellate Court is binding upon us: but whether the facts so found do or do not establish the alleged custom is plainly a question of law to be determined by this Court. Besides as will presently be seen, the judgment of the Judicial Commissioner is based upon evidence not admissible in law, and must, on that ground alone, be deemed unsustainable.

When we examine the written statement of the Defendants we find that the alleged custom is set out in the following terms: "It is the custom observed from a long time past in the families of the Plaintiff, the Defendants and other Kurmis of Pergunnah Silli and other Pergunnahs of the provinces of Chotanagpur, that the eldest son becomes proprietor of the entire village and the remaining sons get something for their maintenance according to the family capacity." This statement, it will be observed, does not clearly specify whether the custom alleged is a family custom, or a local custom, or a class custom. Apparently the case for the defence is that the alleged custom falls within all the three categories.

In so far as a family custom is alleged the facts found are not only not sufficient to establish the custom, they do in reality negative it. It was pointed out by the

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Judicial Committee in the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal* (1), that if a party rely upon the special custom of a family, to take the succession out of the ordinary Hindu law such custom must be proved to be ancient and continuous. The rule is formulated in substantially the same terms in *Hurrpursad* v. *Sheodyal* (2), namely, that custom is a rule which, in a particular family or a particular district, has from long usage obtained the force of law: it must be ancient, certain and reasonable and being in derogation of the general rule of land, must be construed strictly. To similar effect is the statement of Chief Justice Tuidal in *Tyson* v. *Smith* (3). "It is an acknowledged principle that to give validity to a custom which has been well described to be an usage, which obtains the force of law and is in truth the binding law within the particular district or at a particular place, of the persons and thing which it concerns, it must be certain, reasonable in itself, commencing from time immemorial and continued without interruption: [see also *Vayidinada* v. *Appu* (4)]. Consequently the Defendants must establish that the alleged custom, if it is a family custom, has been continuous. Now in so far as, upon the death of Nageshwari, the property was taken by Ram Charan to the exclusion of his younger brother Satrughna, the circumstance is undoubtedly in favour of the Defendants. But this solitary instance is not by itself sufficient to establish the alleged custom. *Sarabjit* v. *Indarjit* (5). It is worthy of note that in the case of *Chandika* v. *Muna* (6), their Lordships of the Judicial Committee declined to find in favour of an alleged custom upon evidence which consisted of four modern instances. As pointed out in the case of *Gopal* v. *Hanumunt* (7), the alleged custom must be very satisfactorily proved by evidence of particular instances, instances so numerous as to justify the Court in finding in favour of the custom. Here, as we have already said, only one instance consistent with the alleged custom has been established. On the other hand, we meet with instances in which the custom would have been recognised, if it did really exist, but the course of succession was contrary to the alleged custom. It is significant that the Defendants allege that Nageshwari was the eldest son of Satrughna and succeeded as such to his estate; the Courts have found concurrently against their allegation. They now turn round and contend that Nageshwari succeeded because his eldest brother relinquished his claim in his favour, this was not only not their case in the Court of first instance but is contradictory to the case sought to be then established. The cases of *Chuttardharee* v. *Tilakdharee* (8) and *Jeetnath* v. *Lokenath* (9) to which reference was made in the course of argument are clearly of no assistance to the Respondents. Consequently the alleged custom, if it is a family custom, has not been established.

The question next arises whether the alleged custom, if it be deemed a local or a class custom, has been proved upon the facts found by the Courts below. The Judicial Commissioner has relied princi-

(1) 14 M. I. A. 570; 17 W. R. 553 (1872).
(2) L. R. 3 I. A. 259 at 285 (1876).
(3) 9 Ad. and El. 406 (421); 48 R. R. 539 (550) (1838).
(4) I. L. R. 9 Mad. 44 (1885).
(5) I. L. R. 27 All. 203 (1904).
(6) I. L. R. 24 All. 273; L. R. 29 I. A. 70 (1902).
(7) I. L. R. 3 Bom. 273 (1879).
(8) 6 Mac. Sel. Rep. 325; 7 Ind. Dec. 910 (1839).
(9) 19 W. R. 239 (1873).

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pally upon a judgment of an Assistant Settlement Officer delivered in the course of proceedings under Chap. XII of the Chotanagpur Tenancy Act. It has been pointed out that the present suit was instituted on the 18th September 1909 whilst the judgment mentioned was delivered by the Assistant Settlement Officer at the attestation stage on the 5th January 1910, and that the record-of rights in accordance therewith was finally published so late as the 6th March 1911. The fact naturally affects the value and importance of the decision of the settlement authorities. But, apart from this circumstance it is clear that the judgment of the Settlement Officer has been used for a purpose for which it is not admissible under the law. Reliance might possibly have been placed upon the judgment to show that the custom was recognised by the revenue authorities. But the findings of the Settlement Officer cannot be incorporated into the evidence in this case and treated as practically conclusive between the parties. It is further worthy of note that the Settlement Officer relied upon information gathered by him from the tehsildar of the Silli estate. Whether the Settlement Officer was competent to act upon information so obtained, which was clearly not legal evidence, may be a question for consideration, but it is plain that the Judicial Commissioner was in error when he based his decision on this statement of the tehsildar, who had not been examined as a witness in this litigation: It cannot be disputed, therefore that the judgment of the Judicial Commissioner is based upon material not admissible in law. But even if the material is used, how far does it carry the case of the Defendants? The statement of the tehsildar is to the effect that the custom of primogeniture exists in 82 out of 84 villages comprised in the Silli estate under which the parties to the present litigation hold their tenancies. The alleged custom, treated as a local custom, is not prevalent in all the villages, and if admittedly it does not prevail in two of the villages, an inference cannot very well be drawn that it does prevail in the village in question. The conclusion is irresistible that the materials upon which the Judicial Commissioner has based his decree do not justify the inference he has drawn from them.

The result is that this Appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs thoroughout.

Appeal allowed.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 488 OF 1911.

CHAUDHURI, J. 1913, Heard, 22, July. Judgment, 4, August.	GOURI SUNKER BYAS *v.* NIADER SING and others.

Hindu Law—Succession to a yati *(religious ascetic)—*Chela *and* sisya *(disciple or pupil of a Hindu religious ascetic or mendicant—Heirs natural and special, under rules of Hindu Law.*

A Brahmin who had left his home in early life and settled in Burrabazar in Calcutta where he lived the life of a Hindu mendicant and practised religious austerities but dressed himself in ordinary clothes and deposited monies with firms in Burrabazar on interest and had also acquired property in the Punjab cannot be taken to have renounced the world and was not a yati *or a religious*

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ascetic in the sense of the Hindu Law and on his death his natural heirs under the ordinary rules of the Hindu Law are entitled to succeed to his property.

Nor was the Plaintiff who claimed to be the heir of the deceased Brahmin as his chela was his sat-sisya *or virtuous pupil in the sense of the Hindu law and was not entitled to succeed against his natural heirs who have proved themselves to be his legal heirs.*

The facts are shortly these :—

A Brahmin Pundit of the name of Sobharam better known as Sudarsan Das Sadhu many years ago renounced his family and home in the Punjab when only a boy of ten years. Since then he resided in Calcutta and practised religious austerities, and led the life of a Hindu religious mendicant. In the course of his life he acquired considerable properties and died intestate and unmarried on the 28th of September 1910 aged 80. The Plaintiff claiming to be the *chela* or religious disciple of the deceased claimed to be the heir of the deceased to the exclusion of his kinsmen and brought this suit alleging that the Defendants had by representing themselves to be the blood relations of the deceased obtained from the District Court of Rohtak a certificate under the Succession Certificate Act to the estate of the deceased and that they were collecting monies left in deposit by him with certain firms in Calcutta and appropriating the same themselves.

The material facts are fully stated in the judgment.

Mr R N. Mitter (with him *Mr C. C. Ghose*) for the Plaintiff. --A *yati* is a religious mendicant of the Ramanuja sect. Entrance into a religious order is tantamount to civil death so as to cause a complete severance of his connection with his relations as well as with his property, inheritance to which opens on his renouncing the world by the adoption of a religious order; any property which may be subsequently acquired by persons adopting religious orders passes to their religious relations. Sarkar's Hindu Law, p. 335.

"Such persons broadly may be sub-divided into 3 classes :—"

(*a*) Naisthika or Brahmochary—Life-long student.

(*b*) Vanaprastha leaving the house-hold order and becoming a hermit.

(*c*) Bhiksu, *yati* or *sanyasi*, or one who renounces the world or becomes a religious mendicant.

Renunciation must be complete and not nominal. Gharpure's Hindu Law, p. 232, and Mayne, 7th Edn., p. 800.

The case of the Bairagis stands on a different footing. They adopt a religious order and still they buy, sell, marry and have children. They do not leave the "house-hold order." Therefore the case of Bairagis is quite different from ours. *Tilak Chander* v. *Shama Charn* (2).

In determining right of succession to property left by deceased head of a religious institution, the only law to be observed is to be found in the custom and practice which must be proved by evidence. *Genda Puri* v. *Chatar Puri* (3). Installation or confirmation by the brotherhood was not so important to the title being only ceremonial. *Janoki* v. *Sri Gopal* (4).

In the case of *Ganesh Gir* v. *Amrao*

(2) 1 W. R. 209 (1864).
(3) I. L. R. 9 All. 1. (1886).
(4) L. R. 10 I. A. 32 : s. c. I. L. R. 9 Cal. 766 (1882).

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Gir (5), it has been laid down that "no successor having been nominated by a deceased mahant, at an assembly of mohants of the same sect, the Plaintiff a *sanyasin*, who had been *khas chela* of the deceased was installed by them.' It is clear from the authorities that to become a religious ascetic and exclude his heirs from succession to property subsequently acquired, he must *bonâ fide* retire from all worldly affairs and in fact become as it were dead to the world leaving all the property then vested in him to the legal heirs who succeed to it at once." S. D. A. decisions, for 1852, p. 1084. Wealth of a *yati* is inherited by his *sat-sishya*. Yajnavalkya in Asiatic Researches, Vol. XVI, p. 134.

A fellow disciple is by general usage allowed to be heir in default of main claimants. The person who becomes a follower of the spiritual teacher is universally termed a religious brother by the fraternity of devotees. Vyavastha Darpana, p. 215. There is difference between a *yati* and a *sanyasi*. Amarkosha, Brahmabarga, Verse. 43.

Mr. S. K. Mullick (with him *Mr. S. N. Dutt*) for the Defendant contended that the *yati* referred to in the text of Yajnavalkya is the *tridandi sanyasi*. Shama Charn's Vyavastha Darpana, Pt. II, p. 314.

This is an exception to the laws of inheritance laid down by the Mitakshara. Mitakshara, Chap. II, sec. 8, Verse 1. An ascetic has been very accurately defined by Shastri Golap Chandra Sarkar's Hindu Law, p 478. The deceased did not qualify himself under that definition. The Hindu Law of Inheritance requires that the sect of *yati* should be of pure caste and does not provide for any that is not pure. Vyavas ha Darpana, p. 316.

In the goods of Sitaram Das (6), the approved pupil after performing the ceremony becomes like the spiritual guide and does what he does and follows the peculiarity of dress which he observes. *Ibid*, p. 318. There are two classes of *sishyas*. (1) Disciple, (2) one who receives mantras without having to work in the temple. He does not succeed. *Ibid*, p. 319. A *sishya* in a menial secular employment is an impostor. The position of the Plaintiff is no better. As to rights and duties of ascetic see—Yajnavalkya, Bk. III, Verse 56-65. Mandlik, p. 250. *Ramdhan* v. *Dalmir* (7).

Amongst *sanyasis* no *chela* has the right to succeed to the property of his deceased *guru*. *Nirunjun* v. *Padaruth* (8), *Madho Das* v. *Kamta Das* (9).

An election or recognition by members of the sect is necessary. *Ramdhan* v. *Dalmir* (7).

The deceased did not fulfil any of the conditions imposed upon a *yati* by the shastras and the whole suit moreover is misconceived.

C. A. V.

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—The Plaintiff alleges that one Pundit Sobharam Sadhu who was also known as Sadhu Sudarsan Das was by caste a Brahmin and by faith and profession a religious mendicant, having renounced his family, relations and original home in Zillah Rohtak in the Punjab when

(5) Macnaghten's Select Cases, Vol. I, p 218 (1807).

(6) Vyavastha Darpana, Part II, p. 316.

(7) 14 C. W. N. 191 (1909).

(8) 1 S. D. A. for N. W. P. 512 (1864).

(9) I. L R. 1 All. 539 (1878).

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he was only a boy 10 years old; that Pundit Sobharam never married, and permanently resided in Calcutta and practised religious austerities, and down to the time of his death led the life of a religious Hindu mendicant; that he died intestate at the age of 80 or thereabouts, on the 28th September 1910, leaving no issue of his body, no brothers, nephews or sister's son nor any blood relations either on his father's or mother's side. That inasmuch as he was a Sadhu, and had entered into the religious order of Bhikshus or mendicants, his relatives had no right to succeed to him; that he had taken the Plaintiff as his religious disciple or *chela* when the Plaintiff was only 10 years old, and that the Sadhu thereafter performed the initiation ceremony of the said religious order upon the Plaintiff, who thus became the recognised *chela* or disciple of the said Sadhu, and that he alone is entitled to succeed to the estate and effects left by the said Sadhu, as his heir according to Hindu Law in preference to the Defendants who, the Plaintiff alleges, have falsely put forward a pretended relationship to the said Sadhu. The Plaintiff further alleged in his plaint that the Sadhu who used to be revered by a large number of people in the town of Calcutta and other places in India was the recepient of various donations of money from various persons in order that the said money might be spent by him in religious and charitable purposes according to his absolute discretion, and in this way the said Sadhu during the whole period of his life as such "Bhikshu or religious mendicant" as aforesaid came to have in his hands, from time to time, considerable sums of money wherewith after defraying the expenses of such religious and charitable works as he considered proper, he used to deposit the surplus for safe custody with several respectable Hindu firms in Calcutta in whom he could trust, such as the firm of Messrs. Juggernath Madan Gopal of No. 70, Cross Street, Calcutta. where he had deposited Rs. 3,000, and that of Messrs. Dhunraj Gunpat Rai of No. 42, Armenian Street, Calcutta, with whom he had deposited about Rs. 2,600.

The Plaintiff further alleges that the Defendants on coming to learn of the death of the said Sadhu in Calcutta and having discovered that he had left some money in deposit with certain Hindu firms in Calcutta, began to pretend as aforesaid to be the distant kinsmen of the deceased Sadhu, and surreptitiously and without any notice or intimation to the Plaintiff applied for and fraudulently obtained a certificate under the Succession Certificate Act from the Court of the District Judge of Rohtak to the estate of the said deceased, and on the strength of such certificate, were trying to realise and appropriate the said sums of money. He therefore prayed that it might be declared that the Plaintiff was the sole heir under Hindu Law of the said Sadhu and entitled to his estate and effects, and that the succession certificate should be annulled by this Court, for an enquiry for the ascertainment of the assets which the said deceased died possessed of, and for other relief.

The first question therefore is as to whether the deceased was a religious mendicant or a *yati*, and whether the Plaintiff as his *chela* was entitled to succeed to him.

There is no doubt about the law on this subject. According to the text in Yajnavalkya the heirs of a hermit, of an ascetic, and of a professed student, are in their order, the preceptor, the virtuous pupil,

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and the spiritual brother and associate in holiness. Yajnavalkya II, 138.

The commentary on the text is, that the virtuous pupil, *sat sishya*, takes the property of a *yati* or ascetic. The virtuous pupil, again, is one who is assiduous in the study of theology, in retaining the holy science and in practising its ordinances.

The next question that I have to decide, is, is the Plaintiff the *sisya* and *sat-sisya* of the deceased. The text quoted above is the only text relating to succession to the property of a *yati* and subsequent commentaries and works on Hindu Law have dealt with this text alone in dealing with the matter. Mayne in his Hindu Law, p. 816, 7th edition, para. 603, say this:—

"One who has entered into an order of devotion is also excluded from inheritance, since he has of his own accord abandoned all earthly interests. The persons who are excluded on this ground come under three heads, *viz*, the Vanaprasatha, or hermit; the *sanyasi* or *yati*, or ascetic; and the Brahmachari, or perpetual religious student. In order to bring a person under these heads, it is necessary to show an absolute abandonment by them of all secular property, and a complete and final withdrawal from earthly affairs."

The Plaintiff alleges, as I have mentioned, that the Sadhu left his house when he was 10 years old, and, as it is stated, that he gave up his home and all his earthly connection with his family; that he came without any money, but that he had left a fairly large sum of money in Calcutta, is not disputed. Then how did he make this money. If he brought it from his house it does not shew complete abandonment of all earthly interest. If he made it in Calcutta, how did he make it? The Plaintiff alleges in the plaint that he received large sums of money from different parts of India, which were entrusted to him for charitable purposes, and this is the residue left over. There is absolutely no evidence that he ever received money in this way, and therefore I cannot but hold that he earned this money while in Calcutta. The Plaintiff gives no explanation how he made it. That he left Rohtak and lived in the very heart of a large commercial town, in Burra Bazar, shows that he had no intention of taking the *sanyas* and that he rather profitably employed his time, when he was living in Burra Bazar. It is ridiculous to ask me to hold that a person of this character satisfies the description of a "*yati*," as it is contained in the Hindu law books. The Plaintiff claims to succeed on an exceptional rule of succession, and he must shew that the requirements have been fulfilled. It has been rather poetically and unconvincingly argued that in the old days people were "giants" and that the present generation is a generation of "pigmies" and therefore a modern *yati* need not satisfy the ancient standard. I am unable to hold that in interpreting this particular text of the Hindu Law the old standard should be lowered. It must be shewn that the person was a "*yati*" according to its accepted meaning. The text has been strictly construed in different Courts in India. The Madras Court has refused to hold that it applies to Sudras because a *yati* belongs to an *asram* to which only the twice-born class is admitted, *Dharmapuram* v. *Virapandiyam* (1).

Witnesses have said that the deceased was a religious Brahmin; that he was not a mendicant in the sense that he begged and lived upon what he obtained by begging; that he practised his religion in a small room in the 3rd story of Monohar

(1) I. L. R. 22 Mad. 302 (1898).

GOURI SUNKER BYAS *v.* NIADER SING.

Dass's Kotra, which is a very populous quarter inhabited by a large number of Marwari merchants. He is respectfully spoken of by some of the witnesses as a 'Mahatma," some called him a "Babaji." He appears to have been a Brahmin, who lived in Burra Bazar and earned money as such, that is to say by performing, from the evidence that has been given although slender, "*paths* and *poojas*" in different places.

The Plaintiff admitted that the Sadhu had not given up his sacred thread, had not taken the *danda*, and did not wear *sanayasi's* clothes, as he said he was a Ramanuja Vaisnab, and according to the custom amongst Vaisnabs of this class it was not necessary to give up the sacred thread and take the *danda*, although they might become *dandis*. He wore leather shoes and dressed himself in the ordinary way, and did not dress himself in Gerooa or yellow clothes.

I am not satisfied, that there is any ground for holding that he was a *yati*. The plaint distinctly made him out to be a religious mendicant, which has not been proved.

The next question is has the Plaintiff shown that he is a *sisya*. He says he was taken as a *chela* when he was 10 years old. That he was taken as a *sisya* is nowhere stated in the plaint. It is merely stated therein that he was taken into the order, some time later, by which I understand he is referring to the order of a religious mendicant. Evidence has been given that he lives with his mother and brother. I entirely disbelieve the Plaintiff when he says that he has no connection with them, and does not live with them and does not even know where they live, although they live in Calcutta. Persons in the employ of his landlord have produced books and have spoken to having realized rent from him personally for the rooms which they stated he occupied with his mother and brother. I accept their evidence as true.

About his initiation, he is the only witness with the exception of a person of the name of Sugan Chand and another, both of whom, I consider absolutely untrustworthy witnesses. I disbelieve Sugan Chand's statements altogether without any hesitation. He was asked about certain allegations, which he had made in an affidavit, and he said that he knew nothing about them. If those statements were untrue he knowingly made them to support the Plaintiff's case. If true his present statements are untrue.

It is impossible to place any reliance upon him. I considered his conduct so serious, that at one time I thought that proceedings ought to be taken against him. The other witness was a person of the name of Gobind Ram Sett who spoke to the Plaintiff being a *sisya*; that he knew Sobharam Sadhu; he introduced himself as a jeweller who used to live in Monohar Dass's Kotra. I happened to know this man and I mentioned to learned Counsel on both sides what I knew about him. Learned Counsel for the Plaintiff then stated that he did not intend to rely on this man at all. Witnesses of this kind having been called shows that there are certain influences at work; some persons more influential than the Plaintiff appear to have been assisting him in this case. It lends support to the suggestion that Kanhai Lall has been engineering the case of the Plaintiff.

I hold that there is no reliable evidence that this man was ever taken as a *sisya* by Sobharam. He describes himself as a *chela* in the plaint. There is clear distinc-

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Contents.

NOTES.

Criminal Sessions.

The last Criminal Sessions of the year commences its sittings from date, Mr. Justice Fletcher presiding.

The Late Mr. Justice Pigot.

We regret to have to notice the death of the late Mr. Justice Pigot of the Calcutta High Court. He served on the Bench from May 1884 to March 1896. He was a barrister and an advocate of the Bombay High Court before he came to Calcutta as a Judge. He was regarded as a very sound judge and his judgments command great respect to this day.

The Lord Chief Justice of England.

The appointment of Sir Rufas Isaacs as the Lord Chief Justice of England and the chorus of approval with which the appointment has been hailed on all hands show how people's minds have widened and the out-look of things have changed within comparatively recent times. The present Lord Chief Justice is the first Lord Chief Justice of England of Jewish extraction. It is no doubt true that we have in our generation seen a statesman of the Jewish race attaining the position of the leader of the House of Commons and the Prime Minister of England. He too was, no doubt, a man of great talent. But his advancement was brought about by exigencies of party politics and in no small degree through his personal and political influence over the aristocracy and the royalty.

But the domain of law has always been more democratic. Merit and ability find a readier recognition in the legal profession than perhaps in any other sphere of life. The prejudice against the Jewish people in the days of Sir George Jessel was much stronger than it is to-day. Still he rapidly rose to the position of the Master of the Rolls and was universally admitted to be the most brilliant judge who ever sat on the English Bench. Sir Rufus Isaacs has also by sheer merit risen from a position of comparative insignificance to that of the highest judicial rank amongst the judges of England. He comes from the family of a fruit merchant and but for his talent, industry and perseverance the world would have never heard of him. He has been a brilliant advocate but he has never been dramatic in his advocacy. Nor has he been a technical lawyer. Clearness and perspicuity in the presentation of the law and facts and his power of focussing all the available light on the most favourable aspects of his case have been the keynote of his remarkable career at the Bar. There has seldom been a counsel who has been able to handle witnesses better or get more out of them from cross-examination. As a judge of facts and a sound exponent of law and justice he is expected to take the shine out of his many illustrious predecessors. He is only 53 years of age and many expect that he will be amongst the Lord Chief Justices of England what Sir George Jessel was amongst the Masters of Rolls.

The Attorney-General and law officers.

The present Attorney General Sir John Simon will be remembered by some members of the Calcutta Bar as their contemporary at Oxford. His rise in the profession and more particularly in the House of Commons has been almost unprecedented, so far as the career of a member of the Bar is concerned. He too belongs to the gifted Jewish race. He was called to the Bar in 1899. Although it cannot be questioned that his preferment to the position of the Attorney-General is due chiefly to his superior talent and merit, yet looking at the appointment from the point of view of a lawyer one cannot deny that the Government in conferring on him the office has been more influenced by political than legal considerations. Mr. Buckmaster, K. C., who succeeds Sir John Simon as Solicitor General is one of the most distinguished leaders of the Chancery

Bar and is a lawyer of a very superior order. But he is not likely to make such an efficient party leader as Sir John Simon. Attorney-Generals have not before Sir Rufus Isaacs, as a rule, occupied the position of Cabinet Ministers. The recent tendency is to include the Attorney-General in the Cabinet. This is bound to have the effect of giving the appointment a more political complexion than before. From the public point of view it would be surely more desirable if the position of the Attorney-General is filled by the most eminent lawyer available. Such men would be in a position to give independent advice to Government, which does at times serve to safeguard public and personal liberty more than the professed liberalism of party leaders.

Peripatetic Privy Council.

We publish in another column Lord Haldane's speech at the London University about the future of the Privy Council as an Imperial Court of Appeal for the Empire. We have no objection to the amalgamation of the Judicial Committees of the House of Lords and the Privy Council. But the prospects of a peripatetic Privy Council does not cheer us at all. It is but natural that the self-governing Colonies do not desire that vital questions affecting their rights and liberties should be adjudicated upon by English Judges sitting in Westminister or Downing Street. But people in India prize the right of appeal to the Judicial Committee because they expect that English Judges of the highest rank and free from all local prejudice would bring to bear a fresh mind in the case and decide according to the most approved principles of English Justice. If Judges of indifferent merit are sent out to India to hear the appeals to the King in Council, they would lose confidence in such appeals. Besides that they would be deprived of the services of the best talents of the English Bar. So we join our English contemporary of the *Law Journal* in condemning the proposal.

The English *Law Journal* says :—

Lord Haldane appears to have been 'thinking aloud' at an educational function at University College, where he adumbrated a remarkable scheme for the future hearing of Colonial appeals, which the *Times* neatly sums up in its heading, 'An Imperial Assize.' The Lord Chancellor regards the House of Lords, as a judicial as well as a political chamber, as being *in articulo mortis*. What is to take its place? He says 'the great link of the Empire, the Judicial Committee of the Privy Council—just as it has been proposed for Irish disputes in the Home Rule Bill. But the work will be far too great for the Judicial Committee as it is at present constituted; so, as the King is 'not a local institution but an Imperial institution,' so his Privy Council ought to be regarded as an imperial body, and there is no reason why it should not be as much localised in the dominions as it is localised in London at home. That way, it seems we shall get a Court which 'will not offend against the canon which the self-governing Dominions desire to set up—that their Supreme Court of Appeal shall not be outside themselves. But that does not entirely solve the problem. Having reduced the Judicial Committee of the Privy Council to an abstraction, to an institution without local habitation, there is no reason, it is said, why it should not sit in more than one division, so that it need not be sitting always in the same place but might move, if necessary, from time to time about the Empire. 'What more easy than to export some members from London from the Judicial Committee to go and sit as the King's Imperial Privy Council in Canada?' That is the meaning of the 'Imperial Assize.' It rather takes one's breath away. But we are glad to see that Lord Haldane does not commit himself to the scheme.' We rather hope that he does not mean it.

Reduction of sentences.

We noticed in our last issue the principles enunciated by the new Lord Chief Justice of England regarding the reduction of sentences on appeal. The English *Law Journal* contains in its last issue a more detailed account of the cases in which the principle was given effect to.

The precedent established last week in *Rex* v *John Martin* (ante p 621) has been followed this week by the Court of Criminal Appeal in a number of appeals. In that case, as was pointed out in this column, the Lord Chief Justice adopted a principle not formerly acted upon generally by the Court, namely that there should be, within reasonable limits, a certain proportion between length of sentence and value of goods stolen in cases of larceny irrespective of the prisoner's record, and that sentences which greatly exceed this proportion ought to be reduced upon appeal. In *Rex* v *James Connor* (November 3) the prisoner had been sentenced at the West Riding of Yorkshire Quarter Sessions to 18 months' hard labour for stealing a pair of boots; he had been convicted twenty times since 1888, and seven of those convictions were for larceny. When the present crime was committed he had been only four days out of prison. Such a record has hitherto been generally considered by judges as requiring a sentence of penal servitude, but the Court, applying the test of value, reduced the sentence to nine months' hard labour. Again, in *Rex* v *John James McKone*, a sentence of three years' penal servitude passed at Sheffield Sessions after a conviction for receiving stolen goods—an offence usually treated with severity because it assists burglars to follow their avocation—was for similar reasons reduced to one of twelve months' hard labour. And in *Rex* v *Charles Sanders*, where the prisoner had received a sentence of nine years' penal servitude at Barnstaple Quarter Sessions, for obtaining goods by false pretences, the sentence was reduced to one of three years. Here, however, no novel principle was required, since, although the prisoner was an old offender, he had been living an honest life for the two years immediately preceding the crime—a fact which has already in several cases been held sufficient to justify a reduction of sentence (*Rex* v. *John Hill*, 2 Cr App. R 74; *Rex* v. *Cullen*, 4 Cr. App. R. 7; *Rex* v. *Benjamin Smith*, 4 Cr. App. R. 48).

We are glad to notice that the principle is already being acted upon in the Calcutta High Court.

LORD HALDANE ON THE FUTURE OF THE PRIVY COUNCIL.

THE JUDICIAL COMMITTEE.

He understood the lecturer would deal with the judicial arrangements of the supreme tribunals of the Empire, and

with the Judicial Committee of the Privy Council. That was a body which was attracting more and more attention, and which he ventured to predict would attract still more. As some of them knew, appeals from England, Scotland, and Ireland went at present to the House of Lords. If a Bill of which they read a good deal in the newspapers were passed, then appeals from Ireland would go, like those from the Dominions, to the Judicial Committee of the Privy Council instead of the House of Lords in future. The other day when he was in Canada, he was struck with the feeling among those best competent to give an authoritative opinion that, if any change took place, what they did not want was to have to appeal to some new Court outside the Dominion It was easy to talk about an Imperial Court of Appeal, but not easy to define it in a way which did not trench on the just claims of the Dominions across the seas to be self contained What they said to him was that they valued the appeal to the King in Council very much, and did not want to interfere with that; but if anything was to be done to alter the judicial arrangements, they hoped the foundation of that appeal and the form of that Court would not be varied. That was probably the observation which every one of the self-governing Dominions would make. It meant they did not want to appeal to any Court outside themselves, but they regarded the King in Privy Council, advised by the Judicial Committee of that Privy Council, as something not outside themselves. Both parties of the State were agreed that the Second Chamber, as it existed at the present time, must be reformed and in a fashion which would make it impossible for it to be the supreme Appellate Court of England, Scotland and Ireland, and if that came they would have to find a new Appellate Court, What could that Court be? He was not speaking for anybody but himself, and was not committing even himself, but he thought they would find it would work out so that presently the great link of the Empire which the judicial functions of the King in his Council represented would be further developed and the appeals, whether from countries forming part of the King's Dominions outside these islands or from these islands themselves, would be to the King in Council, as it had been proposed with regard to Irish appeals in the Home Rule Bill.

AN ITINERANT COURT.

That would involve certain changes The change would be one of form rather than of substance. All appeals would be to the King in Council, and would be heard by the Judicial Committee of the Privy Council, which committee, instead of sitting in one division as to-day, might sit in several divisions, and as the King was president in each of his dominions represented by his Ministers, and as the Privy Council was an Imperial body containing the chief justices and the most distinguished persons in the Empire, they had at once a Court which did not offend against the canon which self-governing Dominions set up, that the supreme court should not be outside themselves. The Privy Council was a real Imperial body, and if it could sit in more divisions than one it would solve a problem which had been vexing the minds of a good many statesmen from time to time Supposing, for instance, they had to deal with a question of boundary in Canada, what would be more easy than to export some members from London to go and sit as the King's Imperial Privy Council Committee in Canada, and deal with the thing on the spot? They might call in the assistance of some distinguished member just as the Privy Council in London had been strengthened by the assistance of eminent judicial personages from the Dominions The Lord Chief Justice of the Union of South Africa had been sitting in the House of Lords hearing Scotch appeals, and had been very useful owing to his knowledge of the Roman Dutch law. They had in existence a most valuable instrument, which, with very little development, would give one of the greatest tribunals and one of the most unifying influences for holding together the Empire which it was possible to conceive. A reform which transferred the hearing of all the supreme appeals of the various Dominions of the King to the King in Council, and enabled the Judicial Committee of that Council to sit in more than one division, moving about through the Empire, would be a great step in the solution of the problem of Imperial unification.

CURRENT INDIAN CASES.

(CIVIL.)

Civil Procedure Code (Act XIV of 1882), sec. 539—Specific Relief Act (I of 1877), sec. 42.

RAMADOS *v.* HANUMANTHA, I. L. R. 36 Mad. 364.

The Plaintiff sued for a declaration that he was the rightful Dharmakarta of the plaint temple the lands belonging to which were in the actual possession of tenants and for reinstatement in the office and also for an injunction restraining the Defendants who were in possession of the office from interfereing with him in that office. The Plaintiff's father had been dismissed from the office and thereafter on a suit by one of the Defendants and another under sec. 539, C. P. C., a scheme of management was framed under which the Defendants were appointed trustees of the temple. The questions for determination were among others—Is the suit maintainable without a prayer for possession of the property belonging to the temple?

Can the Plaintiff bring this suit in view of the scheme framed under sec. 539, C. P. C.?

Held—That assuming that the consequential relief referred to in sec. 43, Specific Relief Act, is a relief against the Defendants in the suit and not against third parties the Defendants could not give the Plaintiff physical possession of the temple property as the physical property was outstanding in the tenants and therefore the proviso to sec. 42 was no bar to the present suit.

That the present suit being one to enfore a private right the provisions of sec. 539 were not applicable to it and the scheme previously framed was no bar to the suit.

Promissory note.

KARUPPAPPA *v.* BAVA MOIDEEN, I. L. R. 36 Mad. 370.

The Plaintiff sued on the following document—"Promissory note executed in favour of—In the matter of the purchase of piece goods by me from your shop on this date, the sum found due by me as per list is Rs. 600, which sum I promise to you or to your order on demand with interest at 1¼ per cent."

The document was executed in Mysore to which was affixed a one anna stamp of the native state of Mysore in favour of one M who endorsed it to the Plaintiff in British India without affixing a British one anna stamp to it.

Held—That it is no doubt true that the question whether an instrument is a promissory note or not should be judged by the words used and that the instrument must contain in words an unconditional undertaking to pay a sum of money and it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money but the instrument in question was a promissory note and it was not duly stamped as soon as it came into British India into the hands of the Plaintiff's transferor.

Land Acquisition Act—Inam *lands.*

HANUMANTU PANTULU *v.* THE SECRETARY OF STATE FOR INDIA, I. L. R. 36 Mad. 373.

Certain *Inam* lands were acquired by the Government for a Municipality. The Plaintiff's suit was for a declaration that the Government was not entitled to levy ground-rent for the lands in his occupation and for the recovery of the amount collected from him by the Government as a ground-rent. It was contended that the Municipality acquired by the Land Acquisition proceedings the *Inam* right which belonged to the original owners of the land and that by successive sales the Plaintiff owned that right and the Government was entitled only to quitment ss from the *Inamdar.*

Held—That it was the Government that acquired the land and the title of the Municipality was derived from Government. When the land became vested in Government it became ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier.

Malicious prosecution, suit for—Onus of proof.

DYDINADIER *v.* KRISHNASWAMI IYER, I. L. R. 36 Mad. 375.

In a suit for malicious prosecution it is not on the Defendant to show that there was reasonable and probable cause but on the Plaintiff to prove its absence.

Civil Procedure Code (Act V of 1908), Or. 6, r. 17—Amendment of plaint—Maintainability of suit.

SEVUGAN CHETTY *v.* KRISHNA AIYANGAR, I. L. R. 36 Mad. 378

The Plaintiff alleged that the Defendants were his servants on a monthly pay and had charge of his shop and he claimed that the accounts kept by them in regard to the business were his property and he sued to recover these accounts.

Before any evidence was recorded the Plaintiff put in a petition for amendment of the plaint. It did not allege any new facts but merely prayed that an additional relief might be granted on the facts stated in the original plaint.

Held—That the suit was maintainable and the petition for amendment of plaint could be granted under Or. 6, r. 17.

Karam Kas Tenure—South Malabar.

ACHUTHAN MENON *v.* V. C. SANKARA NAIR, I. L. R. 36 Mad. 380

The holder of a Karam kas tenure in South Malabar has only the permanent right of cultivation but has no right of alienation.

Limitation.

ANANT *v.* NARAYANARAZU, I. L. R. 36 Mad. 383.

The attachment of a person's property as if it belonged to another gives the owner a cause of action for a declaratory suit and the sale held in consequence of that attachment is a fresh invasion of the owner's rights and gives a fresh cause of action

Mahomedan law—Moplas of Malabar.

PAKRICHI *v.* KUNHACHA, I. L. R. 36 Mad. 385.

A girl when married passes over to her husband's family under the Mahomedan law and there is no obligation on the members of her natural family to [illegible] her after her marriage even if she is divorced.

A gift made to the husband of a Mopla girl governed by the Mahomedan law does not become void even after the divorce of the girl and the property does not revert to the donor.

Review.

CHALMER'S NEGOTIABLE INSTRUMENTS RELATING TO BRITISH INDIA. Fourth edition. *By A. Eggar, Esq., B. A., Bar-at-Law. Advocate, Calcutta High Court. Messrs. Thacker, Spink & Co., Publishers, Calcutta.*

The present Editor has changed the arrangement of the work. He gives the Indian Act XXVI of 1881 at the beginning without any annotation. Then he proceeds to classify the provisions of the Act under different headings such as "consideration," 'acceptance,' 'payment' &c. Under each of such headings the Indian law as also the English law are stated by reference to the Statutes and also the case-law. We have gone through some of the chapters and find the law accurately stated. This arrangement has no doubt its advantages inasmuch as it gives a comprehensive view of the general law as to 'consideration' and the like, all at a glance. But it has its drawbacks also. It is inconvenient for reference to the other provisions of the law which may have a direct or indirect bearing on the question of consideration or acceptance.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Greenlands, "Ld."* v. *Wilmshurst & others.* Before LORDS JUSTICES VAUGHAN WILLIAMS AND HAMILTON, AND MR. JUSTICE BRAY. 18th July 1913.

Libel—Qualified privilege and privileged occasion—Communications made as a matter of social or moral duty would be privileged but not communications made in self-interest or for profit.

This was an application by way of appeal. Messrs. Greenlands, Ld. sued for damages for libel and slander. The Defendants were the London Association for the Protection of Trade, their Secretary Mr. Hadwen and their correspondent Mr. Wilmshurst. A member of the said Association inquired of the Association as to the credit of the Plaintiffs. The secretary replied as follows:—

Greenlands, Ld. are in a large way of business. Hold very considerable stocks, and their turnover is extensive, but there are heavy debentures charged on their assets which is considered out of proportion to the break-up value of the assets. However, for such credit as your figures, £20 to £30, they are considered a fair trade risk.

The Court below held that the occasion was not privileged, and found malice against the secretary and awarded heavy damages against the Association and the secretary. On the present appeal a re-trial was ordered. In the course of his judgment Lord Justice Vaughan Williams said:—

Qualified privilege, Mr. Odgers, in his well-known book on Libel and Slander, grouped under five heads: but it was only heads (1) and (2) which he proposed to deal with. "(1) Where it is the duty of the Defendant to make a communication to another person who has an interest in the subject-matter of the communication or some duty in connexion with it. (2) Where the Defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest or some duty in connexion with the matter." Mr. Odgers divided head (1) into two parts—(*a*) statements made in answer to inquiry; (*b*) statements not in answer to previous inquiry. The libel here complained of, whether regarded as written and published by Wilmshurst or regarded as written and published by the Trade Association and Hadwen, or both by Wilmshurst and the other Defendants, seemed to have been written in answer to respective inquiries made to the Trade Protection Association, the one with which he was dealing being the inquiry of Shand Kydd to the group of persons calling themselves the London Association; the other being the inquiry, or instruction to inquire, made of or to Wilmshurst by the London Association. Head (2), that is to say, where the Defendant had an interest in the subject-matter of the communication, and the person to whom the communication was made had a corresponding interest or some duty in connexion with the matter, was thus applied by Lord Esher, Master of the Rolls, in *Hunt* v. *Great Northern Railway* (1891, 2 Q. B., 189):—"The occasion had arisen if the communication was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist the occasion is a privileged one, and the question whether it was or was not misused is an entirely different one."

The association was merely an association of individuals who called themselves members, and who were elected, or rather, in fact, nominated by the secretary. The election was by the secretary's submitting to the committee of management the name of candidates for enrolment of members for their approval or disapproval at an ordinary meeting of the committee of management, and each member had to pay an annual subscription. One of the objects of the Association was the making of private inquiries as to the actions, respectability, and trustworthiness of individuals and firms, and another was the detection and exposure of swindlers.

He doubted very much whether the publication of information obtained from a person who was paid for the information he supplied was information given on a privileged occasion. The authority which was relied on as specifically dealing with that point was *Waller* v. *Loch* (7 Q. B. D., 619). Sir George Jessel, Master of the Rolls, in delivering judgment, said on page 621:—"According to *Harrison* v. *Bush* (5 E. and B., 344) a communication which a person makes *bonâ fide* in discharge of a moral or social duty of imperfect obligation is privileged," and later, on the same page, said:—"It is not necessary in all cases that the information should be given in answer to an inquiry. In *Davies* v. *Snead* (L. R 5 Q. B., 608), Mr. Justice Blackburn says that 'where a person is so situated that it becomes right in the interest of society that he should tell to a third person certain facts, then, if he *bonâ fide* and without malice does tell them, it is a privileged communication.' Now if the secretary believed that the lady to whom he gave the information in this case was making the inquiry to learn whether the Plaintiff was deserving of assistance with a view to relieving her or inducing other persons to relieve her, then he was discharging a moral or social duty in answering the inquiry, and was entitled to answer it."

Justice Blackburn in *Davies* v. *Snead* said:—"If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and, if answered *bonâ fide* and without malice the answer is a privileged communication."

He doubted if the so-called Association or Hadwen were discharging a moral or social duty in obtaining and giving information which was got for the Association or a member of it at a price for the service by Wilmshurst.

There must be some limit to the proposition that the publication of information thus obtained by payment to a stranger was a publication on a privileged occasion, and that the publication was privileged unless the Plaintiff proved express malice of the Defendant. It could clearly not be said, in his opinion, that the occasion would be privileged if the Defendant obtained the information by the employment of a paid detective, who, independently of his duty arising from his employment as a detective, would owe no duty to Defendant such as that which was owed by the officers of the Charity Organization Society to the Society, or by servants to their masters, whether in private service or in public service—*e.g.*, the servants of a railway company.

Land Acquisition Act—Inam *lands*.

HANUMANTU PANTULU *v*. THE SEC[RETARY OF] STATE FOR INDIA, I. L. R. 36 Mad. 37[3]

Certain *Inam* lands were acquired [...] for a Municipality. The Plainti[ff ...] claration that the Government [...] ground-rent for the lands [...] recovery of the amount [...] Government [...] on the [...] the [...] formation given [...] thought that he [...] occasion in this [...] but he preferre[d ...] alternatively, [...] The decision [...] that Court [...] and *prim*[*â facie* ...] having [...] Commit[tee ...] the effec[t ...] was accurately stat[ed ...] that the occasion was privileg[ed ...] cation injurious to the Plaintiff's [...]r was made in the general interest of society and from sense of duty; not so if it was made from motives of self-interest by those who for the convenience of a class trade for profit in the characters of other persons, and who offer for sale information which, however cautiously and discreetly sought," may have been improperly obtained."

[...]s [...]n. [...]nd [...]re, [...]lly [...]cial [...]that [...]*Dun* [...]Held, [...]muni-

NOTES. and trustworthiness of individuals and another was the detection and [...]ch whether the publication [...] from a person who was [...]pplied was informa[...] The author[...] xxi

His Lordship Vaughan Williams, L. J., thought that the obtaining of information from Wilmshurst, even though the fee was small, fell within the principle of Lord Macnaghten's observations. But it should not be forgotten that trading for self-interest was the keynote that ran through the whole of the passage.

The members of the trade society, although they did, in his opinion, sell information at a price, and make a profit, yet were not traders in the ordinary sense of the word. They were all of them men of a commercial class accustomed to give credit, who joined together to get the characters, presumably of their would-be customers, and they conducted the business of getting these characters in such a manner that the payments they received from the subscribers, whom they called members, were such as to leave them yearly with a considerable profit balance, which from time to time they invested.' He did not think that the communications made as to the characters and pecuniary position of would-be customers were made in legitimate self-defence, or [fr]om a *bonâ fide* sense of duty. The interests considered were the interests of a class, and the information which they gave in return for the members' subscription was, in his opinion, not obtained cautiously and discreetly when they got it from Wilmshurst, who was not a servant or a confidential agent.

Taking the view which he had expressed, it [w]ould follow *primâ facie* that the appeal should [b]e dismissed, and the judgment of the Lord Chief [J]ustice affirmed. But since Several Defendants [h]ad conducted their case so as to be jointly liable separate judgmen s ought not to have been passed. And the damages also were excessive and there should be re-trial.

Messrs. Smith, K. C, Scott, K. C., and Hart for the Appellants.

Sir Edward Clarke, K. C., and *Mr. Fraser* for the Respondents.

B. D. *Re-trial ordered.*

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF PUNJAB.]

THE LORD CHANCELLOR. LORD MOULTON. LORD SHAW. 1913, October.	BIR BHAN, Appellant, *v.* THE KING-EMPEROR, Respondent.

Leave to appeal in criminal cases when granted.

This was an application for special leave to appeal.

The Petitioner was convicted under sec. 471 of the Indian Penal Code and sentenced to three years' rigorous imprisonment and a fine of 5,000 rupees. The charge against him was that he fraudulently or dishonestly used as genuine an order for refund of Octroi duty which he knew or had reason to believe to be a forged document and thereby obtained a sum of money from the Municipal Fund of Sialkot, to which he was not entitled.

The Petitioner was the managing member of a joint Hindu family of which the adult members were Kripa Ram, Hira Lal and Joi Chand. The said joint family carried on the business of Corn Merchants under the name and style of a firm called Behari Lal Bir Bhan. As Behari Lal the Petitioner's father was dead, the said firm was popularly known by the name of Bir Bhan alone. The business of the firm was conducted by the several members of the joint family as well as by a manager Bhagwan Das and a servant Bishan Chand.

The firm entered into a Contract with the Commissariat Department at Sialkot to supply them with 4,600 maunds of barley and 7,500 maunds of gram from June to September 1911 but in accordance with the Departmental Regulations the Contract was actually made out in the name of the Petitioner alone.

In respect of the above Contract supply, orders for 400 maunds of barley and 492 maunds of grain were issued and the quantities of grain were supplied to the Store-keeper Supply and Transport Corps at Sialkot. In order to obtain refund of Octroi duty paid in respect of the said quantities of grain application was made to the Supply and Transport Corps Office at Sialkot which for-

warded it to the office of the said Store-keeper and finally Certificates or Orders for the refund of Octroi in respect of 400 maunds of barley and 492 maunds of grain were issued. The figures in the said Orders were altered into 1,400 and 2,492 by prefixing the figures "1" and "2" to the quantities specified therein. The charge against the Petitioner was that he fraudulently or dishonestly used the said forged Orders for refund of Octroi knowing or having reason to believe that the said Orders were forged.

The Petitioner's defence was that there was absolutely no evidence on the record to show, *first*, that the application for refund was signed or presented or made by the Petitioner; *second*, that he had any knowledge of the said application for refund: *third*, that he knew or had reason to believe that the said Order for refund had been altered by any person or that it was a forged *document*; *fourth*, that he received the said order for refund or that it was received by some other person within his knowledge; *fifth*, that he received any money under the forged Order for refund or that some other person received the money thereunder.

The Petitioner was tried by the Sessions Judge at Sialkot with two Assessors for offences under secs. 420 and 471 of the Indian Penal Code. The case for the prosecution was that your Petitioner and no other member of the said firm had perpetrated the fraud. The said Sessions Judge delivered his judgment on the 25th June 1912. Agreeing with the Assessors he found the Petitioner guilty of both offences and sentenced him to a concurrent sentence already stated above.

The Petitioner appealed against the said conviction and sentence to the Chief Court of the Punjab which delivered its judgment on the 3rd August 1912. The learned Judge (G. C. Beadon, J.) set aside the conviction under sec. 420 and allowed the appeal to that extent but affirmed the conviction and sentence under sec. 471 of the Indian Penal Code.

The Petitioner submitted that there has been a great violation of the principles of natural justice and that substantial and grave injustice has been done to him and prayed for special leave.

Mr. DeGruyther (with him *Mr. Bhugwandin Dubé*).—This is an unusual application because it is an application to Appeal to His Majesty in Council in a criminal matter. We say there is no evidence whatever in this case as against the Appellant. What he has been convicted of is really this. A fraud had been perpetrated for or on behalf of a firm consisting of several members, who were all taking an active part in the management of the firm and there is nothing whatever to connect the head of the firm, the present Appellant, with the actual commission of the offences, and he really has been charged with and convicted of criminal liability and responsibility for the fraud because he is the head member of the firm and the amount which was obtained by fraud had been credited in the firm's books. May I very shortly state what the real point is?

[THE LORD CHANCELLOR.—There have been two trials.]

Mr. DeGruyther.—There has been one trial and an Appeal.

[THE LORD CHANCELLOR.—There have been two hearings on this point.]

Mr. DeGruyther.—So there is in every criminal case in India There is first the hearing before the Sessions Judge and after he has delivered his Judgment there is an Appeal to the High Court.

[THE LORD CHANCELLOR.—What you say is that the learned Judges who disposed of the case ought to have held that there was no evidence.]

Mr. DeGruyther.—That is so, my lord.

[THE LORD CHANCELLOR.—But there was a great deal of evidence against other people.]

Mr. DeGruyther.—There is no doubt that a fraud had been perpetrated.

[THE LORD CHANCELLOR.—And therefore the only question was the knowledge, or want of knowledge of your client. The King in Council does not review criminal proceedings as a rule; it is only in the most exceptional cases that he does. He does not sit as a Court of Appeal to hear cases of error; still less does he review the weight of evidence. He does not even review the question of whether there ought to have been a finding that here was no evidence, so long as the natural forms of justice have not been violated or some gross scandal occurred. It is difficult for you to bring a case such as you have described within the extremely limited category of cases in which His Majesty gives leave to Appeal.]

Mr. DeGruyther.—What I am going to urge before your Lordships is this, that, in fact, there is no evidence, and, therefore, there was a miscarriage of justice; in other words, that there was no evidence at all to go to the Jury on which they could come to the conclusion that the Defendant was guilty. I submit that a violation of those forms would be a miscarriage of justice and would bring this case within the Rule.

[LORD MOULTON.—The sums here were large. Was not the Court entitled, I will not say apart from evidence, to give great weight to inferences that the principal partner must have known it?]

Mr. DeGruyther.—The sum is trifling in this case: it is Rs. 200.

[THE LORD CHANCELLOR.—On the principle you have put, it comes to this: You say there is no evidence.]

Mr. DeGruyther.—Yes, my Lord.

[THE LORD CHANCELLOR.—That is not enough, because the Court may have thought there was enough evidence and have made a mistake. We

do not review mistakes. We only review gross violations of the natural principles of justice.]

Mr. DeGruyther.—Would it not show a miscarriage of justice if the facts are as I say? The point is really this. The charge is in connection with obtaining a refund of octroi duty. The firm were contractors with the Indian Commissariat Department and the Supply and Transport Department and they obtained a refund of octroi duty which they were entitled to on goods supplied for the use of the Government. An application was made to the Supply Department for the issue of a certificate of the quantity supplied to the Government, and the certificate bears an alteration and is forged in regard to the quantity. With regard to the application for the refund made to the Supply Department and the issue of the certificate by the Supply Department certain witnesses were called from the Supply Department and every one of them came into Court and said: I cannot say which member of the firm it was. All the members of the firm carried on this business and one or other of them at one time or another came and made this application.

[THE LORD CHANCELLOR: They all agreed that the firm made it. The only question was whether the senior partner knew of it, and the Court held that he did know].

Mr DeGruyther: The Court has held that the senior partner committed the offence without reference to the other partners. May I read one passage in the judgment to your Lordships. The judgment says: "In the present case the Prosecution avers that the accused and no other member of the firm perpetrated these frauds."

[THE LORD CHANCELLOR: That is the charge and the Court heard it and the Court held that there was evidence that the agents of the principal did it and they came to the conclusion on the evidence that the principal partner did it. You say there was not enough evidence. There may have been an error, but this is not a Court of Appeal to review on the ground of error.]

Mr. DeGruyther: May I just indicate to your Lordships what the point is. The first point is in connection with the application. There is no proof whatever that the head of the firm either signed it or knew of it.

[THE LORD CHANCELLOR.—The Court has held that there was knowledge.]

Mr. DeGruyther.—They never held that there was; they inferred that he must have known.

[THE LORD CHANCELLOR.—Sitting as a tribunal of fact, they found that he did know it. They had the witnesses before them and he did not go into the box.]

Mr. DeGruyther.—No; my Lord. There is no provision made for that in India.

[THE LORD CHANCELLOR.—Evidence was called. Were people in his own employment called?]

Mr. DeGruyther.—The only person in his employment who was called was his Manager, but his Manager was called for the purpose of denying that he committed the offence himself, but even his Manager does not prove that any one of the applications was in the handwriting of the accused or that he made them. That is one part of the fraud.

[LORD MOULTON.—Did the accused call no evidence?]

Mr. DeGruyther.—No, my Lord.

[THE LORD CHANCELLOR.—That in itself, is a circumstance which the Tribunal may have attached importance to. You may say that this finding was, in your opinion, against the weight of evidence, but you cannot say that there was no evidence before the Court.]

Mr. DeGruyther.—What there was before the Court consisted of three facts: one was that this man was head of the firm; the second was that, being the head of the firm, the whole of the proceedings were nominally in his name, and the third was that the amount which had been received from the Octroi Department was credited in their books of account, but not in the handwriting of the accused, and there is nothing to connect the accused with it. There is no proof that he applied for the certificate to the Transport Department. There is no proof that when he went to the Municipal Authorities and asked for a refund of this money, that he himself did anything. The Municipal Authorities say that sometimes it was one member of the firm and sometimes another member of the firm. They were all entitled to ask for the refund. Can it be said that there is any evidence whatever that the accused, and no member of the firm, perpetrated these frauds?

[THE LORD CHANCELLOR.—I can see that there was room for the Court to draw an inference against him. They may have drawn it wrongly, but you cannot say it is a case in which there was no evidence at all. There was a great deal of evidence, circumstantial evidence it may be, to connect the accused with the offence. In their Lordships' opinion this case does not fall within the class of cases where they advise His Majesty to give leave to Appeal].

B. D. *Leave refused.*

GOURI SUNKER BYAS *v.* NIADER SING.

tion between a *chela* and a *sisya*. A *chela* is a personal attendant who may be raised to the rank of a *sisya*, but there is no evidence of any value that he was ever taken as a *sisya*. Evidence has been given that he earns his livelihood by selling powders and *sherbet*, how far that is a fact, I need not determine. He has failed to establish his status, and therefore his suit must fail. One of the persons called by the Plaintiff, Radha Kissen Kabani, is a respectable person. The only thing that he said about the Plaintiff was that he was always with the Sadhu since 14 or 15 years." "Sabharam was a Babaji"; "he was a Sadhu." It has been argued that a *yati* does not necessarily mean a sanyasi, and a passage has been quoted to me which says that a person is a sanyasi and *yati* who does work (Karma) without having any desire for the effect (falam) that the work would produce. He should not be *nivagin* and he should not be *akriya*. That is not the definition of a *yati* in the text that I have quoted. "*Yati*" means a Bhikshu, a sanyasi—an ascetic or anchorite. Some reliance has also been placed on certain texts quoted from a work called the Vaisnab Dharma Ratnakar. It is a sectarian treatise in which Vaisnabs are described as *asramis*. I do not think it is a work of any authority and in fact, judging from certain quotations placed before me, I am not prepared to attach any weight to the work. One of the passages was that a Brahmin who gives up the Brahmanic religion by holding the *danda*, is sure to go to hell after death and a sanyasi who also gives up his *sikha yagnopabit* is equal to a Chandal when alive and goes to hell after death. I have gone through the book and found certain outrageous passages relating to the life of Sankar-acharja of a most revolting character. It is only a sectarian work, of a controversial character meant to glorify the Ramnuj Vaisnabs. I hold that the Plaintiff's case fails in both respects. Sobharam was not a *yati* and the Plaintiff has not proved that he was his *sisya* or *sat-sisya* and it must be dismissed. The Defendants have proved that they are the legal heirs of the deceased and in my view they are entitled to his property. They have shown by producing a certified copy of a conveyance, that in 1878 some property was acquired in the District of Rohtak in the name of the Sadhu, and I accept the Defendant's evidence that the property was purchased by Sovaram, which shewed that he had not only not cut off his connection with his native village, but went there and acquired property of considerable value. There is also evidence that he attended the wedding ceremony of the Defendant Naidar Sing. This is uncorroborated by any other evidence, and I am not prepared to place much reliance upon it.

It is also clear from the evidence given on behalf of the Defendant that Sobharam kept money in different Marwari firms in Calcutta which carried interest; that he kept his money with two different firms and transferred his deposit from one firm to another. The man seems to have been well known in Burra Bazar. He lived there for a number of years, and it is very curious that not a single Marwari merchant, a great many of whom live in and near Monohar Das's Kotra, has been called, nor any of the members of the firms or their gomastas with whom the money is now in deposit. Witnesses belonging to the old firm which kept his money have been called on behalf of the Defendant. One of them, a Marwari gomasta, said that he knew that Sobharam used to perform "*paths*" and was paid for them.

GOURI SUNKER BYAS *v.* NIADER SING.

The suit must be dismissed and dismissed with costs. There is not the faintest chance of the Defendant realising any of the costs from the Plaintiff. I was asked to make Kanhai Lall responsible for these costs, but there is no evidence justifying it.

Mr. Mullick—The rule will be discharged with costs and we are also entitled to the costs incurred before the Registrar on giving security.

CHAUDHURI, J.—Yes.

Mr. Mullick—We have put in certain books of various firms. May we have them back on putting in copies of the entries.

CHAUDHURI, J.—Yes.

Babu Achal Nath Mitter, Solicitor for the Plaintiff.

Babu Amar Nath Ghose, Solicitor for the Defendant.

A. K. G. *Suit dismissed with costs.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

1913,
Heard, 6 & 7, August.
Judgment,
3, November.

RAJA DURGA PRASAD SINGH
v.
RAJENDRA NARAYAN BAGCHI, since deceased, and others.

Indian Evidence Act (I of 1872), sec. 92—Written lease, evidence to vary terms if admissible—Agreement to take reduced rent, not registered, if admissible—Want of consideration—Transfer of Property Act (IV of 1882), sec. 107—Evidence of negotiation, if admissible—Lease of land specified by boundaries—Evidence to prove that area stated and not exist, if admissible—Abatement of rent, tenant's claim of—Onus—Tenant deprived of a portion of land by form of injunction, erroneously decreed, in landlord's suit to restrain encroachment by tenant on khas *lands.*

Where an annual rent of Rs. 2,800 was reserved in a lease, a subsequent agreement whereby the landlord agreed to take a reduced rent of Rs. 2,000 a year only would for want of registration be inadmissible in evidence and would also be unenforceable for want of consideration.

The receipt by the landlord of a reduced rent for some years, in the absence of reliable and admissible evidence to prove such an agreement, was held to be consistent with the reduction having been a mere voluntary and temporary abatement.

Where the area of demised land, which was described in the lease as lying within certain specified boundaries, was stated therein as 400 bighas, extrinsic evidence was not admissible to show that there was not the stated area within the specified boundaries.

Extrinsic evidence as to the negotiations which led up to the contract was inadmissible to vary the construction of the lease.

Where after a permanent lease had been executed, the landlord sued the tenant for alleged wrongful entry upon his khas *land by the tenant and prayed for an injunction to restrain the tenant from committing such trespass, but the Court instead of granting the injunction as prayed decreed that the tenant be restrained from dealing with property lying outside the demised mouzah "as delineated in the map prepared by the Civil Court Amin," and the tenant preferred no appeal against the decree:*

Held—*That it was not intended by that decree to reduce the area of the land which the tenant was entitled to deal with under his lease, and in a suit for arrears of rent he could not claim an abatement of the rent if in fact the injunction, which was*

provis.

RAJA DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BAGCHI.

granted in wider terms than were called for, had that effect, as he did not avail himself of his remedy by way of appeal and submitted to the decree.

Where the tenant tendered a reduced amount of rent and interest, on the plea that owing to his having not been given possession of the entire area demised, he was entitled to an abatement of rent but no ground was made out by the tenant for such abatement, the tender was not a good tender.

It is for the tenant to make out a case, if he has one, for an abatement of the fixed rent.

This was an Appeal from a Judgment of the Calcutta High Court (Doss, and Richardson, JJ.) which is reported in I. L. R. 37 Cal. 293. The facts of the case sufficiently appear from the said report and the Judgment of their Lordships of the Judicial Committee.

Mr. L. DeGruyther, K. C., and *Mr. J. M. Parikh* for the Appellant submitted that the lessee was not entitled to any abatement. The boundaries specified in the lease were quite definite and certain and the rights of the parties were governed by it. The mention therein of 400 bighas was a mere description. There was evidence that the land had not been measured by the lessor. In fact the Defendant himself deposed that the 400 bighas were fixed by guess and not by any measurement. Further the covenant in the lease provided that the rent was never to be varied. Even supposing that the area governs, the Defendant could not claim abatement. He could rescind the lease and we were willing to do so. Both parties being under a mistake of fact the contract was void under secs. 13 and 20 of the Indian Contract Act. And further, the Defendant has failed to prove that he was not in possession of what was leased to him. In his evidence he deposed that he got possession of the entire land leased to him. But his case is that he had since been dispossessed by virtue of the decree made in the suit of 1902. His remedy was to appeal against it, but he did not. In any case it was not proved that he had in fact been dispossessed by the lessor from the land leased.

Sir Earle Richards, K. C., and *Mr. Bhugwandin Dubé* for the Respondent submitted that the conduct of the parties both before and after the execution of the lease shewed that the dominant intention of the parties was that the area was to govern the rights. The rent was calculated on the basis of acreage, and the lessor throughout stated that 400 bighas of land were leased. The boundaries were uncertain, and the Amin who inspected the locality and drew a map deposed that he could not make a map upon the the basis of the boundaries in the lease. The Respondent was entitled to abatement of rent for the deficiency. The Amin's evidence was uncontradicted and he swore that we had only 275 bighas in our possession. It must follow that we have been evicted from the rest of the land. The injunction passed in the suit of 1902 made it illegal for us to work beyond the 275 bighas. Reference was made to the following authorities: *Mortlock* v. *Buller* (1), *Hill* v. *Buckley* (2), *McKenzie* v. *Hesketh* (3) where rent was proportionately reduced. *Doe* v. *Meyler* (4). William's Vendors and Purchasers, p. 630 (3 Edn.). Woodfall's Landlord and Tenant, p. 478. *Gopanund Jha* v. *Gobind Purshad* (5).

(1) 10 Ves. 292 (1804).
(2) 17 Ves. 394 (1810).
(3) 7 Ch. D 675 (1877).
(4) 2 Maule & Selwyn's Rep. 276 (1814).
(5) 12 Suth. W. R. 109 (1869).

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Mr. L. DeGruyther, K. C., in reply referred to *Llewellyn* v. *Earl of Jersey* (6). He submitted that the eviction, if any, was due to the decree of a competent Court from which the Defendant could have appealed. He did not do so. But in any case he was not entitled to any compensation or abatement.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an Appeal by Raja Durga Prasad Singh, the Plaintiff, from a decree, dated the 26th August 1909, of the High Court at Calcutta, which varied a decree, dated the 27th April 1907, of the Subordinate Judge of Manbhum in a suit for arrears of rent, cesses, and interest, which was brought on the 15th August 1906, in the Court of the Subordinate Judge of Manbhum, upon a mokurari kabuliyat of the 3rd December 1894

The kabuliyat was executed by Rajendra Narayan Bagchi, now dead, who, with others who derived title through him, was a Defendant to the suit. The pottah, corresponding to the kabuliyat, was executed by Raja Jaimangal Singh, now dead, the original lessor, whose interest vested before suit in the Plaintiff. In the kabuliyat, Rajendra Narayan Bagchi acknowledged having received from Raja Jaimangal Singh a pottah corresponding to the kabuliyat, and stated that "On the agreement that the heirs and representatives of both of us, yourself and myself, shall be bound by all the terms and conditions of the pottah and this kabuliyat, I execute this mokurari maurasi kabuliyat." The pottah has not been put in evidence in this suit, but it has not been suggested by either side that it differs in any material respect from the kabuliyat or that anything turns upon the construction of the pottah.

The material words of the kabuliyat so far as it affects the matters in issue in the suit are as follows :—

"I, having applied to get from you a settlement of the rights of cutting, raising, and selling, etc, the coal underneath the 400 bighas of land described in the schedule below, within mouzah Dobari, in pergunnah Jharia, recorded in towzi No. 8 of the district Manbhum Collectorate, and which is within the zemindari owned and possessed by you in ancestral right, and you having granted my application, I hereby execute to you a mokurari permanent maurasi kabuliyat for 400 bighas of land as per boundaries below, within the said mouzah and which will be enclosed by me on putting up masonry pillars at my own cost and according to demarcation made by you for your taking from me Rs 8,400 as salami and fixing an annual mokurari rental of Rs 2,800 for the rights in coal under the said 400 bighas of land; and I agree that year after year and according to the instalments, I shall pay to you into your zamindari kachari, every year in three instalments, the fixed rental and also the road and public works cesses and other taxes and cesses payable by me according to law, that may be imposed in future by Government, namely, in Sraban of each year, Rs. 900, in Aghran Rs. 900, and in Chaitra Rs. 1,000 out of the rental fixed; and after taking dakhilas for the same according to the usage in vogue in your serishta, I shall thereupon enjoy and continue to enjoy from generation to generation all the rights in the coal under the 400 bighas by cutting, raising and selling the same after making the said coal fit for the market, and vested with the power of gift, sale and all kinds of assignment of the same according to pleasure. The rental fixed shall never on any account be varied. . . . If I fail to pay any instalment of the rent or cesses, then for the unpaid instalment money, I shall pay interest at the rate of rupee one per cent. per mensem from the date of the lapsed instalment till the date of payment. If I fail to pay six consecutive instalments of the rent or cesses, &c., then on the next date of instalment you will be entitled to bring the settled coal lands into your khas possession. . .

(6) 11 M. & W. 183 (1843).

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According to this kabuliyat I become vested with the right and title to the coal under the settled land from to-day. I shall have to pay nothing for the year 1301 B. S. as rent or cesses, &c. From the year 1302 B. S., I shall continue to pay the entire rent Rs. 2,800 by proper instalments. You are not liable to me for the return of the above amount of selami (premium) or for any other matter."

The schedule which is referred to in the kabuliyat is as follows :

SCHEDULE OF THE BOUNDARIES.

"On the south—boundary line of mouzah Fatehpur, as per thak.

"On the west—boundary line of mouzah Jharia Khas, as per thak.

"On the east—border of the 100 bighas of land settled with Gopal Krishna Roy and others and the Chatkari jore.

"On the north—boundary line of mouzah Bherakata as per thak, and the Chatkari jore.

"Right in the coal underneath the 400 bighas of land, within these boundaries."

The Plaintiff in his plaint alleged that default had been made in the payment of instalments of the fixed rent and of the cesses, and claimed a decree for Rs. 23,868 in respect of principal and interest and further reliefs. So far as is now material, the Defendants to this suit by their written statement alleged, that the coal underneath 400 bighas of land in mouzah Dobari had been demised by Raja Jaimangal Singh to the Defendant Rajendra Narayan Bagchi ; that they had not been given possession of the underground rights of the 400 bighas of land ; that they were entitled to an abatement of the rent which had been fixed by the kabuliyat ; and that they had made tenders of the rent which, according to them, was due, and consequently denied that the interest which was claimed by the Plaintiff was payable. Their tenders were based upon a reduced rent. It appears that the grounds upon which the Defendants alleged that the Plaintiff was not entitled to the rent fixed by the kabuliyat, and was entitled only to a reduced rent, were that Raja Jaimangal Singh had, according to them, in 1898 reduced the fixed rent from Rs. 2,800 a year to Rs. 2,000 a year on the representation of Rajendra Narayan Bagchi, that the coal which had been demised was of inferior quality and could not be sold as steam coal, and that under part of the land no coal was found ; and that by an injunction which was decreed on the 15th December 1902, in a suit which had been brought by the present Plaintiff on the 26th April 1902, the right of the Defendants to work coal under the demise was restricted to an area of 274 bighas 4 cottahs. The Defendants further alleged in their written statement that they had paid the cesses direct into the Collectorate, and denied that the Plaintiff was entitled in law to get any cesses. The Defendants claimed to set off *pro tanto* certain costs and interest thereon which had been allowed to them as against the Plaintiff by the decrees in the suit of the 26th April 1902.

The Subordinate Judge of Manbhum held in this suit that the rent fixed by the kabuliyat had been reduced by Raja Jaimangal Singh to Rs. 2,000 a year, and that the Defendants were not entitled to any further reduction. He also held that the Defendants had tendered the amounts of the reduced rent, and consequently that the Plaintiff was not entitled to interest in respect of the amounts so tendered. The Subordinate Judge also found that the Defendants had paid the cesses direct to the Collector, and were not liable to pay them to the Plaintiff. The Subordinate Judge properly decided that the Defendants were entitled to set off the costs, with interest, awarded in the suit of 26th April 1902. From the decree

of the Subordinate Judge each side appealed to the High Court at Calcutta.

The High Court found that the document by which the Defendants sought to prove that Raja Jaimangal Singh had agreed to reduce the rent from Rs. 2,800 to Rs. 2,000 a year was, for want of registration, inadmissible in evidence to vary the terms of the kabuliyat, and that the alleged agreement for reduction of rent was without consideration and was not enforceable. On both points their Lordships agree with these findings of the High Court. There was no reliable and admissible evidence to prove that Raja Jaimangal Singh ever bound himself to accept a reduced rent. The fact that he did for some years accept a reduced rent is consistent with the reduction having been a mere voluntary and temporary abatement.

The High Court having found on evidence not contained in the kabuliyat that the rent of Rs. 2,800 a year had been fixed by Raja Jaimangal Singh and Rajendra Narayan Bagchi on the assumption that within the boundaries specified in the schedule to the kabuliyat there were in fact 400 bighas, concluded that the description by boundaries of the subject of the demise might be disregarded, and that the demise was a demise of 400 bighas, whether 400 bighas were or were not contained within the specified boundaries, and finding on the evidence of an Amin, which their Lordships will later consider, that within the specified boundaries there were not 400 bighas, and that the Defendants were in possession of only 275 bighas 3 cottahs 10 chittaks, the High Court decided that the Defendants were entitled to a proportionate abatement of the fixed rent.

Although, in their Lordships' opinion, the question as to what had been demised in 1894 turned upon the true construction of the kabuliyat, and that construction could not be varied by extraneous evidence as to the negotiations which led up to the contract which was, in fact, made, or by evidence showing that within the boundaries specified in the schedule to the kabuliyat there was not 400 bighas of land, their Lordships consider that it will be satisfactory to ascertain what evidence, if any, there is as to the actual bigha area of land within the boundaries specified in the schedule to the kabuliyat, and how it happened that the right of the Defendants to work coal was, at the time when the rent sued for accrued due, restricted, apparently, according to the High Court, to the coal under 275 bighas 3 cottahs 10 chittaks.

Before the lease by pottah and kabuliyat was made the land within the boundaries specified in the schedule to the kabuliyat had not been measured. There is no evidence to show that the land had, at any time, been measured by, or on behalf of, Raja Jaimangal Singh. The Defendant, Rajendra Narayan Bagchi, in his evidence in this suit, stated, "The 400 bighas were fixed by guess. It was not fixed by any measurement. When I took the settlement (the lease) it was settled that I would get 400 bighas of land. It was also settled that if the land was found to be less the deficit would be made good." He admitted that some months before the 26th April 1902 he had the coalfield in his possession measured by an Amin, but he stated that he did not remember how much land had been ascertained by that measurement. He said, "I never tried to ascertain the area myself." No evidence has been brought to their Lordships' attention which suggests that Rajen-

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dra Narayan Bagchi or any of the other Defendants ever complained to Raja Jaimangal Singh that they had not been placed in possession of the area or coalfield which had been demised in 1894. Raja Jaimangal Singh, who accepted in 1898 and subsequently a reduced rent, did so on the representation of Rajendra Narayan Bagchi that the coal was of inferior quality and was not saleable as steam coal, and that under part of the lands no coal had been found, and not on any representation or complaint that there were not 400 bighas of land within the boundaries specified in the schedule to the kabuliyat.

On the 26th April 1902, the present Plaintiff brought a suit against Rajendra Narayan Bagchi and others, who are either Defendants to this suit or are represented in title by Defendants to this suit. In his plaint of 1902 Raja Durga Prasad Singh alleged that the Defendants had wrongfully entered upon and worked his coal in mouzah Jharia Khas, and claimed damages and a perpetual injunction restraining the Defendants from cutting and raising the coal in Jharia Khas. In that suit of 1902 a Civil Court Amin was deputed to make measurements and to make a report. He made a report which is dated the 29th September 1902. It appears from that report that for the purpose of measuring and preparing a map he received but little useful or practical assistance from those who represented the Plaintiff, and that the Defendants pointed out to him the lands of which they alleged that they had been given possession under the demise of 1894. According to the Amin's report the lands so pointed out by the Defendants measured 346 bighas 4 cottahs 4 chittaks, but he reported that the boundaries of the lands which were pointed out to him by the Defendants did not agree with the boundaries as specified in the kabuliyat. In his report the Amin stated that of the 346 bighas 4 cottahs 4 chittaks, only 257 bighas 3 cottahs 4 chittaks were within mouzah Dobari. It is to be observed that the lands which the Defendants pointed out to the Amin included part of mouzah Jharia Khas, where the Defendants were alleged to have committed the trespass, and it is also to be noticed that the Plaintiff in the suit of 1902 had alleged in his plaint that he believed that the coal in Jharia Khas was of a better quality than the coal which had been demised to the Defendants, and found a ready sale in the market. The Amin prepared a map which was in evidence in the suit of 1902, and is in evidence in this suit. According to his report of 1902, it was not possible for him to lay down on the ground the northern, western, and southern boundaries of the Defendants' holding, as there was no field-book to show the bearing at the station points and the distances of the chain lines. The Amin was examined as a witness in this suit on the 27th March 1907, when he stated that he had made the map by relaying on it the lands of the Survey and the Thakbast map. It is to be observed that the boundaries according to the Survey map and the Thakbast map did not agree. In his evidence given in this suit the Amin stated that the area of the lands lying within the boundaries which were specified in the schedule to the kabuliyat were 275 bighas 3 cottahs 10 chittaks, and that in mouzah Dobari, according to the Thakbast, there are 788 bighas 15 cottahs and 2 chittaks of land. If the statements as to areas, which will later be referred to, contained in the Judgment of the Subordinate Judge in the suit of 1902 and in the Judgment of the High

Court in Appeal in that suit, be correct, the Amin must have confounded the areas shown by the Revenue Survey map with the areas shown by the Thakbast map. No reliable conclusion as to areas can be drawn from the report or from the evidence of the Amin.

The Subordinate Judge in the suit of 1902, in his Judgment of the 15th December 1902, stated that "The Amin's report shows that out of the 400 bighas let out to the Defendants, they are in possession of 346 bighas 4 cottahs and 4 chittaks only. Measuring according to the Survey map, 86 bighas and 8 cottahs of this fall within mouzah Jharia Khas and Fatehpur, and 2 bighas 13 cottahs and 5 chittaks fall within mouzah Bharakata, and 257 bighas 13 cottahs and 4 chittaks only fall within mouzah Dobari. But measured according to the Thak map, the whole of the land in the Defendants' possession, excepting 1,600 square feet, falls within mouzah Dobari." In that suit the Subordinate Judge found that the Defendants had trespassed on the Plaintiff's coal to the extent of 1,600 square feet. On the 15th December 1902, the Subordinate Judge "decreed that an injuction be issued to the effect that the Defendants do not carry on operations outside mouzah Dobari, as delineated in the map by the Civil Court Amin, according to the Thakbast map, and that the remaining portion of the claim be dismissed." Except that an injunction was granted, the suit was dismissed with costs. Whether intentionally or carelessly it is difficult to say, but the injunction which the Subordinate Judge granted was wider in its operation than was the injunction which had been asked for in the plaint of that suit. The Subordinate Judge should have confined himself to the question which he had to determine, which was whether the Defendants had committed a trespass by working coal in the Plaintiff's mouzah Jharia Khas, and having found that the trespass had been committed, he should have confined the injunction to be granted to the injunction which the Plaintiff had asked for, namely, an injunction restraining the Defendants from trespassing in mouzah Jharia Khas. The Subordinate Judge was not concerned with the extent of the area demised in 1904 in mouzah Dobari. The result is that the Defendants are restrained from working coal outside the limits of mouzah Dobari, as delineated, correctly or incorrectly, by the Amin in his map, which he stated that he had prepared according to the Thakbast map.

From the decree of the 15th December 1902 of the Subordinate Judge, the Plaintiff appealed to the High Court at Calcutta. The Defendants submitted themselves to the injunction which had been granted, and did not appeal. The learned Judges of the High Court who heard the Appeal stated in their judgment that "The area demised to the Defendants was 400 bighas within Dobari, but they actually hold only 346 bighas. This actual area belongs to Dobari, if the boundaries of that village be taken according to Thakbast map, but only 257 bighas of it belong to that village according to the Revenue Survey map. It is possible that 346 bighas were leased to the Defendants as 400 bighas, but it seems impossible that only 257 bighas could have been leased to them as 400." The High Court dismissed the Appeal with costs. But whatever may be the area in bighas within mouzah Dobari of the land which the Defendants pointed out to the Amin as being in their possession, it is obvious to their Lordships that

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the Subordinate Judge and the High Court considered that the Defendants had 346 bighas of land within mouzah Dobari underneath which they might lawfully continue to work the coal under their kabuliyat, and that the Subordinate Judge had not intended that the injunction which he was granting should have the effect of reducing to 257 bighas the area in mouzah Dobari within which the Defendants might lawfully work the coal under the kabuliyat. Their Lordships have no means of ascertaining what was in bigha measurement the area in mouzah Dobari to which the Defendants were restricted by the injunction of the 15th December 1902, and whatever that area may in fact be, it must be borne in mind that there is no evidence to prove that the lands which the Defendants pointed out to the Amin were the lands of which they had, in fact, obtained possession in 1894.

It was for the Defendants to make out a case, if they had one, for an abatement of the fixed rent. On this part of the case their Lordships find that the Defendants have not proved how many bighas in fact were contained in the area of mouzah Dobari which is within the boundaries which are specified in the schedule to the kabuliyat, and they have not proved the area in bighas within those boundaries of which they were put in possession. They have not proved that the area which they pointed out to the Amin was the area of which they obtained possession under the kabuliyat. They have not proved that otherwise than by the action of the Court of the Subordinate Judge in the suit of 1902, in granting the injunction in the form in which it was granted, and by their own neglect to appeal from that decree, they have been deprived of the right to work any coal which otherwise they would have been entitled to work under the demise. The action of the Subordinate Judge in granting the injunction in the form in which it was granted gave the Defendants no right which they could enforce by suit, or of which they could avail themselves as a defence to a suit for the fixed rent, although the injunction probably restricted their right to work the coal which had been demised in 1894; they had their remedy by way of appeal from the decree which granted the injunction, but they did not avail themselves of it. In their Lordships' opinion the Defendants have failed to prove any facts which would entitle them to any abatement of the rent fixed by the kabuliyat.

It follows from what their Lordships have said that the tenders in respect of rent, and interest upon arrears of rent, which the Defendants relied upon, having been tenders based on a reduced rent, were not good tenders either as tenders of rent, or of interest on arrears of rent, and were ineffective.

The High Court in the appeal in this suit found that the Defendants had not proved that they had paid to the Collector the cesses and taxes which under the kabuliyat they were bound to pay to the Plaintiff, and gave the Plaintiff a decree for Rs. 301-3-0 in respect of cesses, calculated on a reduced rent; the Plaintiff is entitled to recover the sum of Rs. 525 in respect of cesses, the only defence pleaded as to the claim in respect of cesses having failed.

Their Lordships will humbly advise His Majesty that this Appeal should be allowed, and that the decree of the High Court should be varied by decreeing the Appellant's claim for Rs. 23,868 0 0 less

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Rs. 3,083-7-9 costs, due by the Appellant to the Respondents in respect of the previous suit of the 26th April 1902, with interest at the rate of Rs. 6 per centum per annum from the date of suit until realisation on the balance decreed, namely on Rs. 20,784-8-3, with costs in the Court of the Subordinate Judge, and on Appeal in the High Court.

The Respondents must pay the costs of this Appeal.

Solicitor: *Mr. E. Dalgado* for the Appellant.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

B. D.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES NOS. 219 AND 296 OF 1909.

CHITTY, J.	
TEUNON, J.	KRIPASINDHU ROY PITAM,
1913,	Defendant, Appellant,
Heard,	*v.*
28, February,	MOHUNT PARMANAND
3, March and	DAS GOSWAMI and
28, April.	others, Plaintiffs,
Judgment,	Respondents.
4, June.	

Sarbarakar *(in Orissa), status of, if that of tenure-holder—Dalbehera* jagirs, *resumption and settlement of—Effect—Lands reserved to Dal beheras at resumption, tenure in.*

The jagirdars *of the military* jagirs *into which, under Native Princes, the greater part of Killah Khurdah (in Orissa) was parcelled out (styled the Dalbeheras) and native revenue officers known as Pradhans, Bhuimals, Kotekharans, Kowri-Bhagias, when the* jagirs *were resumed by the British Government, engaged with Government under the denomination of* sarbarakars *for the collection and payment of the revenue assessed by it.*

Held, *on the evidence, that although from 1818 onwards the tendency of Government and of the majority of its officers was to regard the* sarbarakars *as mere office-holders, they themselves had never before 1861, distinctly acknowledged that this was their position, and on the other hand had asserted their status as tenants and there were circumstances connected with their tenure of the lands which militated against the Government's view of their position as servants and their status under their engagement with Government was something higher than that of servants.*

That from 1861 to 1896, Defendant No. 1, the present sarbarakar, *and his father before him were regarded and treated as tenants and they have successfully asserted their status and maintained their possession as such.*

That the Defendant No. 1's status is that of a tenure-holder.

Sarbarakars *who were originally Dalbehera* jagirdars *could not in any case be ejected from lands which were reserved to the Dalbeheras at the general resumption of the* jagirs.

This was an Appeal preferred on the 17th of May 1909 against the decree of Babu Jogendra Nath Mukherjee, Subordinate Judge of Cuttack, dated the 22nd of March 1909.

The facts of the case will sufficiently appear from the judgment.

In No. 219 of 1909. *Babu Girish Chandra Pal* for the Appellant.

Babus Sarat Chandra Ray Chowdhury, Charu Chandra Bhuttacharjee and *Shib Chandra Palit* for the Respondents.

In No. 296 of 1909. *Babus Sarat Chandra Ray Chowdhury* and *Charu Chandra Bhuttacharjee* for the Appellants.

Babu Girish Chandra Pal for the Respondent.

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The JUDGMENT OF THE COURT was as follows :—

The suit out of which these 2 cross-appeals arise relates to 2 Mouzahs, Bande and Koranga, and a half share in a 3rd Mouzah Sardhapore all comprised within Gurh Atiri situated in Killah Khurdah in the District of Puri.

From the Government publication, entitled "Selections from the Correspondence on the Settlement of the Khoordah Estate," we find that Killah Khurdah formed part of the Crown lands of the Native Princes who once ruled over Orissa, and at the time of the British Conquest was in the possession of their descendant Rajah Mukund Deo. In 1804 Rajah Mukund Deo rebelled, and thereupon his estate was forfeited to Government and has ever since been treated as a khas mehal.

Under its Native Princes the greater part of Khurdah was parcelled out into Jaghirs, the holders of which were bound by the terms of their tenure to perform certain services, and also in some, if not in all, cases to pay a light quit rent. The most numerous and important class of *jagirdars* consisted of the Dalbeheras or hereditary Military Chiefs, having under them a body of "Paiks" performing police and military duties. The *jagirs* of these Dalbeheras were known as Gurhs and Gurh Atiri appears to have been originally a *jagir* of this nature. Whether the Dalbeheras were also responsible to the Rajah for the revenue assessed on the lands within their several *jagirs* is not clear but whether working as village communal officers, or under the Dalbeheras or directly under the Rajah's Sadar Sherista were a number of Revenue Officers known as Padhans, Bhuimals, Kotekharans, Kowri-Bhagias, and by other titles, all remunerated by service lands.

The British occupation was followed by a number of successive settlements of land revenue. At the earlier of these settlements, *jagirs* (other than the lands in the immediate possession of the *jagirdars*) were in general resumed. Apparently, in part compensation, the Dalbeheras and the revenue officers above referred to were admitted, when willing to do so, to engage, under the denomination of *sarbarakars*, for the collection and payment of the Government revenue assessed on their several Gurhs or villages.

From Exhibit "E," a *hukumnamah*, dated 7th March 1823 and signed by Mr. Wilkinson, the Deputy Collector then in charge of Khurdah, we find that at that time and for the settlement of 5 years from $\frac{1231}{1824}$ to $\frac{1235}{1828}$, the *sarbarakars* of Gurh Atiri were Parmeswar Ray Pitam Dalbehera, Charan Gajendra Kowri-Bhagia, Pindik Das Bhuimal, Dina Bandhu Mahanty Kotekharan and Lokenath Santra Behera Padhan. From Exhibit "F," a similar *hukumnamah*, dated 17th January 1831, we find that in the settlement of $\frac{1238}{1831}$ to $\frac{1247}{1840}$ Parmeswar Ray Pitam Dalbehera became the *sarbarakar* for the 2½ mouzahs now in question. This settlement is known as the "Decennial Settlement" and was in fact extended to 1856. In 1856 the Decennial Settlement was followed by what is known as the "Noyabadi" settlement for a term of 24 years from 1857 to 1880. From *hukumnamah*, Exhibit "G," dated 2nd August 1856, we find that the *sarbarakar* at that time of these 2½ mouzahs was Brindaban, the son of Parmeswar. Of the other half of Saidhapur, and of a 4th Mouzah named Atiri the *sarbarakar* at the settlement of 1857 was admittedly Gajendra Charan

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Kowri-Bhagia and of a 5th, Mouzah Chulupalang the *sarbarakar* was Juggernath Das Bhuimal, the descendant of Pindik Das.

From Ex. 6, para. 7, we learn that the Gurh had been divided into 5 Kismats the remaining two being the Kotekharan and the Behera-Padhan.

During the currency of the 24 years' settlement made in 1850, that is to say in 1861, the Government of Bengal decided to discontinue an allowance of salt granted in the times of the Hindu Rajahs to 20 Mathdharis or Mahants of Maths in Puri, associated with the worship of the God Juggernath Mohaprabhu. In lieu of this allowance Government by its letter, 437A of 13th September 1861 (Ex. 1), made to the Mathdharis a grant of Gurh Atiri. The orders of Government were communicated to the local officers in the Board of Revenue's No. 1001 of 19th September and thereupon, on the 10th November 1861, Gurh Atiri, described as comprising 3 Kismats, Kismat Dalbehera, Kismat Kowri-Bhagia and Kismat Bhuimal, *i.e.*, the 5 villages Bandeh, Koaranga, Satdhapur, Atiri and Chulapalang, was struck off the revenue roll and made over to the possession of the Mathdharis with effect from the beginning of the year 1269 (v. Exh. K)

For some time the local officers appear to have been in doubt whether the grant by Government represented a grant of the five villages or merely an assignment of the revenue payable by the *sarbarakars*. We find these doubts and the consequent difficulties discussed in Ex. 4 (letter 637 of 9th November 1875 from the Board of Revenue to Government), Ex. 6 (letter 364 of 24th March 1879 from the Commissioner to the Board of Revenue) and Ex. 5 (letter No. 185A of the 31st May 1880 from the Board of Revenue to the Commissioner). These doubts should have been set at rest when in 1875, in its No. 2755 of 25th November (Ex. 3), Government repeated or confirmed the grant to the Mathdharis of Gurh Atiri but in Ex. 5 already referred to, the Board of Revenue in 1880 found it necessary again to explain the position and to enjoin upon the local officers the necessity of refraining from all interference with the Mathdharis in the management of their properties. In the written statement in the present suit we further find a suggestion that the grant was made not to the Mathdharis but to the God Juggernath Mohaprabhu. This suggestion is also negatived by the terms of the grant (Exs. 1 and 3) and by the correspondence contained in Exs. 4, 5 and 6.

As we have already stated Gurh Atiri was transferred to the Mathdharis during the currency of the 24 years' settlement made in 1857. That settlement expired in 1880 but in the khas mehal portion of Khurdah was extended to 1882, when it was followed by the first Cadastral Settlement of the Estate, a settlement which remained in force from 1882 to 1897. That again was followed by the new current settlement made under the provisions of Chap. X of the Bengal Tenancy Act.

Neither the settlement of 1882 nor the settlement of 1897 affected Gurh Atiri which had become the property of the Mathdharis. When the khas mehal portion of Khurdah was under re settlement in 1880-82, the Mathdharis apparently did nothing, but in 1897 whether at the instance of the Mathdharis or at the instance of Government, under the provisions of sec. 101 of the Bengal Tenancy

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Act, the making of a survey and the preparation of a record-of-rights in respect of the lands in Gurh Atiri was undertaken. The records were finally published and the proceedings completed apparently in 1899 (v. Exhts. 16a, 16b, 16c and Q, also para. 9 of the plaint). Meanwhile, some time about 1889, Kripasindhu Roy Padhan, Defendant No. 1, had succeeded his father Brindaban in the position of *sarbarakar* of Mouzahs Bande, Karanga, and Sandhapur (8 annas).

In the record-of-rights of Mouzah Bande (Exh. 16c) Kripasindhu is recorded as the holder of two plots of *Sarbarakari jagir* measuring 8,170 acres and similarly in the record of Mouzah Panasabasta (Ex. 9) he is shown as holding 6 plots of *jagir* measuring 19,077 acres. Otherwise he is not recorded as having any interest in any of the mouzahs in which he is or was *sarbarakar*.

On the 21st August 1873 in suit No. 116 of that year (v. the decree filed and admitted in evidence in this Court Exh. App. A) the representatives of the 20 Mathdharis partitioned Gurh Atiri and on this division the Dalbehera Kismat, that is the 2½ villages now in suit, fell to the Mahanta of 11 Maths.

On the 20th December 1899 the Mahants of these 11 Maths served upon Kripasindhu a notice of dismissal and as they failed to obtain or to retain possession, the suit out of which these appeals arise was instituted on the 5th October 1907. The 8 Plaintiffs and *pro formâ* Defendants 13 and 14 now represent the 11 Maths to which the villages in dispute fell at the partition of 1873.

The case of the Plaintiffs is that Defendant No. 1, his father and grandfather before him were mere officers or servants first of Government then of the Mathdharis, liable to dismissal for misconduct during the currency of a settlement, and having no right to any renewal of their appointments at the close thereof. They therefore sued for the ejectment of Defendant No. 1 from the 2½ mouzahs in suit, and also from the *jagir* lands recorded in his name in villages Bande and Panasabasta.

Defendant, on the other hand, contends that he and his ancestors were and are tenure-holders not liable to dismissal or summary ejectment and that he held the *jagir* lands in Bande and Panasabasta as Dalbehera and not as *sarbarakar*.

The Sub-Judge found that the Defendant was not a proprietary tenure-holder; at the same time he also held that he was not a mere servant, that his succession to the right or office of *sarbarakar* had been recognised by the Plaintiffs and that on his executing a kabuliyat undertaking during the currency of the present settlement to pay to the Plaintiffs year by year a sum equivalent to 80 per cent. of the rent assessed on the raiyats or tenants in the record-of-rights proceedings, he was entitled to retain possession. Against the decree both parties have appealed, and in the appeals the two questions that have been argued are (1) whether Defendant No. 1 is a tenure-holder or a servant and (2) whether his *jagir* lands in Bande and Panasabasta are his Dalbehera or his *sarbarakari jagir*. We may take both these questions together.

Of the documents independently exhibited in the case, the earliest in date are the *hukumnamahs* (Exs. "E., F and G") of 1823, 1831 and 1856. These are all addressed to the raiyats of the villages, direct them to pay rents to the *sarbarakar* at the assessed rate and recite that the *sarbarakar* or *sarbarakars* have executed

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kabuliyats or engagements for the term of the several settlements. Now when in 1861 Gurh Atiri was made over to the Mathdharis these kabuliyats or at least the kabuliyats of the then current settlement should in ordinary course have been made over to them. In 1865 (v. Exh. L) we found them suing Brindaban on his kabuliyat of 1856. We may therefore safely infer that the Plaintiffs have in their possession or have access to these kabuliyats or some of them or copies of them. When the appeals came on for hearing on the 28th of February we therefore thought it right to give the Plaintiffs a further opportunity of producing either the original kabuliyats or certified copies of one or more of them, but on the 28th of April when the appeals were finally heard, the pleader for the Appellants was still unable to produce any of these documents. He then placed before us certified copies of applications made to the Collector of Puri for certified copies of the kabuliyats executed by the *sarbarakars* in 1831, 1844 and 1856, but none *re* the the kabuliyat of 1823 The kabuliyats of which copies were applied for, it appears, could not be found. Apart from this no explanation of the non-production of the kabuliyats has been given in evidence and we can only infer that if produced they would not support or would not wholly support the Plaintiff's case. In this conclusion we are strengthened by such references to the kabuliyats as we can find in exhibited documents. Thus in his letter No. 304 of 24th March 1879 (Exh. 6) Mr. Smith, then Commissioner of the Orissa Division, in a marginal note to his para. 13 writes :—"The old form of agreement was somewhat that of a farmer and somewhat that of a servant."

Again in his note, dated 5th October 1880 (Selections, Vol. 2, p. 258), Mr. Metcalfe, then Commissioner, writes as follows :—*Sarbarakars*............have hitherto held their office under agreements which for purpose of reference have been called A. B. C. and D. Forms A and D were drawn up so far back as 1836........It has been held that the position of a *sarbarakar* holding under agreement A was that of a Mustagir" (lessee)...*Sarbarakars* holding under D agreements were considered by Mr. Smith to be in the position of farmers." Similarly in his No. 86 of 15th December 1879 Mr. Armstrong, then Collector of Puri, when forwarding the Settlement Officer's rate report for the purposes of the impending cadastral settlement of the khas portion of Khurdah, writes as follows :—"The new form of agreement for *sarbarakars* is a vast improvement on the old *sanad* which left their position very doubtful. It might however be still further improved by an acknowledgment on the part of the *sarbarakar* that he is a servant of the Government (Sel. Vol. II, p. 130, para. 22).

We next proceed to examine the documents contained in the 2 volumes of Selections in so far as they throw any light on the position of Dalbeheras and *sarbarakars* prior to the transfer of Atiri in 1861.

In 1817 occurred the insurrection of Jagabandhu Mahapatra, the hereditary Bukshi or Commander of the Forces to the Rajahs of Khurdah. The rising was quickly suppressed and, soon thereafter, an officer named Mr. Ewer was appointed Commissioner to enquire into the affairs of Orissa. On his report, dated 13th day of May 1818, that is on the portions dealing specifically with Khurdah (v. Selections, Vol. I, pp. 58, to 61 and p. 90, para. 235), the description of affairs contained in the first portion of this judgment has been

largely based. From his report (v. pp. 12, 61-3) we further find that in the settlements of Major Fletcher and Gholam Kadir from 1804 to 1817 the *sarbarakars* were permitted to appropriate to themselves whatever they could realise from the raiyats over and above the sum which they themselves had engaged to pay to Government provided only that they adhered to certain imperfectly ascertained or wholly undefined rates and had thus, in Mr. Ewer's opinion, been given an interest of some sort in the soil.

Soon after Mr. Ewer's report followed the settlement of Khurdah for the years 1818 to 1820. The report on this settlement dealing more particularly with the year 1819-1820 is by Mr. Forrester, a Deputy Collector placed in 1818 in special charge of Khurdah, and is dated 17th October 1819. In this report (v. Selections, Vol. I, p. 105 *et sequitur*) Mr. Forrester states that he had in general admitted as *sarbarakars* the persons who had entered into engagements at the preceding settlements, that he had reverted to the rates fixed for different classes of land in the different villages by Gholam Kadir in $\frac{1218}{1808}$, that the *sarbarakars* were bound by their engagements to adhere to those rates and not charge more than 4 annas per man on new cultivation, and that they had no proprietary right in their Gurhs or villages (paras. 47, 8, 10 and 50). He further speaks of the general resumption of the *jagir* lands that had taken place after the rebellion of Rajah Mukund Deo and his followers, and states that with the previous approval of Government he had exempted from quit rent the small portions of *jagir* lands reserved for the Dalbeheras and some of the Dalvis, and in order to secure their more active assistance in police matters proposed some small augmentation to the reserved areas. (Paras. 63, 49 and 67). In Government's letter No. 8 of 24th December 1819, the Governor-General in Council confirmed Mr. Forrester's settlement, extended it to the close of the year 1228 (1821) and approved his suggestion for the improvement of the condition of the Dalbeheras (Selections, Vol. I, pp. 121-2, paras. 17, 18 and 24).

Mr. Forrester was succeeded by Mr. Wilkinson and in the selections we next find Mr. Wilkinson's report dated the 24th October 1836 on his settlement of Khurdah for the year $\frac{1238}{1831}$ to $\frac{1247}{1840}$ (Selections, Vol. I, p. 123). In this report he refers to a settlement made by him in 1825 for a period of five years. This is evidently the settlement referred to in *hukumnamah* Exh. E and though for five years in fact remained in force up to 1836. Mr. Wilkinson then proceeds to say that during the currency of the five years' settlement he had deputed officers to measure the lands in the estate, had fixed rates for the several descriptions of land, had distributed to the cultivators pottahs specifying their fields, areas, and rent assessed, and had then taken from the old *sarbarakars* engagements or agreements for the payment of the aggregate of the raiyati rents less 20 per cent. in lands and money. (Selections, Vol. I, pp. 123 126, paras. 4, 8, 10 and 11). He further stated that in this 20 per cent. he had included the assessed or estimated rents of the *jagirs* reserved for and confirmed to Dalbeheras and Dolois by Government orders dated 1st August 1822, and also the rent of additions to such *jagirs* made in subsequent settlements. In the 14th para. of his report he describes the classes of persons who as *sarbarakars* had entered into engagements for the collection and

payment of Government revenue. From this we find that the Kotekharan, the Bhuimal and the Kowri-Bhagia were officers in the nature of accountants who had been admitted to engage jointly with the Dalbeheras of their Gurhs, and that Padhans or Behera-Padhans were officers appointed for the superintendence of cultivation and the collection of rents in villages held directly by the Rajah or his chief officers at head-quarters. In his description of the Dalbeheras he agrees in the main with Mr. Ewer but adds that they were removeable for misconduct and claimed no proprietary rights. He further states that the few Dalbeheras who had declined to engage for the revenue of their Gurhs were nevertheless in possession of their reserved *jagirs*. The *hukumnamah* Exh. F evidently refers to the settlement forming the subject-matter of this report of 1836 and the division of Gurh Atiri into 5 Kismats would seem to be explained by the suggestion made in Mr. Forrester's report of 1819 to the effect that in subsequent settlements, as opportunity occurred, Gurhs in the open country should be broken up and the component parts separately settled (Selections, Vol. I, p. 3, paras. 52-3, p. 116, para. 8).

Mr. Wilkinson's report was forwarded to Government by Mr. Halliday, then Member of the Board of Revenue. In its No. 1201 dated 22nd August 1837 (Selections, Vol. I, p. 136) Government confirmed the settlement with effect from $\frac{1244}{1837}$, extended it to the close of $\frac{1263}{1856}$, and in para. 5 observed as follows:—"As regards the *sarabarakars* who as the settlement has been formed by Mr. Wilkinson, are merely collectors of certain fixed rents, receiving in land and in a share of the rental about 20 per cent. on the collections His Lordship (*i.e.*, the Governor) entirely agrees with Mr. Halliday that neither the engagements with Government, nor of course the lands by which the service rendered is remunerated should be matters of inheritance and liable to sub-division among heirs. Government has clearly the power to forbid its offices, and such the *sarbarakarships* of Khurdah clearly are, or the lands by which the holders of these offices are remunerated, from being subdivided." Those orders were communicated to the Commissioner by the Board in its No. 36 of 15th September 1837 with the following instructions: "You will cause it to be distinctly notified to the *sarbarakars* that at the expiration of the present settlement, Government will select its own engager, wherever they may choose to exercise the right so to do, and that the present incumbents will be held liable to dismissal for default or bad behaviour satisfactorily proved before the local authorities. It is very desirable that in all future cases individuals only should be acknowleged and allowed to treat as *sarabarakars*" (Selections, Vol. I, p. 138, para. 3).

The next settlement was made in 1857 and it was for a term of 24 years, *i.e.*, for 1857/1880. This settlement merely extended the previous settlement in respect of areas then assessed, and added to it all subsequently cultivated lands. It is hence known as the "Nayabadi" settlement. The Collector Mr. Annand's report on this settlement, and Government orders thereon, add nothing to our information *re sarbarakars* and Dalbeheras. It may however be noted that it was at this settlement that *hukumnamah* Ex. G was issued, and it was of course during the currency of this settlement that the 3 Kismats of Gurh Atiri were transferred to the Mathdharis.

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We have now dealt with all the important documents of dates prior to 1861 to be found in the volumes of Selections. But it would appear that with a view to the cadastral settlement which subsequently took effect from 1883 further enquiries into the fiscal history of Khurdah were initiated in 1875. The reports of the officers of that time are not of course of the same value as the earlier reports (*e.g.*, the report of Mr. Ewer) except in so far as they reproduce their original sources of information. In Mr. Taylor's report of 21st May 1877 (Sel. Vol. I, p. 160) we find that Mr. Trower who was Collector at the time of Mr. Ewer's enquiry had in March 1818 begun a settlement for the years 1225-26. In the report of 23rd March 1818 Mr. Trower is quoted by Mr. Taylor as stating that so far as he could ascertain the collections from raiyats in the times of the Rajahs were made as follows :—"An Amin was deputed from the Sudder who, together with the Kajees on the part of the Rajah, his Dewan and the Bukshi made an estimate of the resources of each mehal. The collections were then entrusted to the Padhans and other village officers who from being employed in different duties were *sarbarakars.* These village officers appear to have been hereditary and they are the people with whom, generally speaking, all settlements under the British Government have been made. On the resumption of the *jagir* lands of the Paiks and of a portion of that of the Dalbeheras and Dullais by Major Fletcher these people also (that is the Dalbeheras and Dullais) appear also to have been admitted as *sarbarakars* (para. 12)."

This is the only indication we have that in Khurdah *sarbarakars* were known prior to the British occupation.

We may next notice that on the 19th February 1876 when dealing with questions arising in connection with the then impending settlement, Mr. Dampier, then Member of the Board of Revenue, wrote as follows :—

"A separate report is required on the subject of Dalbeheras and Dullais' *jagirs.* . . The services which the Dalbeheras and Dullais were bound to perform under the Rajahs were of a military and semi-military nature. At Mr. Forrester's or Mr. Wilkinson's settlement a certain number of these Dalbeheras were invited to become *sarbarakars* and executed agreements accordingly. The condition was that they should continue to enjoy their *jagirs* and should in addition receive a certain stipulated percentage on the collections. At the same time certain of their number were left alone enjoying their *jagirs* without being called on to perform any services in return."

The complaint is that those left in the possession of their *jagirs* have since been and are recognised as absolute proprietors of them, their title being heritable and transferable, whereas those who accepted service as *sarbarakars* have been very differently treated, their old military Dalbehera and Dullai *jagirs* have been declared to be mere *sarbarakari jagirs* and are being declared liable to forfeiture (as being part of their *sarbarakari* remuneration) if they are at any time removed from the *sarbarakarship.* The matter requires closer investigation (Sel. Vol. II, pp. 20-21, para. IV). After the investigation that followed Government in 1880 decided that the *jagirs* of those Dalbeheras, and other old service tenure-holders who had not been appointed *sarbarakars* and who therefore had been enjoying their lands free of rent in return for liability to perform some

indefinite police service which was really not required should be assessed at favourable rates at the settlement of 1882-97 and thereafter at full raiyati rates (Sel. Vol. II, p. 170, para. 13).

Mr. Dampier appears to have been misinformed as to the attachment of any condition *re* their *jagirs* when Dalbeheras first became *sarbarakars*. In any case events subsequent to 1861 in the khas mehal portion of Khurdah cannot affect the title of Defendant No. 1 to his *jagir* and there is no suggestion that prior to the present proceedings any attempt was at any time made to oust him therefrom. On the other hand the statements made *re* the *jagirs* of Dalbeheras who did not become *sarbarakars* are of importance.

From the papers contained in the two volumes of Selections which we have now examined, it is clear that from 1818 onwards the tendency of Government and of the majority of its officers was to regard the *sarbarakars* as mere office-holders. But it does not appear that at any of the settlements prior to 1861 the *sarbarakars* distinctly acknowledged that this was their position. Moreover there are facts which militate against this view. For instance, the *sarbarakars* were held responsible for the full sum entered in their engagements whether they succeeded in realising from the cultivating raiyats less or more (v. *e.g.*, Sel. Vol. 2, pp. 258-9, para. 41). Again they were entitled to retain for themselves the rent assessed on such waste lands as they succeeded in bringing under cultivation during the currency of a settlement [v. *e.g.*, Sel. Vol. I, p 106, para. 10, Vol. II, p. 176 (9)]. Further in practice their position was hereditary.

On the whole the evidence we have discussed leads to the conclusion that when Gurh Atiri was transferred to the Mathdharis in 1861 the status of the *sarbarakar* under his engagement or *sanad* was something higher than that of a servant.

With regard to the *jagir* lands of the present Dalbehera *sarbarakar* [v. Exs. H and G Jamabandis of 1231 (1824)] it is manifest that they represent what was reserved to the Dalbehera on the general resumption of Dalbehera and other *jagirs* in 1804 5. They represent grants for police and semi-military services and even if the Plaintiffs could succeed in removing Defendant No. 1 from his position as *sarbarakar* they could not in the present suit succeed in resuming his Dalbehera *jagir*. Moreover with regard to the *jagir* lands lying in Mouzah Panasabasta, as no grant of that mouzah was made to the Plaintiffs or their predecessors, to those lands it does not appear that they have any title whatsoever.

We have now to consider the oral and documentary evidence of events subsequent to 1861.

We have already referred to the suit for rent brought by the Mathdharis against Brindaban Roy Pitam in 1865. From the judgment (Ex. L) it would seem that the sum due from the *sarbarakars* was claimed and was decreed as rent. Further, the sum due represented 3 years' arrears and it appears obvious that if he had been regarded as a servant he would surely have been dismissed for such a serious default.

It is next stated by the Plaintiffs that in 1866 they dismissed the *sarbarakar* of the Kowri-Bhagia Kismat. No papers relating to his dismissal have been put in evidence but from the recitals in the plaint (Ex. M) in suit No. 116 of 1873 it appears that the Kowri-Bhagia was not dismissed but was sued for arrears of rent

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and on his failure to pay was ejected under the provisions of sec. 78 of Act X of 1839. It is thus evident that he was treated not as a servant but as a tenant.

In the plaint (Ex. M) in suit No. 116 of 1873 brought by the predecessor in interest of Plaintiff No. 2 against Brindaban Roy Pitam, the Bhuimal *sarbarakar*, and the co-sharer Mathdharis, it is recited that the *sarbarakari* was "the property (Hakait) of 3 *sarbarakars*," that "the rent payable by them" was so much and that the remaining 2 *sarbarakars* were "in possession" of their Kismats.

When giving the Plaintiffs a further opportunity of producing the *kabuliyats* executed by the *sarbarakars* we thought it right to give to Defendant No. 1 also an opportunity of supplementing the plaint (Ex. M) by a copy of the decree in the suit. From the certified copy now produced it appears that the suit was compromised, that the Mathdhari Defendants, the *sarbarakar* Defendants and the Plaintiff respectively filed petitions of compromise and that the suit was decreed in terms of those petitions (which were embodied in the decree) on the 21st August 1873. The petition of the *sarbarakars* concludes thus: "Be it known that . . . . the *sarbarakari* right which we have in the disputed *sarbarakari* according to the terms mentioned in the *rubakari* dated 8th October 1861 of W. L. Heeley, Esq., Acting Salt Agent, will continue according to ancient custom."

The *rubakari* referred to (Ex. K) merely recites that the interests of the *sarbarakars* "will remain as hereafter" but from the proceedings in the suit it is fairly obvious that in 1873 the *sarbarakar* Defendant was asserting right as a tenant and was in 1865 not regarded as a servant.

The settlement made and the *kabuliyat* executed by Brindaban expired in 1880. Though the Mathdharis were well aware of their position as proprietors of the mouzahs in question, as is apparent from their resistance to the attempts made by Government officers to encroach upon their right (v. Ex. 6, para. 5 and Exs. 11 to 13), they made no attempt to oust the *sarbarakar* or to disturb the pre-existing state of things.

In 1889 Brindaban died and his son Kripasindhu, Defendant No. 1, succeeded him as *sarbarakar*. From the receipt (Exs. C series and P series) granted by at least 6 of the present Plaintiffs or their predecessors-in-interest and extending from 1890 to 1906 it is clear that the Mathdharis recognised Kripasindhu, and received rent and road-cess from him and that he remained in possession of the mouzahs as his father had done before him. This is also apparent from the oral evidence.

In fact it is not until 1894 or 96 that we find any attempt by any one of the Mathdharis to disturb Kripasindhu's possession. From Exh. N, judgment in rent-suit No. 143 of 1896, it appears that the Mahant of Revassa (predecessor of Plaintiff No. 6) realised or attempted to realise rents for 1302 and 1303 (1895-96) direct from at least one raiyat. Defendant No. 1 successfully asserted his claim to the rent.

Next followed the settlement proceedings of 1897-99. In this no doubt the Plaintiff succeeded in procuring the omission of the Defendant's name from the records. But apart from this, the notice of dismissal (Exh. 17 dated 20th Decr. 1900) and the uncorroborated oral evidence of the Plaintiff's sole witness Chintamani Dass to the effect that Plaintiff collected the rents of the raiyats from

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1308 (1901), there is no evidence of any attempt actually to oust the Defendant until 1903-04. Exhs. 14 and 15, the judgment and decree in rent suit No. 317 of 1903-4, and the Exh. 10 series (deposits of rent in November 04 and January 1905) no doubt show in those years a serious attempt on the part of the Plaintiffs as a body to eject the Defendants and to collect the rents of the raiyats direct. But in this attempt from the oral evidence of Defendant 1 and his witness Ananta Gantra, Exh. O, the judgment in appeal in rent-suit No. 317, and the J series of Exhibits (deposits of rent) it is clear the Plaintiffs failed.

Thereupon on 5th October 1907 the Plaintiffs filed their present suit.

From the evidence we have discussed it is abundantly clear that from the transfer of the mouzahs in 1861 until 1896 the *sarbarakar* Defendant and his father before him were regarded and treated as tenants and that they have successfully asserted their status and maintained their possession as such from 1861 until the present day.

On a review of the whole evidence we must therefore hold that Defendant No. 1 is a tenure-holder.

Into the incidents of that tenure it is neither necessary nor proper to enter. The issues framed raised no such question and the evidence was not directed to any such issue.

It follows that the Plaintiffs' appeal No. 296 must be dismissed. Having regard to paragraphs 6 and 8 of the written statement and the 1st, 2nd and 3rd grounds of appeal, the declaration of the Plaintiffs' title as proprietors of the 2½ mouzahs in suit must be affirmed. In other respects the appeal of Defendant No. 1 (Appeal No. 219) is decreed and Plaintiffs' suit dismissed.

Under all the circumstances we direct that parties do bear their own costs throughout.

Decree modified.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2824 OF 1910.

HOLMWOOD, J. CHAPMAN, J. 1913, 23, January.	SATI PROSAD GARGA and anr., Plaintiffs, Appellants, v. MONMOTHA NATH KAR and ors, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 61—Manager, tender of rent to, but not at village office, if valid—Tender of part as whole—Deposit of portion of rent due, if valid—Contract Act (IX of 1872), sec 38.

A deposit in Court by a tenant of less than the amount of arrears of rent due is not a valid deposit under sec. 61 of the Bengal Tenancy Act.

Any officer of the zemindar authorised to receive rent who happens to be in the village office can receive it and give a valid acquittance. But because a man happens to be the manager of the zemindari, he cannot be compelled to take rent tendered wherever he may happen to be and at whatever time or place it may be offered.

Nor can he be asked to take a small proportion of the rent due as the whole amount.

This was an Appeal preferred on the 22nd of August 1910 against a decree of Mr. C. Cornis, District Judge of Zillah Midnapur, dated the 6th of May 1910, modifying a decree of Babu Ambika Churn Mukherjee, Subordinate Judge of that District, dated the 29th of June 1909.

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The Plaintiffs sued the Defendants for recovery of Rs. 2,302-4 annas being arrears of rent with interest due from Jaista 1315 to Falgoon 1316 and cesses. In defence it was urged *inter alia* that a sum of Rs. 999 deposited in Court should be taken into consideration, and the claim of the Plaintiffs for interest and costs should be disallowed *pro tanto.* The Defendants took the further plea that there was tender of rent to the manager of the Plaintiffs at his house. The Subordinate Judge held that the deposit was not in accordance with law *inter alia* because no receipt was granted by the Court and no notice served on the Plaintiffs. As to tender he held that the Plaintiffs had appointed their manager to be the officer to realise the rents. He accordingly decreed the Plaintiffs' claim in full.

On appeal, the District Judge held that the tender (which appears to have been for the sum deposited in Court) was made to the proper person and was valid. He was of opinion that the Defendants were acting reasonably and in good faith, and that the Plaintiffs had ample opportunity of which they should have availed themselves of withdrawing the money deposited. In this view he modified the decree of the Subordinate Judge by depriving the Plaintiffs of the interest and costs on this amount.

The Plaintiffs preferred this Second Appeal.

Babus Monmatha Nath Mukherjee and *Probodh Chandra Chatterjee* for the Appellants.

Babu Surendra Nath Ray for *Babu Baikuntha Nath Das* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Second Appeal refers only to the order of the lower Appellate Court refusing interest and costs upon a sum of 999 rupees deposited by the Appellants on the 14th April 1909. The plaint was originally filed on the 8th April in that year, but it was returned for amendment and was re-filed on the 16th April 1909. In the meantime, as we have seen, the Defendants deposited the money in Court and stated that they had tendered it to the manager and it had been refused. The money was certainly not all what was due, and it was nothing like what was due, for it has been found in the suit that over 2,000 rupees is due from the Defendants to the Plaintiffs. The deposit therefore was not a good deposit under sec. 61 of the Bengal Tenancy Act, and the Defendants therefore must fall back upon the tender to the manager. It has been held in *Jagat Tarini* v. *Naba Gopal* (1) that if the tenant is able to prove that he has made a valid tender which has been improperly refused and also that he has kept it good, he is not in any worse position than he would be in if he proves that he deposited it in Court. But the learned Subordinate Judge found that the tender was not a valid tender within the meaning of sec. 54 of the Bengal Tenancy Act ; and there can be no doubt that the learned Subordinate Judge was right in law in so holding. The whole of the money due on the *kist* must be tendered at the right time and at the right place to make the tender valid, and the section says nothing as to the person. Any officer of the zemindar authorised to receive money who happens to be in the village office certainly can receive it and can give a valid acquittance. But because a man happens to be the manager of the zemindari he cannot be compelled to take

(1) I. L. R. 34 Cal. 305 at p. 323 (1907).

money wherever he may happen to be and at whatever time or place it may be offered. Moreover, he cannot be asked to accept a small proportion of the rent due as the whole amount.

We have therefore two separate considerations in the case, namely, that the deposit in Court was bad and the tender was bad, and these are questions of law and cannot, as the learned Judge seems to think, be dealt with as equitable matters. The learned Judge merely finds that the money was tendered to the proper person and he thinks that the Appellant acted reasonably and in good faith in this respect. But this is not law. In the case we have just referred to, *Jagat Tarini* v. *Naba Gopal* (1), the rule laid down in sec. 38 of the Contract Act was held to be perfectly good notwithstanding any hing contained in the Bengal Tenancy Act, and it was held that the tender to the eldest son of four joint sons in a Hindu family whose father had been recently deceased was a good tender to all the four. But the rules laid down in sec. 38 are in this case much stronger against the Defendant than the rules under the Bengal Tenancy Act; for it is laid down that the tender must be unconditional, must be made at a proper time and place and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do. If therefore sec. 38 of the Contract Act is relied on the Defendant is entirely out of Court, and we have seen that the law as laid down in the Bengal Tenancy Act is against him both as regards the alleged tender and as regards the deposit.

(1) I. L. R. 34 Cal. 305 (1907).

We therefore think that the order passed by the learned District Judge in the Court below must be set aside and that of the Subordinate Judge restored with proportionate costs, that is to say, the Appellants will be entitled to their full costs in the two lower Courts and to their costs on the value of this Appeal in this Court. We fix the hearing-fee at 2 gold mohurs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL
No. 96 OF 1911.

JENKINS, C. J. MOOKERJEE, J. 1913, Heard, 11 and 12, June. Judgment, 12, June.	SHIVA PROSHAD SAMANTA and ors., Plaintiffs, Appellants, v. GOSSAIN DAS DUTT and others, Defendants, Respondents.

Embankment Act (II of 1882), sec. 74—Apportionment of charges between zemindar and putnidar—*Agreement by zemindar to indemnify* putnidar *in respect of such charges, if contrary to policy or void—Stipulation made before passing of statute, if abrogated—Suit for injunction against recovery—Cause of action—Apprehended breach of contract.*

Where in a putni lease executed in 1870, it was stipulated that the zemindar shall pay "Government revenue, poolbundi *and* dak *cesses, the putnidar having nothing to do with the same":*

Held—*That the stipulation had reference not merely to such* poolbundi *charges as were payable under statutes then in force, but also to similar charges imposed by the Embankment Act II of 1882.*

That there is nothing in that Act to

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render the agreement contrary to the policy of the law or void for other reasons.

Where the Collector made an apportionment of embankment charges between the zemindar and the putnidar, *refusing to give effect to the* putnidar's *plea of non-liability based on the above stipulation, and the* putnidar *sued for an injunction to restrain the zemindar from realising any share of those charges from him:*

Held—*That having regard to the wide powers of recovery of the amount to which the zemindar is entitled under sec. 74 of the Act under an apportionment order, such a suit was not premature.*

That the zemindar having moreover admitted that he intended to take action notwithstanding the terms of the agreement, there was an apprehension of the breach of the contract justifying the institution of the suit.

This was an Appeal under sec. 15 of the Letters Patent filed on the 1st of May 1911 against a decree of Mr. Justice Coxe, dated the 7th of April 1911, in Second Appeal No. 2071 of 1909, preferred on the 28th of September 1909, against the decree of Babu Ambica Charan Mukherjee, Subordinate Judge, 1st Court of Midnapore, dated the 12th of July 1909, modifying the decree of Babu Lall Behary Chatterjee, Munsif, 4th Court, of the place, dated the 9th of December 1908.

The material facts are set out in the judgment of COXE, J., which was as follows:—

COXE, J.—The Plaintiffs in this case are *putnidars* under the Defendants-Respondents and there is a stipulation in the *putni* that the zemindars shall pay the *poolbundi* cesses. Embankment charges were assessed by the Collector under the Bengal Embankment Act, 1882, and have been apportioned on the Plaintiffs as *putnidars.* The Plaintiffs have brought this suit for a declaration that they are not bound to pay these charges and that the orders of the Collector cannot be enforced and for an injunction against the Defendants from realizing these charges from them. The suit was decreed by the Munsif but dismissed, on appeal, by the Subordinate Judge. The Plaintiffs appeal to this Court.

Under sec. 54 of the Bengal Embankment Act, the whole sum assessed as embankment charges is payable to the Collector by the zemindars of the estates benefited. Under sec. 55, every zemindar is entitled to recover from the tenure-holders under him the sums apportioned to those tenures under sec. 59. This apportionment is made by the Collector after notice has been given under sec. 56 that an enquiry will be held for the purpose of apportioning amongst the zemindars and the tenure-holders the sums so payable; and sec. 59 enacts that the Collector shall charge or apportion the amount payable in respect of each estate upon the holders of the tenures therein rateably in the proportion of benefit received. When the apportionment has been completed, the Collector, under sec. 68, makes an order specifying the estates and tenures in respect of which the sums charged or apportioned are payable; and when that has been done, the Collector, under sec. 69, causes a copy of the said order to be published with a notice that the amounts apportioned on the tenure-holders are payable to the zemindars. Taking all these sections together, it is quite clear that the Collector is authorised to assess the embankment charges on tenures after due notice and that the

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tenure-holders are bound to pay those sums to the zemindars. There is no means by which Government can recover those charges from the tenure-holders.

The *first* point taken on behalf of the Appellants is that the Collector's orders apportioning the embankment charges on tenure-holders must be subject to any contract made between the tenure-holders and the zemindars; and that, if such an order is contrary to any such contract, it is a nullity. It is said that all these orders of the Collector must be construed as being passed on the assumption that there is no contract to the contrary. There is certainly nothing in the Act to support this view and I should have expected that, if this had been the intention of the Legislature, suitable words would have been introduced to indicate that the Collector's proceedings were subject to contracts between the parties. And that it was not the intention of the Legislature to make these orders so subject to contracts between the parties may be inferred from the arguments contained in the judgment of the Collector dated the 5th July 1904 on the objection of the present Plaintiffs to pay the charges. The Collector pointed out in that order that a contract of this nature might conceivably make the superior estate insolvent, unable to pay the charges itself, and unsaleable for arrears of such charges. In such a case, as the Government could not recover the charges from the tenure-holders, the result would be that they would not be collected at all. On these considerations, I am not at all prepared to accept the Plaintiffs' contention that, if the Collector's order under sec. 68 conflicts with a contract between the parties, it must be regarded as a nullity.

Secondly, it is argued that the Plaintiffs do not desire that the Collector's order should be set aside but merely that it should not be enforced as against them. This distinction is somewhat too fine for my appreciation. It seems clear that, if these embankment charges cannot be realized in accordance with the Collector's order, the Collector's order is to all practical intents and purposes set aside.

Thirdly, it is argued that the matter is concluded by the doctrine of *res judicata*; but I do not think that that contention can possibly succeed. The decision of the High Court which laid down that the zemindars would be bound to pay the *poolbundi* charges was passed in Appeal from Appellate Decree No. 920 of 1880 and could not possibly conclude the Defendants in this case from pleading that they are not bound to pay the embankment charges assessed under an Act which had not been passed at the time of the previous decision.

The *fourth* point taken is that the Civil Courts are entitled to give relief under sec. 54 of the Specific Relief Act and that the present is a suitable case in which such relief should be given. No doubt, the Courts have such powers; but it appears to me that sec. 86 of the Embankment Act prevents any decree being given to the Plaintiffs in the present case. That section enacts that orders passed under sec. 68 (and I have no doubt whatever that the order now under criticism was passed under sec. 68) shall be final and not liable to be modified or altered otherwise than as expressly provided in this Act. I do not see that any advantage is gained by twisting the simple words of a statute and making them mean the precise opposite of what they appear to mean. I cannot hold that orders passed under sec. 68 are not final

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or are liable to be modified or altered at its discretion by a Civil Court under sec. 54 of the Specific Relief Act. The words seem to me to be perfectly simple and they cannot be evaded in this case without doing violence to the English language.

The view of the learned Subordinate Judge that a decree in favour of the Plaintiffs would interfere with the public duties of the embankment Collector has been criticized and it may not perhaps be sustainable. The effect of the orders of the embankment Collector is that the *putnidars* shall pay these charges to the zemindars and, if these charges are not paid, that default will not interfere with the duties of the embankment Collector, unless the zemindari estate is thereby rendered insolvent, a contingency which is hardly immediate enough to come within the scope of sec. 56, cl. (d) of the Specific Relief Act.

It appears to me that the Civil Courts have no jurisdiction to modify or alter orders duly passed under sec. 68 of the Embankment Act and accordingly I think that the decision of the learned Subordinate Judge is right and dismiss the appeal with costs.

Babu Baidyanath Dutt (with him *Babu Bhupendra Nath Ghosh*) for the Appellants.—Under the stipulation in the lease, the putnidars are not liable for embankment charges. The Collector's order of apportionment cannot therefore bind them. The zemindar's right to recover such charges from subordinate tenure-holders is created by sec. 69 of Act II of 1882 (B. C.).

[JENKINS, C. J.—What proceeding would he have to take ?]

The zemindar can recover it as rent under sec. 74.

[JENKINS, C. J.—Is not your suit premature ?]

The zemindar tried to recover *poolbundi* by two previous suits, but failing therein, he got the Collector to make the present order declaring me liable. The Collector's order has hastened my suit.

[JENKINS, C. J.—Would not your proper course be to defend the zemindar's suit, when it is brought ?]

The zemindar means to enforce his order. I submit I come under sec. 54 of the Specific Relief Act. I am entitled to a declaration that I am not liable. The mere fact of the Collector's order cannot create against me a liability overriding the express contract between the parties. Reads the clause.

[JENKINS, C. J.—Does the contract cover the present charge ? The contract was in 1870, but the charge is created by the Act of 1882.]

The contract refers to *poolbundi*, which means charges for the construction, etc., of embankments. The previous Embankment Acts which were in force at the date of the lease also created these charges, though there might have been no provision for apportionment as now.

It is said that the Collector's order is final, but it is final only on the question of apportionment. There is nothing in the statute to forbid a contract like this between a zemindar and a *putnidar*. It is not opposed to public policy. In fact that was the law previous to the present Embankment Act.

[MOOKERJEE, J.—Refers to a similar case as regards payments of cesses, *viz.*, *Ashutosh Dhar* v. *Amir Mollah* (1).]

Lastly, I submit the present question is *res judicata*, as on the construction of this very lease, it was held by this Court

(1) 3 C. L. J. 337 (1900).

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in the previous suits of the zemindar, that the entire liability lay on the zemindar. See the judgment in S. A. 920 of 1880 (printed at p. 23 of the paper-book).

Babu Nanda Lal Banerjee for the Respondent, submitted, *first*, that on the construction of the lease *poolbundi* did not include the present charge, and, *secondly*, that the Collector's order was final and conclusive. On the first point, reference was made to the previous Embankment Acts, Act XXXII of 1855 (India Council) and Act VII of 1866 (Bengal Council), in which there was no provision for the apportionment of the charge between zemindar and *putnidar*. The charge was wholly on the zemindar.

[JENKINS, C. J.—So that was the basis on which the contract was formed?]

A new liability was created by the later Act VI of 1873 (B. C.) under which *poolbundi* was for the first time made a charge on the *putnidar* and this provision was continued in the present Act II of 1882 (B. C.).

[JENKINS, C. J.—The charge was, therefore, now thrown on the *putnidar* contrary to the bargain of the parties.]

The word "*poolbundi*" in the lease referred to a different charge altogether from what arises under the present Act.

As to the second point, sec. 86 of the present Act, corresponding to sec. 60 of the old Act, made the Collector's order absolutely final.

[JENKINS, C. J.—Have you taken any steps to enforce the Collector's order?]

Not yet, but I intend to do so.

[JENKINS, C. J.—That is a very straightforward and very proper statement.]

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is a suit whereby the Plaintiffs seek to vindicate a right which they claim under a *putni* lease in their favour executed in 1870. By that document it was provided on the part of the Zemindar as follows :—"We (that is, the Zemindars) shall pay the Government revenue, *poolbundi* and *dak* cesses, you having nothing to do with the same." The Embankment Acts in force at that time were XXXII of 1835 (Government of India) and Act VII of 1866 (Government of Bengal) and for the purposes of this argument it has been assumed that the obligation in respect of embankment charges was on the Zemindars at that time. Whether that was under Act VII of 1866 in all cases we need not now determine, but we will assume the correctness of the view that the stipulation which I have read gave practical effect to the state of the law as it then stood. These two Acts have been repealed and that now in force is Act II of 1882 of the Bengal Legislature. There are provisions in that Act under which there can be an apportionment of embankment charges as between the Zemindar and his tenure-holders. There has been that which purports to be an apportionment under the Act and by it a certain burden in respect of *poolbundi* charges has been cast on the tenant. At the time of the proceedings before the Revenue Authority a protest was entered against this view on the strength of the stipulation in the *putni* lease of 1870. But the argument failed, and it was held that this made no difference for the purposes of the Collector's decision and arguments were advanced in the course of the decision to show how mischievous would be the result for which the Plaintiff claimed. It may be that the Collector merely had to apportion without regard to the contractual rights be-

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tween the parties : but of this I am confident that he had no power to take away from the Plaintiff the benefit of any contractual right which he had against the Zemindar and that the Plaintiff is entitled to come to this Court for the purpose of having his contractual rights vindicated.

The first question then that we have to determine is whether this suit can be entertained. At one time I felt some doubt as to whether the suit was not somewhat premature, and whether the proper method of meeting any claim advanced by the Zemindar would not have been by defence to the suit. But any doubt on that score has been dissipated by a consideration of the provision contained in sec. 74, which vests in the Zemindar wide powers of recovery of the amount to which he is entitled under an apportionment order. He could possibly realise his claim without going to a Court, and therefore I felt it could be right for us to give protection to the Plaintiff now, if he is entitled to it. More than that, it has been very properly conceded before us that in this case the Plaintiff does intend to take action notwithstanding the terms of the agreement, so that the Plaintiff is within the provisions of the law which require that it should be shown that there is reason to apprehend the breach of the contract on which he relies. Therefore, I think the suit is properly conceived. The only question then is whether the Plaintiff has the contractual rights which he claims. The clause in the *putni* lease to which I have already referred is in wide terms and is in effect an indemnity against *poolbundi* charges. The first point, therefore, we have to consider is whether that in respect of which the Zemindar now intends to advance a claim is a *poolbundi* charge. Admittedly it is.

The next point for consideration is whether by reason of its being a *poolbundi* charge arising under an Act subsequent to the date of the *putni* it was outside the intention of the parties, so that, though covered by the words, it would not be fair to extend the agreement to this particular charge. There again, I think, there can be no doubt that the *poolbundi* charge with which we are concerned in this case is so similar to that which would have been in existence at the time of the *putni* lease that it is clear it was within the intention of the parties to include such a *poolbundi* as that with which we are now concerned. Indeed, the basis of the contract between them must have been that the *putnidar* was to be exempt from all charges to which the term *poolbundi* could reasonably be applied. Therefore, I think, this second point is established in the Plaintiff's favour and that the agreement extends to the present *poolbundi* charges though they arise under the Act of 1882. This view is, I think, supported by the decision of the High Court in Appeal from Appellate Decree No. 920 of 1880, for it was there held that the agreement was operative, though prior to that suit Act VI of 1873 had come into operation and had superseded the previous Embankment Acts.

The final point is whether it is contrary to the policy of the law that we should enforce the agreement to which the parties came. I fail to see the fine distinction which embarrassed the learned Judge in reference to this point. The Government is in no way prejudiced by this contract between the Zemindar and the *putnidar*. It is merely a contract that the Zemindar will bear, as between him and the *putnidar*, certain charges. If the Government have any right against the

property of the *putnidar*, this agreement would not prejudice in any way the assertion by the Government of its claim. I cannot bring myself to see the difficulty that there is in the Zemindar undertaking to discharge a burden in the place of the *putnidar*, in indemnifying the *putnidar* against this burden. Therefore, the final point, as appears to me, is also in the Plaintiff's favour, that is to say, there is nothing in the Act of 1882 that would render this agreement contrary to the policy of the law or void for other reasons.

To sum up, in my opinion the decree of the lower Appellate Court was erroneous, as was the judgment of Mr. Justice Coxe by which it was affirmed. The Munsif took a correct view.

We, therefore, restore the decree of the Munsif with this variation that we only grant an injunction restraining the Defendants from realising *poolbundi* and *dak* charges from the Plaintiffs in respect of the *putni*.

The Plaintiffs must receive from the Defendants their costs in all the Courts of Appeal as well as in the Court of the Munsif.

MOOKERJEE, J.—I agree.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE 661 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.

1912,
3, May.

JITLAL SINGH,
Petitioner,
v.
RAJA KAMALESWARI PROSAD,
Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 39, r. 2—Bengal Tenancy Act (VIII of 1885), sec. 70—Temporary injunction—Order by Revenue Court, suit for setting aside—Competency of Civil Court to grant injunction—Temporary injunction if may be granted when perpetual injunction not sought for.

Although a decree may have been passed by a Revenue Court, when it is under execution in a Civil Court, proceedings may be stayed by the Civil Court if a suit has been brought for declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction to restrain the decree-holder from executing the decree.

In granting a temporary injunction the Court acts in aid of the legal right so that the property may be preserved in status quo.

Where the Plaintiffs sued for a declaration that a certain order by the Revenue Court was without jurisdiction, but did not ask for a perpetual injunction, it was not competent to them to ask for a temporary injunction during the pendency of the suit.

This was a Rule granted on the 5th of February 1912 against an order of J. C. Twidell, Esq., District Judge of Zillah Bhagalpore, dated the 18th of December 1911, reversing that of Babu Hem Chandra Mukherjee, Subordinate Judge, Monghyr, dated the 18th of November 1911.

The material facts of the case will appear from the judgment.

Babu Ganesh Dutt Singh for the Petitioner.

Babu Satish Chandra Ghose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside an order by which the Court of Appeal below has discharged an order of the primary Court granting a temporary injunction. It appears that the landlord

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Opposite Party obtained an order under sub-sec. (5) of sec. 70 of the Bengal Tenancy Act and proceeded to execute it by an application to the Civil Court. The Petitioner, thereupon, commenced a suit in the Court of the Subordinate Judge for a declaration that the order of the Revenue authorities had been passed without jurisdiction and was illegal and inoperative. During the pendency of this suit, an application was made under r. (2) of Or. XXXIX of the Code of 1908 for a temporary injunction to restrain the landlord from executing the order in question. The Court of first instance granted this application. Upon appeal, the District Judge has discharged the order on the ground that a Civil Court is not competent to stay execution of an order made by the Revenue authorities. In support of this view the District Judge has referred to the case of *Onkar Singh* v. *Bhup Singh* (1). It does not appear however to have been brought to his notice that this decision of the Allahabad High Court has not been accepted as well-founded by this Court in the case of *Ram Lochan Singh* v. *Beni Prasad Kumri* (2). This latter decision is an authority for the proposition that although a decree may have been passed by a Revenue Court, when it is under execution in a Civil Court proceedings may be stayed by the Civil Court if a suit has been brought for declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction to restrain the decree-holder from executing the decree. In the case before us, the ground assigned by the learned Judge for his order is therefore not well-founded. But it is clear that his order is right on the merits. An examination of the plaint shows that the suit is solely for declaration, there is no prayer for any consequential relief; the Plaintiffs do not ask for a perpetual injunction to restrain the decree-holder from executing the decree on the ground that the decree was made by the Collector without jurisdiction. An order for temporary injunction such as the Plaintiffs seek can under Or. 39, r. 2 of the Code of 1908 be sought only in aid of the prospective order for a perpetual injunction. If the Plaintiffs do not ask for a perpetual injunction, if therefore in the event of their success, they cannot obtain a decree for perpetual injunction it is clearly not competent to them to ask for a temporary injunction during the pendency of the suit. In granting a temporary injunction the Court acts in aid of the legal right so that the property may be preserved in *statu quo* [*Saunders* v. *Smith* (3), *Hilton* v. *Granville* (4), *Harman* v. *Jones* (5)]. Here, however, the Plaintiffs do not seek a permanent injunction in the suit and even if they are successful the Defendant will be free to execute the decree. They cannot on principle enjoin the Defendant temporarily when upon the disposal of the suit and dissolution of the temporary injunction the Defendant will be at liberty to proceed with execution. Under these circumstances we are of opinion that the District Judge rightly refused the application for injunction. But we do not express any opinion upon the questions whether the proviso to sec. 42 of the Specific Relief Act, or sub-sec. 70 of the Bengal Tenancy Act is a bar to the suit as framed.

(1) I. L. R. 16 All. 496 (1894).
(2) I. L. R. 36 Cal. 252: s. c. 13 C. W. N. 791 (1908).
(3) [1838] 3 M. J. & Cr. 711.
(4) [1841] Cr. & Ph. 283 (292).
(5) [1841] Cr. & Ph. 299.

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The result is that this Rule is discharged with costs. We assess the hearing-fee at two gold mohurs.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 535 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
17, July.

GAIJUDDI HOWLADAR,
2nd Party, Petitioner,
v.
AINUDDI HOWLADAR,
1st Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Refusal of process against witness—Final order without jurisdiction.

Where in a proceeding under sec. 145, Cr. P. C., the Petitioner applied for summons against a witness, a Sub-Inspector of Police, and the Magistrate made an order that the Sub-Inspector was to appear with his diaries, but on the date on which the case was to be heard the witness did not appear and on the Petitioner again applying for summons against him the Magistrate rejected the application remarking that the application was vexatious and ultimately passed the final order under sec. 145, Cr. P. C.:

Held—*That the order under sec. 145, Cr. P. C., was made without jurisdiction.*

This was a Rule granted on the 15th of April 1913 against an order of J. C. Dutt, Esq., Sub-Divisional Magistrate of Madaripur, dated the 20th of March 1913, declaring the Opposite Party under sec. 145, Cr. P. C., to be entitled to possession of the disputed land.

One Moharali, a tenant of the first party, lodged an information at the police station that some tenants of the second party had forcibly despossessed the tenants of the first party from a *char* where they had been living with their families. The Sub-Inspector in charge of the police station held an investigation and submitted a report that there was a likelihood of a breach of the peace between the parties owing to the efforts of the first party to regain possession of the lands from which they had been dispossessed. Thereupon the Sub-Divisional Magistrate of Madaripur drew up a proceeding under sec. 145, Cr. P. C., in respect of the said *char*. After written statements were filed, the Petitioner second party applied for summons against the Sub-Inspector, and the Magistrate made an order that the Sub-Inspector was to come with his diaries but on the date which was fixed for the hearing of the case after several adjournments the Sub-Inspector did not appear and on the Petitioner applying for summons against him the Magistrate rejected the application as being vexatious, and after examining other witnesses on both sides made his final order declaring the first party to be entitled to possession of a portion of the disputed land and the second party of the remaining portion. Against this order the second party moved the High Court and obtained a Rule on the ground, that the Petitioner was not given an opportunity of examining the Sub-Inspector of Police and, secondly, that the judgment contained no finding of the fact of actual possession. The Magistrate in his explanation submitted: "The Sub-Inspector was not a material witness in the case. He had admittedly no knowledge as regards the actual possession. The case was already long pending. It was of no good to further adjourn the case for his evidence."

Mr. K. N. Chaudhuri and *Mr. A. K. Fuzlul Huq* for the Petitioner.

Mr. P. L. Roy, Mr. K. Ahmed and *Mr. Nuruddin Ahmed* for the Opposite Party.

GAIJUDDI HOWLADAR *v.* AINUDDI HOWLADAR.

The JUDGMENT OF THE COURT was as follows :—

This Rule was issued on the District Magistrate of Faridpur and the Opposite Party to show cause why the order passed under sec. 145 in this case should not be set aside on two grounds, first, that the Petitioner was not given an opportunity of examining the Sub-Inspector of Police; and, secondly, that the judgment contains no finding of the fact of actual possession.

It is not necessary to consider the second ground as this Rule must be made absolute on the first. Looking at the order-sheet of the Magistrate, we find that there was no proper reason for rejecting the Petitioner's prayer for the examination of the Sub-Inspector. The Sub-Inspector had been cited as a witness on behalf of the Opposite Party and afterwards as a witness for the Petitioner. On an application filed by the Petitioner on the 8th February asking for summons against the Sub-Inspector, the Magistrate recorded an order that the Sub-Inspector was to come with his diaries. After some adjournments in the case, on the date on which the case was to be heard, the Sub-Inspector did not appear, whereupon an application was made by the Petitioner to the Magistrate asking for summons against him. On this application, the Magistrate recorded an order which runs thus :—"This is simply vexatious. No process was asked for so long. Rejected." This order was clearly bad.

We think that the order under sec. 145 was a bad order and made without jurisdiction on the first of the two grounds mentioned in the petition.

The Rule is made absolute. The order under sec. 145 is set aside.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 394 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
1, May.

MAHOMED IMAMUDDIN, Petitioner,
v.
DEBENDRA NATH, Sub-Inspector, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 202, 203, 476—Order of Magistrate taking cognizance making over case to another Magistrate for disposal after a local enquiry, if legal—Dismissal of complaint—Order for prosecution.

Where the Petitioner laid a complaint before the Magistrate against a police-officer charging him with various offences of wrongful confinement, extortion, mischief, &c., and the Magistrate who took cognizance of the case make it over to another Magistrate with a direction that the latter would make a local enquiry and then dispose of the case, and the Magistrate to whom the case was so made over made a local enquiry and after examining witnesses dismissed the complaint under sec. 203, Cr. P. C., and made an order under sec. 476 for the prosecution of the Petitioner under sec. 211, I. P. C.:

Held—*That the order of the Magistrate before whom the complaint was laid was bad in directing the latter Magistrate to hold a local enquiry inasmuch as the Code of Criminal Procedure does not make any provision for such a course by a Magistrate to whom a case is made over for disposal.*

On a consideration of the circumstances of the case the High Court set aside the orders under secs. 203, 476, Cr. P. C., and directed a further enquiry into the case.

This was a Rule granted on the 14th of March 1913 against an order of C. R. Mukerjee, Esq., Deputy Magistrate of Jalpaiguri, dated the 24th of February 1913, dismissing the complaint of the Peti-

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tioner and directing his prosecution under sec. 211, I. P. C.

The Petitioner filed the following petition of complaint in the Court of the Deputy Magistrate of Jalpaiguri against the Sub-Inspector of Boda referred to below as accused No. 1 and others.

"In March last my antagonist made a complaint before the accused No. 1 against me and some other persons of killing a cow. In that case the accused No. 1 prayed for warrant against me but the case was dismissed after trial. In last January the other side brought a goat stealing case against my tenant Bhatchak Das and the accused No. 1 sent him up for trial. I looked after the case and gave evidence on behalf of my tenant. The case after trial was found to be false.

"That the accused out of malice and to commit mischief have damaged three of my huts by digging earth. They have demolished the steps and the mat walls.

"That they have further spoiled my paddy, dried rice and coarse rice and pulses by throwing them down on the floor and mixing them up.

"Finding no incriminating goods in my house the accused No. 3 suggested to accused No. 1 that I should be taken to the thana.

"That the accused No. 1 then took me alone elsewhere and proposed to release me if I could spend money and asked me to pay a sum of Rs. 200. Being afraid I paid them Rs. 100 on payment of which the accused left me.

"I therefore pray that the accused and his witnesses be summoned and that the case be enquired into and tried. During the time of the search I was kept outside under restraint and after the search the money was extorted from me putting me to fear."

The Deputy Magistrate examined the Petitioner on his complaint and recorded the following order:

"Babu C. R. Mukherji, 1st Class, will make a local enquiry and then dispose of the case."

Thereupon Babu C. R. Mukherji held a local enquiry, examined 17 witnesses for the prosecution and dismissed the complaint under sec. 203, Cr. P. C., and made an order under sec. 476, Cr. P. C., for the prosecution of the Petitioner under sec. 211, I. P. C. Against both these orders the Petitioner moved the High Court and obtained a Rule.

Mr. P. N. Dutt and *Babu Hit Lal Guha* for the Petitioner.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This was a Rule calling on the Deputy Commissioner of Jalpaiguri to show cause why the order complained of should not be set aside or why such other order should not be passed as to this Court may seem fit.

The Petitioner laid a complaint against the Sub-Inspector of Police charging him with various offences of wrongful confinement, extortion, mischief, *etc.*, on which the Magistrate who took cognisance of the case made it over to Babu C. R. Mukerjee, a Magistrate holding first class powers, to make a local enquiry and then dispose of the case. Babu C. R. Mukerjee thereafter held a local enquiry, examined 17 prosecution witnesses and then passed an order dismissing the complaint under sec. 203, Cr. P. C., and directing under sec. 476 of that Code the prosecution of the Petitioner for an offence under sec. 211, I. P. C. Against that order, the

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NOTES.

Admission to the Inns of Court.

The Secretary to the Provincial Advisory Committee for Indian Students, Bengal, Mr. N. C. Sen, has sent to us the following information which will be of interest to Indian students who may be desirous of joining the Inns of Court in London for qualifying themselves for the English Bar.

"Three of the Inns of Court *viz.*, Grey's Inn, Lincoln's Inn and the Middle Temple have raised the deposit payable by law students for admission from £50 to £100. This means that the payment on admission would be £140, £141-3*s.*-6*d*, £138-12*s.*-6*d.* in the the case of Lincoln's Inn, Middle Temple and Grey's Inn respectively. It is probable that in the case of Lincoln's Inn this regulation will not come into operation until the 1st January next year. So far as the other two Inns are concerned it applies immediately."

Besides the payment of the above fees Indian students will be required to read in barrister's chambers for qualifying themselves for enrolment in the High Court. This means another 100 guneas or £104. Then enrolment in the High Court costs Rs. 500 more and admission to the Calcutta Bar Library Rs. 1,000. All this together with the expenses incurred for three years' residence in England means in many cases a fortune frittered away and not to mvch useful purpose.

Laying of the foundation of the Behar High Court.

If the people of Behar want a High Court for the new Province, people of Bengal ought not surely to object to it. But we have all along been of opinion that the new Province formed by the combination of Behar, Orissa and a good slice of Bengal proper has not at all been a happy combination. If the Government of India had given a little more thought to the matter or had consulted people who are competent to give opinion on a question of this kind, a more homogeneous Province could have been carved out of the United Provinces and Behar, and then His Excellency the Viceroy and Governor-General would not have had to make the inconsistent speech that he did at the laying of the foundation stone of the High Court for the new Province. His Excellency while attempting to reconcile the too obvious anomalies of the new Province only brought them out in bolder relief.

For instance in saying that "it would be an administrative anomaly that its people should still have to carry on their litigation at a place beyond its limits where the obvious inconvenience of distance, cost and time are enhanced by the disabilities of a different atmosphere and a different vernacular," His Excellency, without intending it, emphasised the fact that a High Court at Patna would be an 'anomaly' for all the reasons above-stated so far as the people of Orissa, Dhalbham, Manbhum, the Bengalee speaking areas of Sontal Parganas, South Bhagalpur and Purnea are concerned. In the words of His Excellency, "the only difficulty of any magnitude that rises before us relates to the convenience of the people of Orissa," but, as we have just indicated, the inconvenience, which the people of the Bengalee speaking areas of Behar will be put to on account of "distance, cost and time, enhanced by the disabilities of a different atmosphere and a different vernacular," will not certainly be of any less magnitude. This reminds us of the singularly inconsistent argument of the late Sir (then Mr.) Herbert Risley's first Partition Resolution in which

he urged in the same breath the cession of Ganjam to Orissa by reason of linguistic and ethnic ties and the severance of Eastern and Western Bengal in spite of such ties. With more care and thought the Government could have avoided anomalies of this kind and also much hardship to a large section of the community.

The Government of India confronted with the physical and linguistic barriers between the component parts of a heterogeneous Province, proposes to come to its rescue by suggesting that Judges should go on circuit in the new Province. This practically amounts to the adoption of our suggestion, without its substance, that constituted as the Province is at present, the only means by which justice could be brought nearer home to the people of the Province is by means of the circuit system. If the proposed High Court is to send out Judges on circuit to Orissa and very likely to Chota Nagpur, we cannot divine what harm could have been done to the people of Behar if some Benches of the Calcutta High Court, which is independent of the Local Government, were to sit at Patna. It would, to our mind, have been ever so much more preferable to have the Benches at Patna changed, say, every three months by Judges of the Calcutta High Court and thus avoid even the remote chance of their acquiring any local prejudice. However, we shall be content to wait and watch the course of this new experiment and wish our brethren of Behar every good luck. As for the people of Bengal, their only regret is the dismemberment of the Calcutta High Court to a certain extent. But it is not even 16 years now since we had thirteen Judges and even then the members of the Calcutta Bar and the Vakils got on very well. In fact, the laying of the foundation stone of the Behar High Court has caused no stir in professional circles in Calcutta.

Imperial Circuit of the Privy Council.

We are glad to find that the *English Law Journal* endorses our view that the chief utility of the Privy Council to the Empire consists in its being a tribunal which can view questions in a spirit of detachment and without any local prejudice and that its usefulness will be much impaired by its going on circuit all over the Empire. Considering also the dimensions of the Empire we wonder how it would be practicable not only to require a fair number of the Lords of Appeal to sit in London but also to sit simultaneously or even at different times in the different parts of the Empire. When the scheme has been received spontaneously both in London and here as impracticable, we are sure the Lord Chancellor will before long be convinced that it is so.

No better tribunal for the determination of a constitutional question can be imagined than the body of distinguished jurists who sit in Downing Street, far removed from the political influences that may prevail or the passions that may have been aroused in the colony where the question arose, If Lord Haldane's dream of an Imperial Assize were to be realised, it would be necessary at least to provide that cases involving constitutional issues should, as heretofore, be heard in the capital of the Empire.

The Lord Chief Justice and religious liberty.

We have in these columns already observed that the appointment of the present Lord Chief Justice of England indicates how the cause of religious liberty has triumphed in England within recent memory and also how racial prejudice has been relegated to the back ground in the conferment of the highest appointments to the most deserving subject of His Majesty. It is time that the same spirit should pervade the whole Empire. The reference to this question made by the Lord Chief Justice in his Guildhall Speech is both instructive and interesting.

I cannot address you here to-night in the City without recalling that I should not be here, occupying this position at this moment, if it were not for the great struggles of the City—now so many years ago—in the cause of religious liberty I should be ungrateful indeed if I allowed this opportunity to pass without reminding you that, first of all, it was the City that insisted upon members of my community being members of your Corporation And it was the City that led the struggle for representation, again by members of my community in the House of Commons. If I have strayed for a moment into those paths which, perhaps, are not peculiarly appropriate for the toast to which I am responding, it is because I should think that I were false to everything that is within me if I did not give utterance to these sentiments remembering as I do that memories so quickly fade, and that, where a whole nation now agrees that there should be the fullest religious liberty and toleration, that was not the case when the City fought the battle which placed me here.

The Lord Chief Justice and the Bench and Bar.

The portion of the Lord Chief Justice's speech relating to the relationship of the Bench and Bar in England is no less interesting.

I am privileged to speak for the Judges. I know them from my observation at the Bar more than in my association with them as Judges I know them from practising before them for so long, and it is, perhaps, for that reason that I may respond for them with less restraint, as I am accustomed, or have hitherto been accustomed, to take my place at the Bar, where there was greater freedom of expression, where impartiality was not a virtue, and silence was not golden. Now, in the very fact of which I am an illustration, at the Bar yesterday on the Bench to-day; at one moment fighting with or against opponents at the Bar, who never become enemies but only opponents, and the next either addressing them or being addressed on the Bench; where we know all their qualities; where, when I was at the Bar I used to say I knew their defects, and where, now I am on the Bench, though I am sure I shall not hear it, I know there will be many at the Bar who know my defects. In responding for the judges, I am privileged to say, from the little that I have yet seen, that it is indeed an honour to associate with them in the dispensation of justice.

The Lord Chief Justice on justice in haste.

We hear a great deal about the delays in the High Court of Calcutta. It is interesting therefore to note the views of the Lord Chief Justice on the question of the delays in the King's Bench Division of the High Court in England. His Lordship responding to the toast on behalf of the Bench said :—

I might be tempted to indulge in some speculation as to the result of the Royal Commission which His Majesty appointed to inquire into the causes of delay in the King's Bench Division, but I shall not attempt to do so I am quite certain that that Commission will have laboured to produce recommendations which we shall consider with the utmost respect—recommendations and views which I know that my brother Judges will attempt, not only to consider, but to give effect to if possible—and that the only view which they would put forward at this moment is that the Judges of England are animated by one single purpose—to serve the highest public interests of the State, and to do what in them lies to promote the course of justice, and in that way to do good and satisfy the public demands of the community. I know very well it is easy to criticise Judges, but it should always be remembered that it is the function of the Judges who preside in the Law Courts to interpret the laws and administer them, and that they must leave the function of making the laws to Parliament which is responsible. Perfection can never be attained by human beings, but we can labour, as I believe we have laboured and as I am sure Judges will labour in the future, to make justice swift, and yet not hurried—for justice in haste is, in my opinion, justice in jeopardy. Above all, whilst administering justice and passing judgment upon actions of men we shall always remember that justice is never less in peril than when it is tempered by mercy.

It must be for keeping on the safe side that His Lordship has been tempering mercy with justice. We have seen that sitting in the Court of Criminal Appeal the Lord Chief Justice has been giving effect to extenuating circumstances for the reduction of sentences.

The Attorney-General on misconceptions regarding the Bar.

The Attorney-General, in responding to the toast on behalf of the Bar at the Guildhall banquet said :—

The profession for which he spoke was, of all professions, the most constantly misunderstood. There were still some deluded persons who regarded a barrister as one who earned his living by fomenting strife and who took peculiar pleasure in bamboozling juries and misleading Judges by the exercise of acumen almost diabolic, stimulated by the payment of fees entirely extortionate. In every particular that picture was untrue. So far from strife being promoted by the practice of advocacy, more quarrels were settled, more controversies were closed, and more reconciliations were effected within the boundaries of the Temple and of Lincoln's Inn than in the whole of the United Kingdom besides This country had evolved a system by which Judges, who were themselves trained at the Bar, expected to receive from the advocates who practised before them the contentions appropriate to the case presented with fidelity to their clients, with fairness to their adversaries, and with candour to the tribunal itself. That was why barristers claimed, in some measure, themselves to be the instruments of justice. That was why, by the ancient tradition of that banquet, the Bench and the Bar were coupled in a single toast.

LAYING OF THE FOUNDATION-STONE OF THE HIGH COURT IN BEHAR AND ORISSA.

At the laying of the foundation-stone of the Patna High Court His Excellency the Viceroy said :—"The ceremony that I have been asked to perform to-day is one to which I set my hand with no small feeling of solemnity, for never have I been called upon to execute a task which reminds me so forcibly of that double character I have the distinguished privilege of bearing as the head of the Executive Government of India, and the personal representative of that most gracious sovereign from whom all judicial jurisdiction is derived and in whose name all justice is administered. The history which has led up to the laying of this foundation-stone is within the knowledge of you all, and I think you will agree that when once it has been determined that Bihar and Orissa should be promoted to the status of a separate province, it would be an administrative anomaly that its people should still have to carry on their litigation at a place beyond its limits where the obvious inconveniences of distance, cost and time are enhanced by the disabilities of a different atmosphere and a different vernacular. The only difficulty of any magnitude that rises before us relates to the convenience of the people of Orissa. After mature consideration my Government have come to the conclusion that the most effective device for meeting the case will be the establishment of a circuit system which will not only bring the administration of justice to the very doors of the people, but the Court will be brought in the closest touch with a portion of their jurisdiction where the conditions are in many instances peculiar and different from those of the rest of the Province I am pleased to be able to announce that in according his approval to the creation of a new High Court for the Province of Bihar and Orissa the Secretary of State has also agreed to the establishment of a circuit system for the benefit of Orissa."

His Excellency also laid the foundation stone of the New Legislative Council Chamber. The Viceroy in the course of his address said —

"I lay this stone in the knowledge that on this spot will rise a building worthy of the great uses to which it is destined to be put, and I trust that the successors of the present Legislative Councils will bring to their deliberations within its portals such sense of dignity and responsibility, such ripeness of judgment that from the conflict of jarring interests and clashing opinions from which we can never expect and hardly hope to be free, may emerge decisions and measures devised to advance in the highest possible degree the enlightenment and prosperity of the people of this Province"

CURRENT INDIAN CASES.

(CIVIL.)

Limitation, restitution of conjugal rights.

MAHOMED *v.* SAKINABAI, I. L. R. 37 Bom. 393.

The Plaintiff served his wife with a notice demanding restitution of conjugal rights. This demand was refused on the 19th July 1906 but the Plaintiff took no action for more than two years. On the 16th June 1911 after the passing of the new Limitation Act which contains no Article prescribing a special period for suits for restitution the Plaintiff sent a fresh notice to his wife and on her noncompliance with it filed his suit on the 20th June 1911.

Held—That under the provisions of sec. 4 and Act 35 of the Limitation Act of 1877 the Plaintiff's suit was

barred and the new Limitation Act could not be invoked in aid.

Dekkan Agriculturists' Relief Act (XVII of 1879), sec. 2—Agriculturist, meaning of.

BHIKHA *v.* RAICHAND, I. L. R. 37 Bom. 398.

Any one who ordinarily engages personally in agricultural labour within certain specified limits is an agriculturist irrespective of the proportion which his strictly agricultural income may bear to any other income accruing to him.

Grant of land for reciting Puran *in a temple.*

MADHWACHAR *v.* SHRIDHAR, I. L. R. 37 Bom. 409.

A hereditary office of *vritti* for the reciting of *Purans* in a certain temple was created and certain lands were assigned as remuneration therefor.

Held—That the lands so granted were not resumable.

Where there is an interest in land coupled with a duty and the grant is not forthcoming so that its actual terms may be known it must always be a matter of great difficulty and no more than a mere conjecture to decide whether the interest was so coupled with the duty that the latter could confidently be said to have been the sole motive and condition of the former.

Civil Procedure Code (1908), sec. 60—Dekkan Agriculturists' Relief Act.

NARAYAN ANANDRAM *v.* GOWBAI, I. L. R. 37 415.

An agriculturist in order to resist the application of the general rule laid down in the Civil Procedure Code, sec. 60, must show that he belongs to the privileged class so as to render sec. 22 of the Dekkan Agriculturists' Relief Act applicable to his case.

Lis pendens.

ISHWAR LINGO DESAI *v.* DATTU GOPAL DESAI, I. L. R. 37 Bom. 427.

A covert dealing with property in suit *pendente lite* by any party to the suit cannot possibly cast any duty or obligation on the opposite party.

It is a part of a litigant's right so far as the subject-matter and conduct of the suit are concerned to know precisely where he stands. He is entitled to know who his opponents are and when that has been definitely and finally ascertained to insist that no dealing on their parts with the property in suit shall compel him to go further afield and bring in new parties who but for such dealing could have had no *locus standi* at all.

Civil Procedure Code (1908), sec. 104 (b)—Appeal.

RAGHAWENDRA [illegible], I. L. R. 37 Bom. 442.

Under cl. (*b*) of sec. 104 of the Civil Procedure Code there is an appeal against an order directing an award to be filed.

Where an award dealt, among other things, with *manpan*, matters relating to dignity and so forth, matters of a kind such that the Civil Courts have no jurisdiction to entertain suits arising out of disputes regarding them.

Held—That the award was not to be rejected on that ground.

Mortgage—Auction purchase—Admission by mortgagor of receipt of consideration.

BAKSHI RAM *v.* LILADHAR, I. L. R. 35 All. 353.

An admission as to the receipt of the consideration made by the mortgagor in the mortgage deed and again before the registering officer is admissible in evidence against the purchaser of the mortgaged property at an auction sale.

When such mortgagor was the father in a joint Hindu family and what was purchased was the right, title and interest of the father only.

Held—That the purchaser was not entitled to raise the question of the validity of the mortgage.

Secs. 69, 70 Evidence Act—Mortgage deed—Attesting witness—Proof.

GOBAR DHAN DAS *v.* HORI LAL, I. L. R. 35 All. 365.

Three illiterate persons executed a mortgage deed by affixing their marks thereto. All three of them and all the attesting witnesses to the deed died before the suit on the mortgage was brought. The evidence adduced to prove the mortgage consisted of (1) the statement of a witness who claimed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representatives of the two other executants which recognised the genuineness of the mortgage in suit, (3) a deed of sale executed by the representatives or some of the representatives of the executants of the deed in suit which recognised the genuineness of the said usufructuary mortgage.

Held—That the evidence adduced did not comply with sec. 69 of the Evidence Act and the mortgage deed was not legally proved.

Civil Procedure Code, Or. 20, r. 2—Judgment, delivering of, by successor in office.

BASANT BEHARI GHOSHAL *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, I. L. R. 35 All. 368.

Or. 20, r. 2 provides that a Judge may pronounce a judgment written but not pronounced by his predecessor.

Review.

AN EPITOME OF LEADING CASES ON EQUITY. *By W. H. H. Kelke, M. A., Bar-at-Law. Third edition. Messrs. Sweet and Maxwell, Ld., London. Price 6s.*

This work is based on White and Tudor's classical work but all the same it is not a slavish summary. The author has not followed the alphabetical arrangement but has re-classified the case law according to the subjects, such as Trusts, Mortgage, Specific Relief, Fraud, Infants, &c. Although the book is intended for students as an introduction to the study of White and Tudor's work, it may with advantage be glanced over even by practitioners, as only the simplest cases are given for illustrating the principle and all complications have been avoided. The work is not in the form of a summary of cases but in that of propositions of law explained and illustrated by cases. In this edition reference has been made to the latest edition of White and Tudor and the author has used his discretion in leaving out or replacing references to older cases by more recent ones.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*In re Allsop.* Before the MASTER OF THE ROLLS AND LORDS JUSTICES HAMILTON AND SWINFEN EADY. 20th October 1913.

Trustees, how far protected by the Statute of Limitation—Court's discretion to relieve a trustee when he paid money under an erroneous construction of the will, discussed.

The Appellant was a trustee under a certain will. The trustees under the terms of that will made payments to some legatees. The will was subsequently construed by the Court, and it was discovered that the said payments ought not to have been made. The Respondent brought the present suit claiming that the trustee ought to replace and make good the moneys found due on taking accounts. The trustees pleaded the Statutes of Limitation. The Court below allowed the claim against the trustee personally but on appeal the trustee was exonerated.

The MASTER OF THE ROLLS said that the Defendants claimed the benefit of sec. 8 of the Trustee Act, 1888, in respect of any breach of trust more than six years before the issue of the writ, but in his opinion this defence failed. Sub sec. 1 of that section dealt with two cases—(*a*) where an existing statute would be available but for the fact of the fiduciary relation; and (*b*) where no existing Statute of Limitations applied. In his opinion the present case fell under (*b*) and not under (*a*). If the case fell within sub-section (*b*) it was clear that the statute would not avail because the proviso at the end said that the statute should not begin to run against any beneficiary unless and until the interest of such beneficiary was an interest in possession. In the present case the Plaintiff's interest was not in possession until 1908, so that the statute was no bar.

The Appellants then contended that sec. 3 of the Judicial Trustees Act, 1896, gave the Court jurisdiction to relieve them from personal liability for the breach of trust, and that the circumstances were such that the Court ought in its discretion to exercise the jurisdiction. The Respondents contended that the section applied only to a case where the breach of trust arose from some executive or administrative blunder, and not to a case where money was paid to a person not entitled according to the true construction of the will. The point thus raised was of the utmost importance. Approaching the matter apart from authority, his Lordship could see no ground for narrowing or limiting the application on the wide words of the section. The statute was designed to protect honest trustees, and it ought not to be construed in a narrow sense. He shrunk from holding that, where trustees had divided an estate between A and B after taking competent advice that A and B were alone entitled, they could not plead the section in answer to a subsequent claim by C. So to hold would render the relief given by the section almost nugatory. The decision of Mr. Justice Kekewich in *Davis* v. *Hutchings* ([1907] 1 Ch, 356) might be right upon the facts of that particular case, but the general principles laid down by that learned Judge at p. 365 could not be supported. In his opinion, the case of *The National Trustees Company of Australasia* v. *General Finance Company of Australasia* ([1905] A. C., 373) was an authority that the Court had jurisdiction to relieve when payment had been made to a wrong person. Mr. Justice Parker in *Re Mackay* ([1911] 1 Ch. 307) used language which his Lordship desired to adopt—"If an ordinary business man might reasonably entertain a particular view of the construction of the instrument and the action of the trustee would have been justified if that view had been the true one, that trustee cannot be said to have acted unreasonably merely because this view of the construction of the instrument is wrong. Even when a trustee has distributed an estate on an erroneous construction of a will he has been relieved under the Act." It might be that there was no reported case in which this had been done, but in the opinion of all the members of the Court this might be done in a proper case. Mr. Justice Warrington had held that the Act had no application where a trustee had misconceived his duty and paid money to a person not entitled. With great respect he thought that the learned Judge was wrong in this. The jurisdiction was from its very width one which must be exercised with great caution. It certainly was not enough for a trustee to say "I thought A B entitled and I paid him accordingly." He could not be considered to have acted reasonably if he had neglected to obtain skilled advice. In considering what was reasonable regard must be had to the estate of which he was trustee. In a large estate it might be only reasonable that he should consult counsel of the first rank or apply by originating summons for the direction of the Court, whereas it would not be reasonable to insist upon all this where the estate was small. Applying these principles to the circumstances of the present case, and having regard to the perfect honesty of the transaction, his Lordship thought that the Court was justified in exercising the jurisdiction conferred by the section and relieving the Defendants from the breach of trust committed by their testator and to a small extent by themselves.

Messrs. Clanson, K. C., and Ribton for the Appellant.

Messrs. Cave, K. C., and Chetwynd for the Respondent.

B. D.

KING'S BENCH DIVISION. *The King* v. *Simpson and others.* Before JUSTICES RIDLEY SCRUTTON AND BAILHACHE. 23rd October 1913.

The practice of the English Courts is that a prisoner who has once stood in peril and been acquitted, will not be tried again for the same offence.

This was a rule calling upon the Respondents to show cause why an order of acquittal should not be quashed. The Respondents, who were Justices, tried two miners for an offence under the Coal Mines Act, 1911. The Justices acquitted the accused. It was subsequently discovered that one of the Justices was not qualified to try and for that reason it was contended that the acquittal was bad for want of jurisdiction. The Court discharged the rule. MR. JUSTICE RIDLEY said.—

In the case of *Reg* v. *Duncan*, 7 Q. B. D. 198, Lord Coleridge said :—"The practice of the Court has been settled for centuries and is that in all cases of a criminal kind where a prisoner or Defendant is in danger of imprisonment, no new trial will be granted if the prisoner or Defendant, having stood in that danger, has been acquitted." He thought that was a principle that the Court ought to be slow to transgress. It was true that in the present case the consequences might not be so serious as they might be in other cases. But the principle was one of great importance, and if they made an exception in this case it might be sought to be extended in other cases. If a person had stood in danger and been acquitted the Court could not interfere with that acquittal. The Coal Mines Act, 1911, provided that where proceedings were taken for offences under that Act a man employed in a mine should not, except with the consent of both parties to the case, act as a member of the Court. That was not the place to criticize the Act, although one might say that the Legislature were cutting out all persons who knew anything about the working of mines. One of the Justices sitting in this case was employed in a mine and therefore disqualified. No objection was taken at the time, and the proceedings ended in an acquittal. In those circumstances had the person who had been acquitted stood in peril? Upon that question the decision in *Rex* v. *Justices of Galway*, No. 2 (1906) Ir Rep. II, 499, was in point, although it was not binding upon that Court. In his Lordship's opinion the men in the present case did stand in peril of conviction, the conviction being voidable and not void, and therefore the acquittal could not be quashed.

Messrs. Sankey, K. C. and Trotter shewed cause.

Messrs. Thomas, K. C., and Higgins in support of the Rule.

B. D.

KING'S BENCH DIVISION. *Nicholls* v. *Evans.* Before MR. JUSTICE CHANNELL. 29th October 1913.

Gaming debts paid by crossed cheque—Held, that the loser could not recover.

This was an action in which the Plaintiff sued to recover moneys from the Defendant. The parties made bets and the Plaintiff lost, and paid the Defendant by crossed cheques. The Defendant endorsed them to his bankers who collected the amount. It was contended for the Plaintiff that the Defendant's' bank were the holders of the cheques within the Act of 5 and 6 Wm. IV., ch. 41. The learned Judge found against the Plaintiff. He said :—

They started with the fact that as a rule bets were void and a document given in payment of a bet was given without consideration, but it seemed that the Act of 5 and 6 Wm. IV., c. 41, introduced a new matter and made them not merely void but illegal. If a person made a bet and, having lost, paid in cash, he could not recover the money. That was agreed to be the law. If that was the case it was rather ridiculous that it should make any difference if the person who had lost happened to pay by the machinery of a cheque, and where a cheque was the mere machinery by which payment was made the position as between the parties was exactly the same as if the loser had paid by any other machinery. He wondered what would be the case if the loser paid by a bank note, which in form was a promissory note and which was certainly negotiable. Could it be suggested that if the loser paid by a bank note he could recover the money, but that if he paid in sovereigns he could not? It was said that sec. 2 of 5 and 6 Wm. IV., c. 41, applied to the present case, and upon that section the whole of the argument addressed to him had been based. "Holder" there meant a holder deriving his title from the person to whom the bill was originally given and was intended to distinguish that person from the person to whom it was originally given. If that were the case the whole matter was in accordance with justice and common sense. If a person had given a cheque, note, or bill for the consideration mentioned in the section—namely, for the payment of bets—he could stop it and refuse to pay it at any time before it was actually paid and the transaction became a completed transaction. That being so, if the cheque were paid over to an indorsee he could be compelled to pay that indorsee if he was innocent, but as between himself and the payee of the cheque he ought to be placed in the same position as if the transaction had been an incomplete one, so, that he could stop the cheque. But if the machinery had gone through and the person named as the payee on

the cheque had been paid there was no conceivable reason why the person paying should get the money back. The only difficulty in the case arose from the fact that these cheques were crossed by the Plaintiff, and made payable to the Defendant or his order. As they were crossed the Defendant could only get paid through the machinery of paying them into his bank, the bank being employed to collect them as his agent. If in the present case the payment had been made to the bank in the character of holders in their own right and not in the character of agents' for the Defendant there would have been some doubt whether the statute might not have applied, and if it had been proved that the Defendant's account at the bank was overdrawn possibly the statute might have applied because the bank might then have been the holders of the cheque. No proof that this was the case had been given, and upon the facts before him he drew the inference that the bank collected the money for the Defendant, the payee of the cheque, and upon that view the bank was not the indorsee, holder, or assignee of the cheque within the meaning of the statute, and the statute did not apply so as to make the sum sued for recoverable by the Plaintiff.

Messrs. Haldenstein, K. C., and Moses for the Plaintiff.

Messrs Hemmerde, K. C., and Rowen Hamilton for the Defendant.

B. D.

CALCUTTA HIGH COURT

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD AND SHARFUDDIN, JJ. IN THE MATTER OF THE PETITION OF SURENDRA NATH BANERJEA. 26th November 1913.

Criminal Procedure Code (Act V of 1908), sec. 205—Personal attendance in Court, exemption from.

In a case under the Bengal Municipal Act pending in the Court of the Cantonment Magistrate of Barrackpore against the Petitioner, an order was made requiring the personal attendance of the Petitioner in Court. Against this order the Petitioner moved the High Court.

Mr. J. N. Roy, with *Babu Probodh Chandra Chatterji*, for the Petitioner.—The Petitioner is a member of the Imperial Council. He is also a member of the Bengal Council. He is the owner of several houses within the Barrackpore Cantonment. He was asked to remove some rubbish and the Petitioner referred it to his agent at Barrackpore. These proceedings were instituted against him and in these proceedings the Magistrate has made the order complained of.

Mr. Roy.—On two previous occasions we made such applications and twice we had to come to the High Court to have the order of the Magistrate set aside.

HOLMWOOD, J.—A gentleman of the position of the Hon'ble Mr. Surendra Nath Banerjea ought not to be called upon to appear in person in a Municipal case.

Their Lordships passed the following order:—

We would point out to the Magistrate that it is his bounden duty to allow a legal representative to appear in a case of this kind should any application under sec. 205, Cr. P. C., be made before him to do so. Even if the applicant did not appear personally to-morrow (the date fixed for hearing) but had a competent legal representative present in attendance to represent him, the authority of the case of *Durga Das Rakhit* v. *Naresh Chandra Sen*, I. L. R. 27 Cal. 985, is clear that no criminal proceeding could follow; and we can hardly imagine that the learned Magistrate would proceed to enforce personal attendance in a case of this nature.

CRIMINAL REVISIONAL JURISDICTION. Before IMAM AND CHAPMAN, JJ. REV. NO. 1525 OF 1913. HIRU BALDEO, Petitioner *v.* THE DISTRICT BOARD OF MANBHUM, Opposite Party. 26th November 1913.

District Board Bye law (Manbhum), sec. 2 (2)—Encroachment of road—Hanging verandah if an encroachment.

The Petitioner was convicted by a Magistrate exercising second class powers under sec. 2 (2) of the Manbhum District Board Bye laws for having encroached on the District Board road by putting up a hanging verandah and was sentenced to pay a fine of Rs. 50. Against the conviction and sentence the Petitioner appealed to the Deputy Commissioner of Manbhum who dismissed the appeal. The Petitioner moved the High Court and obtained a rule on the ground that the construction of a hanging verandah does not amount to an encroachment and was not found to have resulted in any obstruction to traffic or inconvenience to passengers.

Their Lordships after hearing both sides discharged the Rule holding that a hanging verandah like the one in question in the present was an encroachment within the meaning of sec. 2 (2) of the District Board Bye laws.

Babu Bepin Chandra Mullick for the Petitioner.

Babu Atulya Charan Bose for the Opposite Party.

Rule discharged.

CIVIL APPELLATE JURISDICTION. Before CARNDUFF AND RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 1839 OF 1910. GURU CHARAN SHAHA, Defendant, Appellant v. SHEBAIT OF THE DEITY ISHVAR NARSINGH JIU AND OTHERS—Plantiffs, Respondents. Heard, 9th November. Judgment, 26th November 1913.

Indian Limitation Act (XV of 1877), sec. 19—Right, admission of—Inference—Kabuliyat—*Acknowledgment of liability.*

Plaintiff, as *shebait* of Thakur Narsingh Jiu, brought this suit in respect of a piece of land between the Thakur's *Akhra* and the present Municipal road. Plaintiff alleged that that piece of land always formed a part and parcel of the *Akhra* and was in possession as such for more than 12 years before suit. The Defendant with the permission of the *pujari Mahant* at first erected a *ghar* towards the north side of the disputed land about 10 or 11 years ago, then about 2 or 3 years ago he erected another hut to the south of *ghar*: again in 1913 Magh or Falgun the Defendant forcibly erected a *ghar* on the southern portion of the disputed land. Hence the suit for declaration of title and for recovery of possession of the land in suit by removing the structures erected by the Defendant. The Defendant denied Plaintiff's right to sue as *shebait*, denied Narsingh Jiu's title to the land in suit and pleaded limitation.

The *Akhrabari* was divided in two by a path. There was dispute as to the northern portion upon which a hut stood. In 1908 the *shebait* sued to eject the Appellant. The suit would be out of time unless a *kabuliyat* executed in 1897 by the Appellant contained what amounted to an acknowledgment of liability within the meaning of sec. 19 of the Limitation Act. The Court of first Instance held that it did not, but the lower Appellate Court took the opposite view.

The *kabuliyat* in question was executed by the Appellant in favour of certain members of the family of the Nawab of Dacca, who had no concern with either the suit or the *Akhrabari*. It related to several plots of land lying to the east of the road which ran along the eastern side of the *Akhrabari*, and, in a Schedule annexed to it, it described the two plots furthest south in the following terms:—"1 North of the khal of Tevar Bazar, east of the road to the karsa lands of my jama, mufafat, your khas tenant Akamaddi and of the *Akhra* lands of Narsingh Jiu &c."

The Appellant purchased some land from Akamaddi in 1894 and those lands were beyond and immediately to the north of *Akhrabari*.

Held—If a person admits a right, it is a necessary implication that he also admits the legal sequences of that right; so that where a person admitted that land of which he was in possession at the time was the property of another, he admitted that he was liable to be made to restore it to that others.

An acknowledgment, to whomsoever made, if it be an acknowledgment pointing with reasonable certainty to the liability in dispute or the right out of which that liability arises as a legal consequence, is an "acknowledgment of liability" within the meaning of sec. 19 of the Limitation Act.

Babus Dwarka Nath Chuckerbutty and *Gopal Chunder Das* for the Appellant.

Babus Jogesh Chunder Roy and *Akshay Kumar Banerjee* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CARNDUFF AND RICHADSON JJ. APPEAL FROM ORIGINAL DECREE No 63 OF 1910. DWARKA NATH SEN GUPTA AND ANOTHER, Claimant No. 2, Appellants. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND RAHIM BUKSH AND OTHERS, Respondents. 27th November 1913.

Agreement, construction of—Acquisition of land—Right to compensation.

The only question raised by the Appeal was as to the construction of an agreement between the Appellant, a landlord, and his lessee. The terms of the agreement were that, in the event of any acquisition of the land by the Municipality or by any Local Self-Government institution, the compensation awarded should go to the lessor. In the present case, the acquisition was by the Government of Bengal for the purpose of a Mahomedan hostel which it was proposed to establish.

It was contended by the Appellant that the parties could not have intended to limit the agreement in that way.

Held, that the words expressly so limited it.

In construing a deed the question always is, what is the meaning of what the parties have said, and not what did the parties mean to say.

Monypenny v. *Monypenny* (9 H. L. 114 at p. 146) followed.

Babu Gunada Churn Sen for the Appellants.

Babu Ram Churn Mitra for the Respondents.

A. T. M. *Appeal dismissed.*

MAHOMED IMAMUDDIN *v.* DEBENDRA NATH.

Petitioner moved this Court and a Rule was accordingly issued in the terms mentioned above.

We notice that the order of the Magistrate before whom the complaint was laid was bad in directing Babu C. R. Mukerjee to hold a local enquiry inasmuch as the Code of Criminal Procedure does not make any provision for such a course by a Magistrate to whom a case is made over for disposal. It is quite clear that the provisions of sec. 202, Cr. P. C., have been misunderstood and consequently misapplied. The attention of the Magistrates to irregularities of this sort has, on many previous occasions, been drawn by this Court but it seems that Magistrates yet indulge in mistakes of this kind which have more or less become common in the practice of law of Criminal Procedure in the mofussil.

The Petitioners in this case complain that the order of Babu C. R. Mukerjee is wrong for many reasons. We have no desire to discuss the errors of that Magistrate in coming to the conclusion at which he arrived because we apprehend that it is possible that by any expression of opinion as regards the errors in the judgment, we may be causing some apprehension in the mind of the Magistrate who has to try this case as to what our own inclinations are on the general merits of the case. We are satisfied that the order of the Magistrate is not proper. The case against the Sub-Inspector may or may not be true. That will rest on the evidence that may be produced at the trial. All that we are concerned with at the present stage is to see whether the evidence produced before the Magistrate is or is not sufficiently strong to warrant the issue of process against the accused for his trial. The Magistrate's order which is a lengthy one leads us to hold that this is not a case in which an order under sec. 203 dismissing the complaint could be properly passed.

We, therefore, make the Rule absolute and direct the Magistrate to hold a further enquiry into this case according to law. The prosecution of the Petitioner under sec. 211 is consequently set aside.

We have no doubt that the learned Deputy Commissioner will consider the desirability of this case being heard by some Magistrate other than Babu C. R. Mukerjee. The case is of some importance affecting the conduct of a public servant against whom very serious charges are laid by a citizen living in his jurisdiction. While the public servant is entitled to every protection against false charges being laid against him, a citizen living within the jurisdiction of that public servant is equally entitled to every protection from his aggressions or oppressive acts. The Deputy Commissioner may consider perhaps the desirability of trying the case himself if his work permits him sufficient leisure to do so. We give no direction in this matter. A request has been made by the Petitioner that the case may be directed to be tried by the Deputy Commissioner. We leave it to the discretion of the Deputy Commissioner who will excercise it as the circumstances of the case may require.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM THE SUPREME COURT OF SEYCHELLES.]

LORD DUNEDIN.
LORD SHAW.
LORD MOULTON.
SIR SAMUEL GRIFFITH.
1913,
5, November.

LOUIS EDOUARD LANIER
v.
THE KING.

Leave to appeal to the Privy Council in criminal cases, when may be given—Invasion of liberty and just rights of a citizen—Embezzlement—Criminal and civil liability, distinction between—Costs against Crown in criminal appeal.

The Appellant who was a member of a firm was authorised by the guardian of two minors by a power-of-attorney to act for the guardian in collecting and investing the minors' property. Acting under this authority funds were received and remittances made from time to time by the Appellant's firm with whom an account was opened in the name of the minors. A certain amount due to the minors from a creditor was paid by him in the shape of crediting it to the Appellant's firm in their account with their bankers which account was overdrawn. The minors' account with the Appellant's firm was duly credited with that amount. The Appellant being thereafter asked to give a guarantee for the funds of the minor in his hand gave security to the satisfaction of the authorities. Thereafter criminal proceedings were instituted against the Appellant who was tried by the Chief Justice without a jury and convicted of having embezzled the minors' money

Held—*That the facts did not on any just or legal view of them warrant a conviction and the grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit appeared in the present case to have been left out of judicial view.*

That the Judicial Committee of the Privy Council does not lightly interfere in criminal cases but in the present case although the proceedings taken were unobjectionable in form, justice had gravely and injuriously miscarried and the sentence pronounced against the Appellant formed such an invasion of liberty and such denial of his just rights as a citizen that their Lordships felt called upon to interfere.

Having regard to the exceptional nature of the case their Lordships directed the Crown to pay to the Appellant the costs of the appeal.

Appeal from the Supreme Court of Seychelles.

The facts of the case will appear from the judgment.

Messrs. Pollock, K. C., and Lee for the Appellant.

Sir Robert Finlay, K. C., and *Mr. O'Hagan* for the Crown.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal from a conviction and sentence of the Supreme Court of Seychelles. It was pronounced on the 5th July 1911 by the Acting Chief Justice, who tried the case without a jury.

The Appellant is a merchant in Mahe on one of the Seychelles islands. He was at the time of the proceedings a member of the Legislative Council of the Colony and Consul for the French Republic, and he held various important commercial agencies. He was managing director of the firm of Lanier and Company.

It is for obvious reasons undesirable to comment upon various peculiarities of the case, and it is expedient to confine even the statement of the circumstances to the barest narrative. Such a narrative is, however, necessary.

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There was in the colony a family of two minor children named Lablache. At a family council duly held under the law of the colony (derived from the French Civil Code) Miss Lucy Lablache was appointed to the office of their guardian. On the 14th November 1901 she executed in favour of the Appellant a Procuration or Power of Attorney, and on the 2nd April 1909, on the eve of her leaving with the children for Europe, she confirmed the Procuration by what is called a Deed of Maintenance. Under these deeds the Appellant had the amplest powers, to act for the guardian in the ingathering and the investment, either with or without security, of the property of the minors.

Acting under these powers, certain funds were received and remittances of money were from time to time made by Messrs. Lanier and Company, the Appellant's firm.

From beginning to end of these proceedings no suggestion has ever been made that either the minors personally, or Miss Lablache, their guardian, ever complained of, or are now or ever were dissatisfied with, the conduct of the Appellant or his firm. Miss Lablache's anxiety appears to have been solely that a high rate of interest should be obtained, and this was done.

A circumstance of importance is that these payments were made by the firm of Lanier and Company. This firm's interposition (presumably at the instance of the Appellant) appears to have been highly in the interest of the minors in past years. A regular account was opened, and from the year 1906 the minors' funds were received and advances made from time to time by the Company. The advances were sometimes far in excess of the receipts; and indeed in the end of 1908, whereas the receipts had been Rs. 6,119, the advances had been no less than Rs. 9,435.

In November 1910 a sum of Rs. 35,313 became payable to the minors by M. D'Emmerez de Charmoy. This gentleman proposed at first to pay by an order in favour of the Appellant and drawn upon the Appellant's bankers, Messrs. Said and Company, but the transaction took the shape of crediting the amount to Messrs. Lanier and Company in their account with their bankers, which account was overdrawn. This was an undoubted irregularity. Their Lordships incline to think that it occurred simply because the firm had been acting in the minors' interest and had had direct account with them for many years. No concealment of any kind was practised. The minors' account with Messrs. Lanier and Company was duly credited and all the entries throughout are openly and regularly made. After this date the firm continued to make advances as before out of this money which was lying with it at interest. The receipts for the last three remittances are produced; they are dated in February, April and May 1911 and cover payments of 1,500 francs. So far as M. D'Emmerez de Charmoy was concerned, he also saw no objection to his payment being thus dealt with. Instead of making it to Mr. Lanier and getting that gentleman's receipt he was aware that the bankers had simply credited their customers Lanier and Company with the amount. He was undoubtedly also aware of the history of the family, of the standing of the firm, and of its previous relations with the minors. That there was anything criminal being done does not at that time seem to have entered into any person's mind.

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On the 20th June 1911, however, a family council was held, which was presided over officially by Mr. Alexander Williamson, the Acting Chief Justice. A "Mr. Finlay Gemmel, friend" asked that Mr. Lanier "must show what cash he has in hand belonging to the minors." Thereupon the Appellant stated fully and with almost complete exactness how the matter stood. Mr. Gemmel suggested that the amount be invested or paid or that a guarantee be given by Mr. Lanier. This was perfectly reasonable, and an adjournment was made till the 27th June to enable one of these courses to be taken. Mr. Lanier acquiesced; and on the 27th June a guarantee for Rs. 34,000, with a mortgage over the properties, was offered by Mr. Lemarchand, and this offer was, of course, unanimously accepted. One would have thought that everything was now satisfactorily arranged and ended. The minors' interests were completely protected. Sharply as the Appellant had been pulled up, he had answered the call: the council were satisfied: and the guarantee and mortgage were put upon record. It seems incredible, but it is the fact, that it was after all this had been done that criminal proceedings were instituted against the Appellant under the Seychelles Penal Code.

On the same day an Information was filed charging Mr. Lanier with having wilfully, fraudulently and feloniously embezzled the minors' money on the previous 31st of May. And on that day, *viz.*, 27th June, a warrant was issued for Mr. Lanier's arrest. On the next day, namely, the 28th June, the Chief Justice informed the family council that he had communicated with the Crown Prosecutor. The proceedings thus started were pursued with alacrity and vigour. The Prosecutor considered it desirable that a member of the Bar should conduct the case, and the family council, again presided over by the Chief Justice, appointed two, and arranged about their fees.

On the 1st November the Prosecutor moved the Chief Justice to be allowed to make drastic amendments to the Information, including one which altered the *tempus delicti* to the 20th June 1911. These amendments were objected to; the objections were repelled; and the trial was fixed for four days afterwards, namely, the 5th July.

On the 5th July an application was made for a week's adjournment to enable Counsel to be employed for the defence, and a telegram from Tamatavi, stating that Counsel's passage was booked, was produced. The application was refused. The evidence laid was substantially in accord with the narrative already given. The books were produced with all the entries in order. No further facts suggesting criminality were proved. In short, Counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the Appellant of crime. The Chief Justice, however, convicted Mr. Lanier and sentenced him to be imprisoned for eighteen months with hard labour and to pay the costs of the prosecution.

Application for leave to appeal to the Supreme Court of Mauritius was refused, on the ground that the case was not appealable. This was correct. Had the sentence been for two years an appeal would have lain. A request was made that the sentence be increased, so as to make the case appealable. This was refused. An attempt was then made to bring the proceedings before the Supreme

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Court of Mauritius by *certiorari*, with a view to their being quashed. The learned Judges of that colony not obscurely intimated that the affidavits before them disclosed a grave question, but they were constrained to decide that they had no jurisdiction to entertain such an application.

Application for leave to appeal to His Majesty in Council was then made and was granted by this Board.

Many grounds for a reversal of the judgment appealed from have been made, and in the affidavits which form part of the present Record others also of a grave character are suggested. It appears to their Lordships, however, that the matter may be disposed of by a consideration of the facts above mentioned, of the judgment itself, and of the reasons stated therefor, the whole being viewed in the light of the Statute. The information, as amended, upon which the trial proceeded was as follows:—" That on or about the 20th day of June in the year of our Lord one thousand nine hundred and eleven, at Seychelles, at a place called Victoria, one Louis Edouard Lanier, Merchant, residing at Victoria, did wilfully, fraudulently, and unlawfully embezzle to the prejudice of the minors Lablache the owners thereof, the sum of thirty-four thousand one hundred and ninety-one rupees and thirty-three cents, which sum had been delivered to the said Louis Edouard Lanier merely in pursuance of a deposit or trust whilst he was acting in his capacity as agent or proxy of the said minors' dative guardian, *viz.*, Lucie Lablache, and as sub-guardian of the said minors, with the condition that the same be returned or produced against the form of the Statute in such case made and provided and against the peace of our Lord the King his Crown and Dignity."

The statutory ground of the information was not stated in its text. But on the 1st July, when the motion for amendment of its terms was made, the Crown Prosecutor announced that he proceeded upon sec. 216 of the Seychelles Penal Code. That section is as follows:—

" Whoever embezzles, squanders away, or destroys, or attempts to embezzle, squander away, or destroy to the prejudice of the owner, possessor, or holder thereof any goods, money, valuable security, bill, acquittance, or other document containing or creating an obligation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (*prêt à usage*) or for any work with or without a promise of remuneration with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment and a fine not exceeding three thousand rupees (Rs. 3,000)."

In the construction of this section placed before the Board by the learned Counsel for the Appellant, an argument was presented that the section refers alone to the failure to restore or replace goods, money, &c., *in forma specifica*, and that the section was accordingly inapplicable to a position like that of the ordinary breach of agency or trust, in which money, in the sense of the actual notes, sovereigns, or the like, does not fall to be returned, but only its equivalent. And the argument proceeded substantially to exclude all such ordinary cases as embezzlement from the ambit of the Seychelles Code, as it was also maintained that that crime was not dealt with by any other or more nearly applicable section.

Against this argument Sir Robert Finlay, on behalf of the Crown, protested, and in their Lordships' opinion, the protest was well-founded. The Statute does

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not appear to be limited in the sense contended for.

Upon the other hand, no countenance can be given to the view that the language of the Statute can be used to rank within the category of crime, conduct, or actions which do not essentially partake of the nature of embezzlement in the sense in which that term is ordinarily and properly understood. Although the term "embezzle" is supplemented by the terms "squander away or destroy," the whole context and view of the section show that the latter expressions are amplifications or exemplifications of the operations which are of the nature of embezzlement, in the sense that the conduct which is libelled has been a wilful appropriation by the accused of the property of another, or, after possession of the same has been acquired, of the wilful squandering or destruction of it to his prejudice. The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility which of course may be imposed by Statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind. It is sufficient with regard to the judgment before the Board of the Acting Chief Justice to remark that such distinctions and, in particular, the distinction between criminal liability and civil liability to account, hardly seem to have been present to his mind.

Two observations may be quoted which make this clear :—

"The act is wilful and fraudulent if he ought to foresee that a prejudice can result. It is not sufficient for him to state that he did not wish to cause prejudice, nor can he defend himself by saying that he did not foresee the result He ought to have foreseen it. It was his duty not only to himself, but to those for whom he acted to take such precautions and to have exercised such fore sight as would not have involved him in the possibility of causing prejudice"

In so far as this is a statement of law, it is a proposition of constructive crime, and does not appear to be warranted by any general principle of law or by any sound interpretation of the section.

The second passage applies the erroneous doctrine thus :—

"In this case the wilful and fraudulent intent resulted from the fact that the accused so used the moneys entrusted to him that he rendered himself unable to produce them when the demand was formally and legally made by the family council."

It is sufficient to say that, in the opinion of their Lordships, even though the legal doctrine proceeded upon were sound, the facts proved do not warrant, but negative, the conclusion drawn. The alleged date of the crime is the 20th June. That is the very date on which the position was explained by the Appellant, and it was arranged that full security should be given, and it was given as stipulated. It would be straining the Act to apply it to anything done on that date, or indeed to the facts as a whole which were proved in this case.

Their Lordships are of opinion that the rules thus laid down by the Judge are in no respect safe guides in a matter of criminal responsibility. If they were, all

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persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in investment, or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest. These propositions are not made in order to mitigate the rigour of that civil responsibility which must attach to all the dealings with the property of others; but they are so elementary as grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit, that their Lordships regret that they appear on this occasion to have been left out of judicial view.

This omission would in any case be serious, but in the present case the point is not merely formal, and the sentence pronounced against the Appellant formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere.

In criminal cases this Board does not lightly interfere. To use the language of Lord Watson in the case of *Dillet* (1):—

"Such Appeals are of rare occurrence, because the rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The Appeal will be allowed, but not on any matter of form. Having carefully examined all the evidence, their Lordships are of opinion that the facts did not, on any just or legal view of them, warrant a conviction. It is unnecessary to consider arguments as to the rushing of the procedure or the harshness of the sentence, for, in their Lordships' view, even although the proceedings are taken to have been unobjectionable in form, justice has gravely and injuriously miscarried.

Their Lordships will humbly advise His Majesty that the Appeal be allowed, that the judgment and sentence appealed from be quashed, and that the Appellant be declared not guilty of the offence charged. Looking to the exceptional nature of the case the Crown will pay to the Appellant the costs of the Appeal. There will also be restored to him the amount of the costs of prosecution paid under the judgment of the Court below.

Solicitors: *Messrs. Loughborough, Gedge, Nisbet and Drew* for the Appellant.

Solicitors: *Messrs. Sutton, Ommanney and Rendall* for the Respondent.

B. D.

(1) 12 A. C. 459, 467 (1887).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 521 OF 1910.

MOOKERJEE, J.
HOLMWOOD, J.
1912,
24, July.

GUNPAT SINGH, Appellant,
v.
MOTI CHAND, Respondent.

Putni Regulation (VIII of 1819), secs. 3, 5, 6—Land Acquisition Act (I of 1894)—Apportionment of compensation money—Non-registration of putnidar's *name in zemindar's books—Effect of, on* putnidar's *title to share of compensation—Refusal of zemindar to allow proportionate abatement—Effect of, on zemindar's title to compensation.*

When the whole of the compensation money for land acquired under the Land Acquisition Act was awarded to the putnidars *on the ground that as the zemindars had not allowed an abatement of rent on*

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account of the land acquired they were not entitled to a share of the compensation money and the zemindars' case was that as the putnidars *did not get themselves registered in the books of the zemindars under the provisions of the Putni Regulation their title was not protected and they were not entitled to claim any portion of the compensation money,*

Held—*That the* putnidars *were entitled to the compensation money and the zemindars to no portion of it.*

Under sec. 6 of the Putni Regulation the landlord may demand a fee for the registration in his books of the name of the purchaser of a putni *as also security from him but the omission to pay the fee and the security does not affect in any way the title of the purchaser whose rights are perfected upon the transfer by the* putnidar *and are not in any way contingent for their validity upon the payment of the fee and security.*

If the zemindars allow an abatement of rent to the putnidars *the rent abated primarily represents their annual loss and they may reasonably claim out of the compensation money the capitalised value of that rent but if they do not allow such abatement they do not suffer any immediate loss by reason of the acquisition.*

This was an Appeal preferred on the 21st of November 1908 against a decision of Babu Kissori Mohun Sikdar, Subordinate Judge, Bhagalpore, dated the 11th of August 1910.

The facts of the case will appear from the judgment.

Babus Dasarathi Sanyal and *Debendra Narain Bhuttacharjee* for the Appellant.

Babu Tarakeswar Pal Chowdhury for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal on behalf of the zemindars in proceedings under the Land Acquisition Act for apportionment of compensation money. The dispute is between the zemindars and the *putnidars* as to the mode in which the apportionment is to be effected. The Subordinate Judge has awarded the entire compensation money to the *putnidars* on the ground that as the zemindars have not allowed any abatement of rent on account of the land acquired, they are not entitled to a share of the compensation money. On behalf of the zemindars it is argued in this Court, *first*, that as the *putnidars* did not get themselves registered in the books of the zemindars under the provisions of the Putni Regulation of 1819, their title has not been perfected and they are consequently not entitled to claim any portion of the compensation money, and, *secondly*, that although no abatement of rent has been allowed by the zemindars to the *putnidars*, yet the zemindars are entitled to a share of the compensation money. In our opinion, there is no foundation for either of these contentions.

In so far as the first point is concerned, sec. 3 of the Putni Regulation of 1819 makes a *putni* tenure capable of being transferred by sale, gift or otherwise at the discretion of the holder in the same manner as other real property. Sec. 5 provides for the registration of the name of the purchaser in the books of the landlords. The landlord may demand a fee and security and he is entitled to refuse to give effect to the transfer till such fee and security have been paid, this is clear from the first paragraph of sec. 6. But it cannot be maintained that the omission to pay the fee and the security affects in any

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way the title of the purchaser. His rights are perfected upon the transfer by the *putnidar* and are not in any way contingent for their validity upon the payment of the fee and the security. This view is supported by the case of *Joy Krishna Mukhopadhya* v. *Sarfannessa* (1) and *Chunder Pershad* v. *Shuvadra Kumari* (2). Reference may also be made to the decision of the Judicial Committee in *Lukhee Narain Mitter* v. *Khetturpal Singh* (3). In that case, a *durputnidar* had paid money to save the *putni* from sale. He subsequently claimed a refund, and the question arose whether the claim was affected by his omission to register his name in the office of the superior landlord. It was ruled by this Court, *Khettro Paul* v. *Luckhi Narain* (4), that his title had been perfected and he was entitled to a refund, notwithstanding that his name had not been registered in the office of the superior holder. The only effect of his failure to secure registration of his name is that the landlord is not bound to recognise his purchase and may sell up his tenure in execution of a decree for arrears of rents, obtained against the registered tenant. Substantially the same view was taken in the case of a permanent tenure in *Matangini Chowdhurani* v. *Sreenath Das* (5), and the contrary opinion implied in *Mungal Das* v. *Dhunpat Singh* (6) cannot be regarded as good law. In other words, as observed in the case of *Okhoy Coomar* v. *Maharaja of Burdwan* (7), the status of a *putnidar* or *durputnidar* does not depend upon the registration or consent of the zemindars. The *putnidars* in the present case are consequently entitled to a share in the compensation money.

In so far as the second point is concerned, it has been broadly contended that the zemindars are entitled to a share of the compensation money even though they have not allowed any abatement of rent to the *putnidars*. In support of this view reference has been made to the cases of *Godadhar Das* v. *Dhunpat Sing* (8) and *Khetter Kristo Mitter* v. *Dinendra Narain Roy* (9). In the case of *Dinendra Narain Roy* v. *Tituram Mukerjee* (10), it was pointed out however that the observations of Sir Richard Garth, C. J., in the case of *Gadadhar Das* v. *Dhunpat Singh* (8), which were followed in *Khettra Krista* v. *Dinendra Narain* (9), were *obiter dicta* and were not binding upon this Court. It has not been seriously questioned that the view that the compensation money should be divided in equal halves between the zemindars and *putnidars* notwithstanding the fact that the zemindars have not allowed any abatement of rent to the *putnidars* cannot be maintained on principle. It has not also been disputed that the view militates against the decisions in *Raye Kissory Dassi* v. *Nilcant Dey* (11), *Bepro Das* v. *Sarat Chandra* (12) and *Ram Ranjan* v. *Bunwari Lal Mitter* (13). If we look at the matter as one of principle, it becomes manifest that the claim of the zemindars is clearly unfounded. The compensation money in the hands of the Collector represents the value of the land acquired by the State. That sum has to be distributed amongst the holders of

(1) I. L. R. 15 Cal. 385 (1888).
(2) I. R. 12 Cal. 622 (1886).
(3) 20 W. R. 380 (1873).
(4) 15 W. R. 125 (1871).
(5) 7 C. W. N. 552 (1903)
(6) 25 W. R. 152 (1876).
(7) 22 W. R. 299 (1874).

(8) I. L. R 7 Cal 585 (1880).
(9) 3 C. W. N. 202 (1897).
(10) I. L. R. 30 Cal. 801 at p. 807 (1903).
(11) 20 W. R. 370 (1873).
(12) 11 C. W. N. cli (1907).
(13) 14 C. W. N. cxxii (1910).

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interests of different degrees in the land acquired. Each claimant can prove the value of his interest, in other words, the measure of the loss sustained by him by the acquisition and when he does this, he becomes entitled to a proportionate share of the compensation money. If the zemindars allow an abatement of rent to the *putnidar* the rent abated primarily represents their annual loss, and they may reasonably claim out of the compensation money, the capitalised value of that rent. But if they do not allow any abatement of rent, if they recover from the *putnidars* the whole of the original rent, although the latter have lost the income derivable from the acquired portion of the land, what is the measure of their loss? Plainly, they do not suffer any immediate loss by reason of the acquisition. It has been ingeniously suggested, however, that although the rent is not abated, the zemindars may in certain events suffer loss; namely, their security for the rent is diminished in value and if the perpetual lease is ever forfeited, they will get back a smaller quantity of land than what was comprised in the original tenancy. This chance of forfeiture is indisputably very remote; indeed, whether under the terms of the *putni* in the present case it can ever be at all forfeited is by no means certain. But even if it be assumed that there may be a forfeiture of the *putni* in certain contingencies, the zemindars have wholly failed to establish the value of this remote chance of possible loss; they are consequently not entitled to any share of the compensation money.

The result is that the decree of the Court below is affirmed and this Appeal dismissed with costs. We assess the hearing-fee at two gold mohurs.

Appeal dismissed.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL DECREE

No. 557 OF 1908.

MOOKERJEE, J.
BEACHCROFT, J.
1912,
Heard, 4, 5 & 12, June.
Judgment, 30, August.

RAM DAS HAZRA, Plaintiff, Appellant,
v.
SECRETARY OF STATE FOR INDIA IN COUNCIL, Defendant, Respondent.

Specific Relief Act (I of 1877), sec. 42—Government servant acquitted at criminal trial dismissed without opportunity to defend himself—Notification of dismissal in gazette—Suit for declaration that dismissal without good grounds and in contravention of Government rules and that notification illegal, if lies—Suit against Crown by dismissed servant for wrongful dismissal or libel, if lies.

Where Plaintiff who held a ministerial post in the Burdwan Collectorate, having been tried under secs. 116, 161 and 466 of the Penal Code and acquitted, was dismissed by the Collector who based his conclusion not only on the materials on the record of the criminal trial but also on matters outside the record, and this was followed by a notification in the Calcutta Gazette *to the effect that "R. H. having been dismissed from Government service is debarred from re-employment in any capacity under Government:"*

Held—*That since a servant of the Crown is liable to dismissal without cause assigned, the Plaintiff was not entitled to sue in a Civil Court for a declaration that there were no good grounds for dismissing him.* VOSS *v.* SECRETARY OF STATE (10), KING *v.* SECRETARY OF STATE (11), CURSETJI *v.* SECRETARY OF STATE (12) *relied on.*

That he was not entitled to a declaration

(10) I. L. R. 33 Cal. 669 (1906).
(11) 13 C. L. J. 357: s. c. 15 C. W. N. 486n (1908).
(12) I. L. R. 27 Bom. 189 (1902).

RAM DAS HAZRA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

that his dismissal was in contravention of the rules framed by Government, because such a relief does not come within the scope of sec. 42 of the Specific Relief Act, any claim for consequential relief in respect thereof against Government not being maintainable.

DEOKALI KOER *v.* KEDAR NATH (14) *relied on.*

That as the Crown could not be sued for libel, the Plaintiff was not entitled to a declaration that his dismissal should not have been notified, assuming that the notification affected his reputation.

That Government is within its rights in notifying the dismissal of a servant and forbidding his re-employment.

PER MOOKERJEE, J.—*Under Government Rules, Plaintiff was entitled to be heard in defence before his dismissal.*

This was an Appeal preferred on the 11th of December 1908 from a decision of Babu Ambika Charan Mukherjee, Sub-Judge, Burdwan, dated the 12th of June 1908.

The facts of the case will sufficiently appear from the judgment.

Babus Dasarathi Sanyal, Monmatha Nath Mukherjee, Amarendra Nath Bose and *Hira Lal Chackrabartty* for the Appellant:

Babu Ram Charan Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an Appeal on behalf of the Plaintiff in a suit for declaration that he has been wrongfully dismissed from Government service and for recovery of arrears of salary. On the 12th August 1890, the Plaintiff was appointed to a ministerial post in the Burdwan Collectorate. On the 12th November 1900 he was suspended. He was subsequently prosecuted along with two other persons for offences under secs. 116, 161 and 466 of the Indian Penal code. The Jury returned a somewhat ambiguous verdict which was interpreted by the Sessions Judge as a verdict of not guilty. The Sessions Judge made a reference to the High Court under sec. 307 of the Criminal Procedure Code, as he disagreed with the verdict of the jurors. This Court ultimately acquitted the accused on the 20th May 1902. *King-Emperor* v. *Chidghan Gossain* (1). The Collector subsequently perused the records and came to the conclusion that although the Appellant had been acquitted by the High Court he was really guilty of abetment of bribery and forgery. He based this conclusion not merely on the materials contained in the record of the criminal trial, but also on several matters connected with the case of which in his own words both the Sessions Judge and the High Court were unaware. The Collector before he came to this adverse finding did not call upon the Appellant to show cause why he should not be dismissed. He stated explicitly that had he not been prosecuted he would have been called upon to show cause. Under these circumstances on the 3rd October 1902 the Collector dismissed the Appellant from Government service with effect from the date of his suspension. A notification, dated 20th July 1903, was subsequently issued in the *Calcutta Gazette* of the 22nd July 1903, to the following effect : "Ramdas Hazra, late a mohurir in the Burdwan Collectorate, having been dismissed from Government service is debarred from re-employment

(14) I. L. R. 39 Cal. 704 : s. c. 16 C. W. N. 838 (1912).

(1) 7 C. W. N. 185 (1902).

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in any capacity under Government." The Appellant sent representations to the Local Government as also to the Government of India but with no effect. The order of the Government of India was passed on the 4th December 1905 and was communicated to the Plaintiff on the 20th January 1906. On the 17th January 1907, the Plaintiff commenced this action against the Secretary of State for India in Council substantially for declaration that he had been improperly dismissed from Government service. He prayed also for recovery of a small sum of Rs. 17 as arrears of salary. But this part of the claim has not been pressed in this Court. The Plaintiff further stated that he would subsequently sue the Secretary of State for damages for wrongful dismissal. The claim was valued for purposes of jurisdiction at Rs. 5,117. The prayers in the plaint were in these terms. (1) A decree may be passed declaring that there were no adequate reasons for dismissing the Plaintiff from his said post and that under the Government Rules the Plaintiff's name was not fit to be published in the *Calcutta Gazette* or in any other newspapers of the Government, (2) it be declared that the statement that the Plaintiff was dismissed as guilty of heinous offence which was published is untrue and that the said publication should not remain published, (3) it may be declared that the said dismissal and publication were due to the deep-rooted malice of the Sheristadar, Babu Tinkari Sarkar, against the Plaintiff and were done by him and through his exertion, (4) that a decree may be passed for Rs. 17-11 ans. 6 gds. claimed by the Plaintiff as due for his salary, (5) that a decree be passed for the costs of the suit. On behalf of the Secretary of State for India in Council the suit was defended on the ground that the plaint did not disclose any cause of action and that the Plaintiff had not been unjustly dismissed and had not suffered in the estimation of the public. The Subordinate Judge has dismissed the suit on the ground that the Plaintiff has no cause of action and is not entitled to any of the declarations he seeks. The claim for arrears of salary has not been entertained as it was cognizable in a Court of inferior jurisdiction and no reference has been made to this part of the case in the course of the arguments addressed to this Court but it has been strenuously argued that the Plaintiff ought not to have been dismissed without an opportunity afforded to him to make his defence, that he has been seriously prejudiced by the *ex parte* order of dismissal passed in contravention of the rules prescribed by Government and that even if the Plaintiff is not entitled to be restored to Government service he is at least entitled to a declaration that his dismissal has not been made in accordance with the prescribed rules.

I am clearly of opinion that the Plaintiff ought to have been heard before he was dismissed from Government service. The Collector wholly misunderstood the scope and effect of the rules on the subject when he held that as the Plaintiff had been prosecuted he need not be called upon to show cause why he should not be dismissed. The Plaintiff had been acquitted by this Court at the criminal trial. His dismissal was not and could not be based on the ground that he had been convicted of a criminal offence. The Collector proceeded on the ground that he had other evidence before him of which both the Sessions Judge and the High Court were unaware; his decision was consequently founded upon matters which

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the Plaintiff was allowed no opportunity to rebut. Under these circumstances the Collector was bound to hear the Plaintiff before he was dismissed. The rule on the subject will be found in the Board's Rules, 1902, p. 70, sec. 14. The Resolution of the Government of India, dated the 29th July 1879, mentioned there, explicitly requires that (except in the cases of public servants who are dismissed in consequence of facts or inferences elicited at a judicial trial) in all cases of removal or dismissal the charge against the public servant concerned shall be reduced to writing and that the decision thereon shall also be in writing. The rule further provides that when witnesses are examined they should, when possible, be heard in the presence of the accused who should be allowed to cross examine, and a memorandum of the evidence shall be placed on the record. The rule specifically states that substantial compliance with these orders is not sufficient, that they are to be strictly carried out and that Commissioners and other appellate officers are precluded from confirming orders of removal or dismissal passed in contravention of these orders. The present case is plainly not covered by the exception ; the Plaintiff was not dismissed in consequence of facts or inferences elicited at a judicial trial ; he had been acquitted and he was dismissed because of facts or circumstances brought to the notice of the Collector but not known either to the Sessions Judge or to the High Court. The exception clearly contemplates cases where the public servant has been convicted at a judicial trial, as the Government of Bombay put it in their Proceedings, dated the 16th October 1883, para. 13 (Board's Rules, 1902, p. 91), a public servant unless himself convicted at a judicial trial has a right to defend himself departmentally against any imputation that he may have therein incurred, and this view is in accord with the Despatch of the Court of Directors of the East India Company No. 42 of the 6th August 1851 as to the effect of sec. 4, of Reg. I of 1829. There can, in my opinion, be no room for controversy as to the true scope of the exception and that this view is correct is conclusively established by the form in which the rule stands in the latest edition of the Board's Rules. I must take it, therefore, that the Collector misunderstood the effect of the Rule and acted in contravention thereof when he dismissed the Plaintiff without any opportunity afforded to him to make his defence ; he has consequently a grievance, namely, that he has been dismissed without a hearing and without an opportunity of justifying himself. It is worthy of note that at the hearing before us no suggestion was made on behalf of the Crown that the Court should not consider whether or not the Plaintiff was dismissed in contravention of the Rules. On the other hand, the matter was elaborately discussed for three days by the learned Vakils on both sides with great ability till the learned Government Pleader was constrained to admit with the fairness which always characterises his arguments that the Plaintiff had been dismissed in contravention of the Rules. I cannot appreciate why under these circumstances the Court should hesitate in the remotest degree to express its opinion upon the merits of the case. It is wholly immaterial that such conclusion may show that the officers of the Crown have failed to follow the prescribed Rules. It is not right till we know what has actually happened to pronounce an opinion upon the question whether the Court is competent to grant the relief

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claimed. The question now arises whether in the events which have happened the Plaintiff has any remedy against the Crown by a suit in the Civil Court.

It is now firmly settled that except where it is otherwise provided by statute as in *Gould* v. *Stuart* (2), all public officers and servants of the Crown hold their appointments at the pleasure of the Crown; *Dunn* v. *Queen* (3), and all in general are subject to dismissal at any time without cause assigned; *In Re Tufnell* (4), *Young* v. *Adams* (5), *Exp. Robertson* (6), *Sheuton* v. *Smith* (7), *Grant* v. *Secretary of State for India* (8), *Dickson* v. *Combermere* (9), nor will an action for wrongful dismissal be entertained. As Sir William Anson puts it (Law and Custom of the Constitution, Vol. 2, Part I, page 221, third edition, 1907) all offices are held either "at pleasure" or "during good behaviour" and unless it is otherwise stated their occupants hold "at pleasure." This principle has been repeatedly recognised in the Courts of this country, *Voss* v. *Secretary of State* (10), *King* v. *Secretary of State* (11), *Cursetji* v. *Secretary of State* (12). It is plain therefore that the Plaintiff was liable to dismissal at any time without cause assigned. What the Crown could do independently of any enquiry and without the assignment of any reason cannot very well be questioned in a Court of law on the ground that the enquiry has not been satisfactory or in proper form or that the reason assigned is unsound and open to criticism [see the observation of Denman, C. J., *In the matter of Poe* (13)]. It is thus impossible to hold as his tenure of office was so precarious that the Plaintiff can successfully claim any relief against the Crown. It has been suggested however that relief may be afforded to the Plaintiff by a declaration on either or both of two grounds, namely, first, that he has been dismissed in contravention of the rules and, secondly, that his dismissal ought not to have been notified. In my opinion he cannot possibly claim relief on either of the two grounds mentioned. The Plaintiff is not entitled to a declaration that his dismissal has been in contravention of the rules because it does not fall within the scope of sec. 42 of the Specific Relief Act nor can it admittedly lead up to any consequential relief against the Crown which the Court is competent to grant. Sec. 42, as was explained in *Deokali Koer* v. *Kedar Nath* (14), does not sanction every form of declaration but only a declaration that the Plaintiff is entitled to a specific legal character or right as to property. Now there is obviously no claim by the Plaintiff as to right to any property, can we then say that he has a claim or title to any legal character which the Defendant is interested to deny? The question must obviously be answered in the negative. The Court invited the learned Vakil for the Appellant in the course of argument to frame a declaration which the Plaintiff may seek in this case in the terms of sec. 42; his endeavour to frame such a declaration was

(2) A. C. 575 (1896).
(3) (1896) 1 Q. B. 116 at p. 119.
(4) 3 Ch. D. 164 (1876).
(5) A. C 469 (1898).
(6) 11 Moo. P. C. C. 288 (1858).
(7) App. Cas. 229 (1895).
(8) 2 C. P. D. 445 (1877).
(9) 3 Fos. & Fin 527 (1863).
(10) I. L. [illegible] 33 Cal, 669 (1906).
(11) 13 C. L. J. 357 : s. c. 15 C. W. N. 486n (1908).
(12) I. L. R. 27 Bom. 189 (1902).
(13) 5 B. & Ad. 681 at 688 (1833).
(14) I. L. R. 39 Cal. 704 : s. c. 16 C. W. N. 838 (1912).

entirely unsuccessful; the only declaration he could suggest was that the Plaintiff has been dismissed contrary to the rules. In my opinion although the dismissal has been contrary to the rules the Plaintiff cannot be granted such a declaration under sec. 42 of the Specific Relief Act. Nor is the Court able to grant the Plaintiff any relief on the ground that his dismissal should not have been notified. It has been argued with reference to the Resolution of the Government of India, dated the 15th June 1895 (Board's Rules, 1902, page 84) that the very fact that his dismissal was notified implied that he had been dismissed for a heinous offence as indeed was stated by the Collector in his order of the 3rd October 1902. It has been urged that in this view the notification of the dismissal of the Plaintiff amounted to a libel on his character. I am unable to accept this contention as well-founded. The Plaintiff has not sued the Secretary of State for India in Council for recovery of damages for libel; if he had made the attempt his suit would have been liable to dismissal on the principle explained in *Grant* v. *Secretary of State* (8) and *Cursetji* v. *Secretary of State* (12). The former of these cases arose under somewhat peculiar circumstances. By a general order it was declared that all unemployed Indian officers ineligible for public employment by reason of misconduct or physical or mental inefficiency should be removed to the pension list. Under this order the Plaintiff was removed to the pension list and a notification of such removal was published in the *Gazette of India*. It was ruled on demurrer, that no action lay either for the removal of the Plaintiff or for the official publication of the fact although special damage was alleged. [See also *Doss* v. *Secretary of State for India* (15) and *Oliver* v. *Lord William Bentink* (16)]. It is manifest therefore that the Plaintiff cannot sue the Crown for libel nor can he ask for a direction upon the Secretary of State that the notification be cancelled or withdrawn. Besides, the notification by itself is harmless; it merely states the fact that the Plaintiff has been dismissed from Government service and the object of the notification is to guard against the possibility of his re-employment in Government service in any capacity. But it is contended that as under the Resolution of the Government of India, dated the 15th June 1895, the dismissal of public servants is notified in the Gazette only in two classes of cases, namely, first, when it is necessary to notify the public of the removal from the service of an officer whether because his appointment was previously gazetted or from any other cause and, secondly, when it is specially desired to exclude from re-employment in the service of Government a public servant who has been dismissed for a heinous offence such as fraud or falsification of accounts, the inference may be drawn that the Plaintiff has been dismissed for such heinous offence. I am unable to hold that the Plaintiff has any real grievance in this matter. The inference adverse to him could be drawn at best only by people familiar with the rule in question but even such a person could not from the mere fact of the notification infer whether it had been issued on the first or the second ground. The order of the Collector was not published and the reason for the dismissal of the Plaintiff has never

(8) 2 C. P. D 445 (1877).
(12) I. L. R 27 Bom. 189 (1902).
(15) L. R. 19 Eq. 509 (1875).
(16) 3 Taunton 456 (1811).

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been made public by the Government in accordance with the well recognised principle that the reason for the dismissal of a public officer should not be stated in the notification regarding his dismissal even in cases in which a conviction has been obtained in a Criminal Court. In fact but for the publicity given to the order of the Collector in the present suit no one outside the official circle need ever have known the grounds upon which his order was based. In my opinion the Government clearly acted within its rights when it notified the fact of the dismissal of the Plaintiff solely with a view to prevent his re-employment in Government service in any capacity. The publication of the notification therefore does not entitle the Plaintiff to any relief against the Secretary of State. It may finally be added that although various imputations were made against the Sheristadar, Tinkari Sarkar, he was not added as a party Defendant and the third prayer in the plaint cannot consequently be granted.

I hold accordingly that the suit as framed must fail but in view of my conclusion that the Plaintiff has been dismissed without a hearing as required by the rules each party will be directed to bear his own costs throughout this litigation.

Under cl. 36 of the Letters Patent the view of the Senior Judge will prevail upon the question of costs and if any sum has been paid or deposited by the Appellant in that behalf it will be refunded to him.

BEACHCROFT, J.—I entertain no doubt whatever that the suit of the Plaintiff does not lie and that the Appeal must be dismissed.

The first two prayers in the plaint are (1) that a decree may be passed declaring that there were no adequate reasons for dismissing the Plaintiff from his said post and that under the Government Rules the Plaintiff's name was not fit to be published in the *Calcutta Gazette* or in other newspaper of the Government, (2) that it be declared that the statement that the Plaintiff was dismissed as guilty of heinous offence which was published is untrue and that the said publication should not remain published.

In arguing the appeal the learned pleader for the Appellant has conceded that the declaration asked for in the first part of the first prayer cannot be given but he presses for the declaration asked for in the second part of the first prayer and in the second prayer.

The case in which declaratory decrees can be made was recently considered by this Court in the case of *Deokali Koer* v. *Kedar Nath* (14), and on the authority of that decision and the plain words of sec. 42 of the Specific Relief Act it is clear that the Plaintiff cannot get the decree which he seeks for in this suit.

Apart from the plain words of the statute it is clear that the suit must fail on general principles. It is settled by a long course of decisions that in the absence of a statute to the contrary the Crown can dismiss its servants at pleasure and that the servant has no remedy against such dismissal. If the Crown can so dismiss its servants, there can be no reason why it should not notify the fact of a dismissal and forbid re-employment. The Government notification in the present case does no more than that. It consists merely of a statement of fact and an order.

But the Plaintiff objects that the effect of the notification is to prevent his getting

(14) I. L. R. 39 Cal. 704 : s. c. 16 C. W. N. 838 (1912).

employment anywhere because it amounts to a statement that he was guilty of a heinous offence. In fact it does not amount to such a statement. Conceding however for the purpose of argument that the construction might reasonably be put on the notification that it amounted to a statement that he had been dismissed on the ground that he had been guilty of a heinous offence, I am of opinion that no suit lies. In that view it is in effect one for defamation, not, it is true, for damages but for a declaration that he has been defamed. But he could not maintain a suit for damages for defamation, *Cursetji* v. *Secretary of State* (12). In effect the Plaintiff is trying to do indirectly what he cannot do directly. The Court will not give declaration that a Plaintiff has suffered an injury if it is powerless to give compensation for that injury.

I purposely refrain from expressing any opinion on the question whether the Plaintiff's dismissal was in accordance with the Government's Rules or not. I think that is a question into which we ought not to enter. If the suit does not lie we ought not to look at the merits. For if we say the dismissal was not in accordance with the rules, I think we practically stultify ourselves, for we give in our judgment the declaration which we say we cannot give in our decree and encourage the institution of untenable suits.

I accordingly agree in dismissing the Appeal. I consider the Respondent is entitled to costs though possibly Government may not wish to enforce them.

Appeal dismissed.

(12) I. L. R. 27 Bom. 189 (1902).

CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1980 OF 1910.

COXE, J.
RAY, J.
1913,
Heard,
24, July.
Judgment,
29, July.

RAM LAL MONDAL and others, Plaintiffs, Appellants,
v.
KHIRODA MOHINI DASI and ors., Defendants, Respondents.

Rent decree—Purchase by some of the judgment-debtors in the benami *of a third person—Failure of execution of the decree against co-judgment-debtors—Suit for contribution—Contract Act (IX of 1872), sec. 69—Malice—Civil Procedure Code (Act XIV of 1882), sec. 232—Facts in plaint not traversed in written statement—Court not entitled to decide otherwise.*

Where a co-judgment-debtor purchases a rent decree, such a purchase is equivalent to paying off the decree, and the purchaser is entitled to bring a suit for contribution from the other judgment-debtors although he tried to evade the provisions of sec. 232 of the Code of Civil Procedure (Act XIV of 1882) by trying to execute the decree against them by a benamdar.

Where a statement of fact in the plaint was not traversed in the written statement or put in issue, the Court is not entitled to decide it against the pleadings.

This was an Appeal preferred on the 16th of June 1910 against a decree of F. Roe, Esq., District Judge of Zillah 24-Pergunnahs, dated the 4th of March 1910, reversing the decree of Babu Aghore Chandra Hazra, Subordinate Judge of that place, dated the 9th of June 1909.

The Plaintiffs instituted this suit for contribution under the following circumstances: One Narendra Nath Bose obtained a rent decree against Plaintiffs Nos. 1, 4, 5, the predecessor of Plaintiffs Nos. 2 and 3, husband of Defendant No. 1

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and Defendants Nos. 2, 3, 4, 5, 6, 7, 8, 9 and 10 and one Gopal Lall Mondal whose interests in the lands for which the rent was claimed was purchased by Plaintiffs. Narendra Nath in execution of the decree attached the moveable properties of Plaintiffs and realised Rs. 413 odd which was payable by the Plaintiffs in their share. The decree-holder subsequently tried to realise the balance of the decretal money by selling the immoveable properties of the Plaintiffs when they purchased the decree in the name of one Nilmony Das on payment of a consideration of Rs. 2,100 on the 7th Falgun 1312. Nilmony tried to execute the decree against the Defendants but on objection being taken by them that under sec. 148, cl. (*h*), Bengal Tenancy Act, it was held that Nilmony was not entitled to realise the decretal dues. The decree was then sought to be executed by the previous decree-holder on the ground that Nilmony had reconveyed the decree to him. This execution case was also dismissed on the ground that the decree was purchased by the Plaintiffs judgment-debtors in the *benami* of Nilmony Das and that the allegation that Narendra subsequently re-purchased the same was a myth.

The Plaintiffs having failed to realise the decree from the co judgment-debtors instituted this suit for contribution against them.

The defence was that the Defendants were not bound to contribute under the circumstances of this case.

The Court of first instance decreed the suit. The District Judge on appeal dismissed the suit on the ground that Plaintiffs did not come with clean hands. "The object of the purchase," said the District Judge, "of the decree was primarily to save the Plaintiffs' own property and secondarily to proceed severally and in turn against each one of the Defendants whom the Plaintiffs desired to attack either by reason of their wealth or some previous grudge." The learned District Judge on appeal also found that the Plaintiffs did not prove the amount they actually paid in purchasing the decree and therefore they could not get any decree against the Defendants. Against the above decision of the District Judge this Second Appeal was preferred.

Babu Mahendra Nath Roy (with him *Babu Biraj Mohan Majumdar*) for the Appellants.—The Defendants were benefited by my purchasing the decree. I am clearly entitled to contribution. See *Soroop Chunder* v. *Troylakhya* (1). The District Judge has found that the Plaintiffs have not been able to prove what they actually paid to the decree-holder; but the statement in the plaint was never traversed in the written statement and the District Judge was not entitled to find against the pleadings.

Babu Shib Chandra Palit (with him *Babus Harendra Narain Mitra, Atul Krishna Roy* and *Prokash Chandra Sarkar*) for the Respondents.—Contribution is an equitable relief. He who seeks equity must do equity. Here the District Judge finds that the Plaintiffs came with unclean hands. Moreover the Plaintiffs never intended to act on behalf of the Defendants in purchasing the decree. The subsequent proceedings clearly show that they never intended to benefit us by the payment. They harassed us as the subsequent proceedings show. The payment is officious and no suit for contribution lies. *Suchand Ghosal* v. *Balaram Mardana* (2).

(1) 9 W. R. 230 (1863).
(2) I. L. R. 38 Cal. 1 (1910).

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Moreover in this case no satisfaction has been certified of the decree and the purchase of the decree does not annul the decree. The landlord might have executed the decree even after the transfer and he did so in this case.

Then it is for the Plaintiffs to prove what they paid to the decree-holder. If they have not been able to prove that, the District Judge was right in dismissing the suit.

C. A. V.

The JUDGMENT OF THE COURT was as follows :—

The parties in this case were judgment-debtors under a decree obtained by one Narendra Bose. The Plaintiff's property was attached in execution and he then bought the whole decree *benami*. He tried to execute it against the other judgment-debtors but failed and he then brought this suit for contribution. The lower Appellate Court has referred in strong terms, which are not without justification, to the Plaintiff's conduct in execution and has held that in accordance with justice, equity and good conscience the suit should be dismissed.

The misconduct of the Plaintiff lay in his attempts to defeat sec. 232B of the former Code. That section forbids the execution of a decree purchased by one judgment-debtor against his fellows. This provision of law the Plaintiff tried to evade by falsely representing to the Court that somebody else had purchased the decree. The reason for the enactment of this provision is given in the case of *Soroop Chunder Hazra* v. *Troylakhya Nath Roy* (1). Apparently it was thought wrong that one judgment-debtor should buy the decree for less than the full amount due and then execute it against his fellows for the full amount due, and the position of co-judgment-debtors was compared to that of surety and principal. I do not myself fully understand why it is worse for a judgment-debtor to realise more than he has paid for a decree than it is for a stranger. The judgment-debtor need not necessarily stand in a fiduciary relation to the others. A stronger objection to my mind is that the purchasing judgment-debtor might execute the whole decree against one of his fellows who might then purchase it and execute the whole against another and so on. This would be prevented by driving the purchaser to a suit for contribution. But in any case there does not seem to be the least reason for supposing that the Legislature intended that a judgment-debtor purchasing a decree should be deprived of all claim to relief against his fellows. It has often been held that having regard to the provisions of sec. 232B such a purchase is equivalent to paying off the decree. In that case the judgment-debtor is clearly entitled to compensation on the principle of sec. 69 of the Contract Act.

Next the lower Appellate Court holds that the Plaintiff has not proved the payment of the purchase money. This point however was not traversed or put in issue and the learned District Judge was not entitled to decide it against the pleadings.

I would therefore decree the Appeal and restore the order of the Court of first instance but as the Plaintiff has been abusing the process of the Courts and for years has been harassing these Defendants by taking proceedings against them which he knew perfectly well to be illegal I would make him bear his own costs throughout.

RAY, J.—I agree.

Appeal allowed.

(1) 9 W. R. 280 (1868).

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL
No. 154 OF 1911.

JENKINS, C. J.
MOOKERJEE, J.
1913,
Heard, 1 and 2, July.
Judgment, 2, July.

SREENATH DUTT, Defendant No. 1, Appellant,
v.
KASER SHEIKH, Plaintiff, Respondent.

Res judicata—*Suit for rent decreed—Tenant if can institute title suit to declare he was the tenant of another person and for recovery of amount realised under the decree—Alleged landlord joined as party.*

Where B having sued C for rent on the basis of a registered kabuliyat, *C denied his tenancy under B and asserted that he was holding as tenant directly under B's superior landlord A, but C's defence was overruled and a decree made in B's favour :*

Held—*That a subsequent suit brought by C in which he made both A and B parties Defendants for a declaration that he was not C's tenant and for refund of the money realised by B under his decree was barred by* res judicata.

DWARKA NATH *v.* RAM CHAND (1) *distinguished.*

This was an Appeal under sec. 15 of the Letters Patent filed on the 25th of August 1911 against a decree of Mr. Justice Chitty, dated the 26th of July 1911, in Appeal from Appellate Decree No. 2006 of 1909, which had been preferred against a decree of Mr. S. K. Nag, Subordinate Judge of Zillah Pabna, dated the 21st of June 1909, confirming that of Babu Kumudini Kanta Ray, Munsif of that place dated the 17th of August 1908.

The material facts will appear from the judgment of CHITTY, J., which was as follows :—

(1) I. L. R. 26 Cal. 428 : s. c. 3 C. W. N. 206 (1899).

CHITTY, J.—This is an appeal by Defendant No. 1 in a suit brought by the Plaintiffs for a declaration that they had jote rights in the land, that Defendant No. 1 had no such right and that the sum of Rs. 24-8-0 might be refunded to them, it being the amount of a decree passed against the Plaintiffs in a rent suit at the instance of Defendant No. 1. The main facts of the case are these. The zemindar was Maharani Surnomoyee. In 1278, Defendant No. 1 executed in her favour a *kabuliyat* for certain lands including the lands in dispute. In 1286, the Defendant sublet these lands to one Jamal Sheikh by taking a *kabuliyat* from him. The Plaintiffs are the descendants of Jamal Sheikh. Jamal Sheikh died in the year 1300. In 1303, the Maharani caused a re-measurement and a re-settlement of all the lands appertaining to Mouzah Malifa in which the lands in dispute are situate. A large number of *kabuliyats* were taken from various tenants. In Sravan of that year the Plaintiffs gave a *kabuliyat* in respect of the lands in dispute. In the following month, that is, in Bhadra, Defendant No. 1 gave a *kabuliyat* in respect of some lands in the mouzah, but not in respect of the lands now in dispute. The *kabuliyat* therefore of Defendant No. 1 of the year 1303 differed in that respect from the *kabuliyat* which he had given in the year 1278. In 1314, Defendant No. 1 sued the Plaintiffs for rent of the lands in dispute for the years 1308 to 1311, and obtained a decree in the Munsif's Court for the amount of that rent, for Rs. 24-8-0. The present Plaintiffs contested that suit but did not carry it beyond the Munsif's Court. They filed the present suit a few days after that decree had been passed claiming the refund which I have already mentioned.

Two points have been urged by the

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Appellant, Defendant No. 1, in this appeal. The first is that the decision in the rent suit between the present Plaintiffs and Defendant No. 1 debars the Plaintiffs from prosecuting this suit by reason of *res judicata*; and, secondly, that there is no evidence of any relinquishment by Defendant No. 1 of his tenancy in regard to the lands in suit.

As to the questions of *res judicata* I do not think that the matter can be said to be *res judicata* in so far as the Plaintiffs' claim for relief is concerned in the present suit. It may be, and no doubt is, the case, that they cannot get rid of the rent decree against them by this suit; nor can they obtain, as they ask, a refund of the amount which was levied from them in execution of that decree. But apart from this it does not appear to me to be a case of *res judicata*. This is a suit for determination of the title of all the parties, the Defendant No. 2, the Maharaja, being added to the persons who were parties to the former suit. The question of the relationship of landlord and tenant was no doubt at issue in the previous suit for the purpose of determining whether the present Plaintiffs were or were not liable for the rent. But that does not necessarily mean that they can never again re open that question. The Full Bench Ruling in the case of *Dwarka Nath Roy* v. *Ram Chand Aich* (1) is in point, and a case very similar to the present was decided only recently by Mr. Justice N. R. Chatterjea and myself (Second Appeal No. 2924 of 1908). The question may have arisen incidentally in the former suit, but that would not prevent its being raised again substantially in a subsequent suit.

(1) I. L. R. 26 Cal. 428 : s. c. 3 C. W. N. 266 (1899).

As to the second point, that there is no evidence of relinquishment, it appears that although there is no direct evidence that the Defendant No. 1 gave up his tenancy of the lands in dispute, there is a considerable amount of evidence from which the Court might reasonably infer that such relinquishment had taken place. Both the Courts have come to the same conclusion on the point and have discussed the evidence at a very considerable length. With that finding of fact this Court cannot interfere, even if it wished to do so, in Second Appeal.

The result is that the appeal fails in substance. But the decree of the Court below must be varied to this extent, namely, that the decree in favour of the Plaintiffs will be confined to a declaration that the Plaintiffs' have jote right to the lands and that Defendant No. 1 has no such right. The question as to when the Plaintiffs' right commenced and the Defendant's right ceased, need not, I think be determined nor can the Plaintiffs have a refund of the amount of Rs. 24-8-0 which the lower Courts have given them. To this extent the decree of the lower Appellate Court must be varied.

Under this circumstance, I direct that the parties do bear their costs of this appeal.

Babu Harendra Narain Mitra for the Appellant.

Babu Braja Lal Chuckerbutty for the Respondent.

The JUDGMENT OF THE COURT was delivered by

JENKINS, C. J.—This is an Appeal by the first Defendant in a suit for declaration that the Plaintiff is not a tenant of the first Defendant but of the second Defendant, and also for refund of the

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money realised by the first Defendant in execution of a decree for rent obtained by him.

It appears that the land in question is situated within the zemindari of the Maharaja of Cossimbazar. On the 19th of August 1871, the first Defendant got a raiyati settlement from Maharani Surnomoyee. On the 8th of April 1880, he sublet the land to one Jamal Sheikh who executed in his favour a registered *kabuliyat.* Jamal Sheikh died in 1893. Thereafter his representatives continued in occupation of the land on the assumption that the under-raiyati interest created by the *kabuliyat* of the 8th of April 1880 was heritable. They were accepted as tenants and apparently paid rent to the landlord. In 1907, the first Defendant sued them for rent. The defence taken was that they were not the tenants under the then Plaintiff but held as tenants directly under the Maharaja of Cossimbazar. In support of this contention, reliance was placed by them upon a *kabuliyat* executed by them on the 26th of July 1896, and it was further alleged that the first Defendant had executed a *kabuliyat* on the 9th of July 1896, whereby he had ceased to be tenant of this land. The Court which tried the suit for rent overruled this contention and held that the present Plaintiff was a tenant under the first Defendant. A decree for rent was accordingly made on the 1st of June 1907. On the 3rd of July following, the Plaintiff commenced this suit for declaration in substance that the rent decree had been improperly made. He described the first Defendant as the principal Defendant and he also described the Maharaja of Cossimbazar as the *pro formâ* Defendant. The principal Defendant resisted the claim on the ground, amongst others, that the suit was barred by the principle of *res judicata.* This defence has been overruled by all the Courts below, and the sole question in controversy now is whether the suit is or is not barred by the principle of *res judicata.* On behalf of the Respondent reliance has been placed upon the decision of a Full Bench of this Court in the case of *Dwarka Nath* v. *Ram Chand* (1). That case is clearly distinguishable. There A brought a suit for rent against B. B pleaded that he held as a tenant, not under A but under C. The suit was tried on the merits and dismissed. A, thereupon, brought a suit against B and C, for declaration that he was the owner of the land. He further prayed that B might be ejected and in the alternative asked that if B remained in occupation, he might be held liable for damages for use and occupation. It was held that the decision did operate as *res judicata* in so far as A and B were concerned but not between A and C. A sought relief on the ground that the previous decision was conclusive between the parties: he treated B as trespasser, and so sought to eject him. In the case before us the question which was raised in the suit for rent was whether the *kabuliyat* alleged to be executed by Jamal Sheikh on the 8th of April 1880 was or was not genuine, and whether the present Plaintiff held as tenant under the first Defendant on the basis of the tenancy created thereby. This was found in favour of the present Defendant. The decision was by a Court of competent jurisdiction —a Court which was competent to try the issue now raised between the parties. It is clear therefore that so far as the first

(1) I. L. R. 26 Cal. 428 : s. c. 3 C. W. N. 266 (1899).

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Plaintiff and the first Defendant are concerned, the question is *res judicata.*

It has been finally suggested by the Respondent that the suit may be remanded to the Court of first instance in order that the Plaintiff may obtain relief as against the Maharaja of Cossimbazar. As already stated the Plaintiff treated the Maharaja as *pro formâ* Defendant and never sought any relief against him. It is too late now to ask for a relief which he did not ask for in the suit in the Court of first instance.

The result, therefore, is that the Appeal is allowed and the suit dismissed with costs in all the Courts.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 470 OF 1913.

STEPHEN, J.	HARI NATH SINGH,
MULLICK, J.	Plaintiff, Petitioner,
1913,	*v.*
Heard, 1, July.	RAM KUMAR BAGCHI
Judgment,	and others, Defendants,
25, July.	Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 25—Addition of parties at late stage of case—Order for security for Defendant's costs—Poverty of Plaintiff if alone can justify such order.

The Plaintiff before bringing the suit made an agreement with one S by which the latter undertook to advance any amount that might be necessary to prosecute the suit up to the Privy Council. The amount so advanced was to be realised from any property recovered by a final decision or on compromise and the Plaintiff and S agreed to divide equally the balance of what was recovered. S was to be able to compromise the suit and if the suit was unsuccessful the Plaintiff was not to be liable to S for costs. The Plaintiff brought the suit on the 31st July 1911. It came on for hearing *on the 1st April 1913. The Plaintiff closed his case on 22nd April and just before that the Defendant applied to the Court to have S made a Plaintiff and to have S and the Plaintiff ordered to give security for the payment of the Defendant's costs. The Court refused to make S a Plaintiff but ordered the Plaintiff to give security for the costs of the suit up to Rs. 5,000. The High Court issued a rule to show cause why S should not be made a Defendant and why the order about costs should not be set aside :*

Held—*That S should not be made a party Defendant partly because the original application to make S a party Plaintiff was made at too late a stage of the case and partly because it did not appear that S had any actual present interest in the property.*

That the order about costs was not made and could not be supported under Or. 25 but the Court has inherent power to make it. The question however which should determine the granting of such an order was whether the Plaintiff had got a substantial interest in the suit or was he suing for another as a mere puppet. Such an order could not be made merely because the Plaintiff was a poor man, and the lower Court having made the order only on that ground it was without jurisdiction.

Held further—*That it could not be said that S's interference was illegal in the sense that it was against public policy as described by the Privy Council in* CHIDAMBARA CHETTY v. RUNGA KRISHNA (3).

This was a Rule granted on the 28th of April 1913 against an order of the Subordinate Judge of Rangpur, dated the 23rd of April 1913, directing the Plaintiff-Petitioner to furnish security for costs payable

(3) L. R. 1 I. A 241 at p. 264 : s. c. 22 W. R 149 at p. 152 (1874)

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to the Defendants in case Plaintiff's case is dismissed.

The facts of the case will appear from the judgment.

Babus Sarat Chandra Ray Chowdhury and *Dhirendra Krishna Rai* for the Petitioner.

Dr. Rash Behary Ghose, Babus Dwarka Nath Chuckerbutty, Tara Kishore Chowdhury, Mohini Mohan Chakravarti and *Khirode Narayan Bhuiyan* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner before us is the Plaintiff in a suit in the Court of the Subordinate Judge of Rangpur in which he sued for the recovery of property valued at nine lacs. The case turns on an adoption relied on by the Defendants of which the Plaintiff denied both the factum and the validity. The suit was instituted on the 31st July 1911, and came on for hearing on the 1st April 1913. The Plaintiff closed his case on the 22nd April and just before he did so the Defendant applied to have one Surendra Chandra Lahiri made a Plaintiff, and to have Surendra and the Petitioner ordered to give security for the payment of the Defendant's costs. The Court refused to make Surendra a Plaintiff, but ordered that the Plaintiff should give security for the costs of the suit up to Rs. 5,000. A Rule has been granted to show cause why this order should not be set aside as being made without jurisdiction and why Surendra should not be made a Defendant.

The facts on which the order is made are that the Plaintiff before bringing this suit made an agreement with Surendra by which the latter advanced Rs. 3,000 to the former to pay the Court-fee on the institution of the suit, and undertook to advance any amount that might be necessary to prosecute the appeal up to the Privy Council. The amount so advanced is to be realised from any property recovered by a final decision or on a compromise : and Surendra will have a charge therefore on any decretal property or money. The Plaintiff and Surendra will then divide equally the balance of what is recovered. If the suit is unsuccessful the Plaintiff will not be liable to Surendra for costs. Surendra will be able to compromise the suit. The fact of this agreement was, it is stated, known to the Defendant before the institution of the suit.

We may say at once that the part of the Rule that relates to Surendra being added as a Defendant must fail : partly because the original application was made at too late a stage in the case for such an order to be appropriate, partly because it does not appear that Surendra has any actual present interest in the property. This part of the Rule is therefore discharged : but as it was not asked for by the Petitioner but was inserted by the Court, it is discharged without costs, which Surendra does not in fact deserve.

The order now before us was not made, and cannot be supported under Order XXV ; but the question is whether the Court has inherent power to make it. That the Court has some such power seems to be certain. So in *Ram Kumar Kundu* v. *Chandra Kant Mukerjee* (1), Sir Montague Smith, in delivering a judgment of the Privy Council, says, "It is ordinary practice, if the Plaintiff is suing for another, to require security for costs, and to stay proceedings until it is given. The new Plaintiffs were fully

(1) I. L. R. 2 Cal. 233 at p. 259 (1876).

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aware, during the pendency of the former suit, of the arrangement between the McFacens, another Defendant, but instead of applying for security for costs, they petitioned to make him co-Plain iff under the 73rd section of Act VIII." In this case the Defendant in the original suit was suing the maintainer of the Plaintiff, and thus though the facts relating to the contract of maintenance were very similar to those in the present case, the above observations were not necessary for the purpose of deciding the case in hand. They no doubt however can be taken as a correct indication of the existing law: and were so treated by Trevelyan, J., in *Khasan Assenullahjoo* v. *Soloman* (2), who after referring to that decision holds that the Court "has power to require security for costs if it finds that the Plain iff is not the real litigant, but that he is only a puppet in the hands of others." The Plain iff had parted with half his interest in the property that might be recovered in the suit: but it was held that he had a substantial interest in the suit, and that the suit was instituted on his behalf. The application for security was therefore dismissed.

On referring to English practice it seems that security may be demanded from a Plaintiff on the original hearing when he is only a nominal Plaintiff. We are however not aware of any cases where security was ordered for this reason except where questions of insolvency, which affect the whole legal status of the Plaintiff, were concerned.

The question which should determine granting of an order for security thus seems to be, Has the Plain iff got a substantial interest in the suit, or is he suing for another, in the capacity of what Trevelyan, J., convenien ly describes as a puppet? The Judge has not treated the matter from this point of view: but has dealt only with the question—can the Plain iff pay the costs if he loses? and on coming to the conclusion that he cannot, has made the order before us because he has the assistance of Surendra. The order admittedly cannot be made merely because the Plaintiff is a poor man. If Surendra's interference is not illegal, it cannot alter the position so long as the suit is in any way that of the Plaintiff.

We are asked to say that Surendra's interference is illegal in the sense that it is against public policy as described by the Privy Council in *Chedam'a a Chetty* v. *Rurga Krishna* (3). On the facts disclosed however we cannot say that this is so.

We hold therefore that the Court had no jurisdiction to make the Rule absolute, and set aside the order. We make no order as to costs.

Let the record be sent down as soon as it is convenient.

Rule made absolute.

(2) I. L. R. 14 Cal. 533 (1887).

(3) L. R. 1 I. A. 241 at p. 264: s. c. 22 W. R. 149 at p. 152 (1874).

[TESTAMENTARY AND INTESTATE JURISDICTION.]

MOOKERJEE, J. 1913, 27, August.

In the goods of HARRIETT TEVIOT KERR, Deceased.

Probate duty, assessment—Value of property, meaning of—Court Fees Act (VII of 1870), Sch. I, Art. 11—Sec. 19I and Sch. III, Annex. A and B, sec. 5—Construction of Statute.

Sch. III, Annexures A and B, of the Court Fees Act make it clear that the duty payable at an application for Probate or Letters of Administration under Sch. I, Art. 11 of the Act is to be calculated

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upon the net value of the estate obtained by the deduction of the amount of debts from the gross value of the estate.

COLLECTOR OF MALDAH *v.* NIRODE KAMINI DASSY (2) *may require re-examination and further consideration.*

"*The interpretation of the expression "value of property" in Sch. I, Art. 11 as the "market value" of property or the value of the entire property less the amount of encumbrance is the reasonable construction of the expression.*

The true mode of interpreting a Statute like the Court Fees Act which has been repeatedly amended, is not to consider individual sections, but to take them as a whole and to give effect to the legislative intent upon a particular matter.

This was an application by the Administrator-General of Bengal for the probate of the Will of Harriett Teviot Kerr, deceased. In consequence of a difference of opinion between the Taxing Officer on the Original Side of the High Court and the Board of Revenue as to the scale on which probate duty was chargeable the question was referred by the Registrar (as Taxing Officer) on the Original Side under sec 5 of the Court Fees Act to the Hon'ble the Chief Justice under circumstances fully set out in his letter of Reference given below.

This is an application by the Administrator-General, for probate of the last Will of the deceased, upon which a question now arises as to what is the proper amount of duty payable in respect of the estate left by the deceased.

The application being by the Administrator-General, an affidavit of valuation, such as is required in the case of an ordinary applicant by sec. 19H of the Court-Fees Act is not necessary, under the decision *In the goods of I. J. Aydall* (1).

(1) I. L. R. 26 Cal. 401 (1899).
(2) 17 C. W. N. 21 (1912).

In accordance with the practice the Administrator-General has set out in his petition a list of the estate and in another list the debts payable out of the estate The value of the estate in the first list is given at Rs. 2,17,896-13-7 and the amount of the debts in the second list at Rs. 1,99,830-10-1¾ leaving a balance of Rs. 18,066-3-5¼.

The question now arising for consideration is at what rate should duty be charged on such balance.

This question arises owing to a letter from the Collector of Stamp Revenue No. 295 R. S. dated the 23rd September 1912.

When that letter came in I submitted it with the following note to Mr. Justice Fletcher for his opinion.

"The annexed letter from the Officiating Collector of Stamps Revenue No. 295, dated the 23rd September last, raises an interesting question with regard to the proper fee payable in respect of estates when Probate or Letters of Administration are applied for. By Art 11, Schedule I of the Court Fees Act XVII of 1870 the fee was 2 per cent on the amount or value of the property in respect of which the grant was made, if such amount or value exceeded Rs. 1,000.

"In the year 1904 a question seems to have been raised before the Board of Revenue as to the correct method of calculating the fee where the gross estate was over Rs 1,000, but, after deduction of the debts, etc, set out in Annexure B, the net value of the estate was reduced below Rs. 1,000

"The then Advocate-General's opinion was obtained by the Board; that opinion is set out on pages 20 and 21 of the Bengal Stamp Manual. The Advocate General was of opinion that 'in the first instance the Court is to see what the fee is when levied on the whole estate, and in order to find the true amount payable as duty, 2 per cent. of the whole amount or value, which the Petitioner is entitled to deduct, is to be deducted from the total fee leviable in respect of the whole estate, *i.e.*, ... Duty, he thought, was payable notwithstanding the fact that the deduction of the debts brought the value of the estate below Rs. 1,000 Since then the Court following that opinion has always charged duty upon such estates in this manner.

"Now when the duty was 2 per cent. it did not matter whether you calculated the duty on the

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amount in Annexure B, the duty on the amount in Annexure A and deducted one duty from the other or whether you deducted the amount set out in Annexure B from the amount set out in Annexure A and calculated duty on the difference; the result was the same; and having regard to the form of the affidavit set out in Schedule III to the Court Fees Act by which the amount in Annexure B, which is not subject to duty, is deducted from the amount set out in Annexure A, and a net total shewn, we have always adopted the latter course calculating the duty on the net balance.

"Art. 11 of the Court Fees Act was by Act VII of 1910 amended and the fee chargeable was changed; 2 per cent. being charged when the amount or value of the property in respect of which the grant is made exceeds Rs. 1,000 but does not exceed Rs 10,000: 2½ per cent when such amount or value exceeds Rs 10,000 but does not exceed Rs 50,000: and 3 per cent when such amount or value exceeds Rs 50,000.

The office, however, does not appear to have changed its practice It has continued to deduct the amount set out in Annexure B from the amount set out in Annexure A and has charged duty on the balance at the rate (for such balance) given in Act VII of 1910.

"The Officiating Collector now claims that this is wrong having regard to the Advocate-General's opinion above referred to, and he has referred to three cases.

" For the purposes of illustration it is only necessary to refer to one of these. *In the goods of E. S. Winger*, the amount set out in Annexure A was Rs. 10,024-6-5, the amount set out in Annexure B was Rs 186, the net total being Rs. 9,838-6-5. Duty was charged on this net balance at 2 per cent, it being under Rs. 10,000.

"If the Collector's contention is correct we ought to have calculated duty at 2½ per cent. on Rs. 10,024-6-5, and then calculated duty on Rs. 186—at what figure? . . . The amount of duty calculated in that way would have been Rs. 246-4, whereas duty was only taken for Rs. 197, there being a difference of Rs. 49-4.

"Now the question is whether this method of calculation is correct or whether our practice of deducting the amount in Annexure B from Annexure A and taking the duty on the balance at the rate given in the amending Act VII of 1910 on the amount of such balance is correct. In this connection I would refer to the form of the affidavit of valuation given in Sch III of the Court Fees Act from which it will appear that from the total of the value of the estate set out in Annexure A is to be deducted the amount shown in Annexure B as not subject to duty If the amount in Annexure B is not subject to duty at all, is the Collector's contention that we should calculate duty upon it correct?

"I would also refer to sec. 19B of the Act which provides as follows.—

'Whenever it is proved to the satisfaction of such authority that an executor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate, reduces the same to a sum which, if it had been the whole gross amount or value of the estate, would have occasioned a less Court-fee to be paid on the Probate or Letters of Administration granted in respect of such estate than has been actually paid thereon under this Act, such authority may return the difference, provided the same be claimed within three years after the date of such probate or letters.

"Before replying to the Collector I desire to take your Lordship's opinion on this point If your Lordship thinks that there is no doubt about it, or that, having regard to the fact that the opinion of the Advocate-General referred to has never been questioned, it would be more convenient to have these points raised when the next case comes up before me, when I could refer the point to the Chief Justice under sec. 5 of the Court Fees Act, I could so reply to the Collector."

His Lordship's (Mr. Justice Fletcher) opinion was as follows —

"In my opinion the views expressed by the learned Registrar in this note are clearly right I, as at present advised, do not agree with the opinion of Mr. O'Kinealy when Advocate General. The form clearly shows that duty is not to be calculated on the amount of the debts. I can see no answer to the Registrar's view.

"Take for instance the case of an estate in England exceeding one million gross but net only £20,000 Can it be seriously suggested that the duty is at the rate of 8 per cent. on the small balance of £20,000 instead of 4 per cent. on an estate of the value of £20,000."

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Thereupon I, under His Lordship's directions, informed the Collector that we should continue to follow our practice even in estates where the gross value is over Rs. 1,000 but the net value below that amount.

Subsequently the Board of Revenue in their letter No. 294A, dated 23rd January 1913, referred to this matter and drew attention to a recent ruling of this Court, *The Collector of Maldah v. Nerode Kamini Dassy* (2). The question in that case was simply whether duty was payable at all in a case where the gross estate was valued over Rs. 1,000, and the Appellate Court (Stephen and Richardson, JJ.) held that having regard to the wording of Art 11 of the 1st Schedule of the Court Fees Act, duty was payable on the ground, as I understand the judgment, that exemption is only allowed in cases where the gross amount or value of the property in respect of which the grant is made does not exceed Rs 1,000 The gross value of the estate in that case was only Rs 1,985. So no question arose as to the rate at which duty was to be charged on the net value.

In the present case however that question does arise.

If duty is to be calculated on the principle mentioned in the Collector's letter based upon the opinion of the late Advocate General, Mr. O'Kinealy, we ought to calculate duty at 3 per cent on the gross assets Rs. 2,17,900 – Rs. 6,537, then duty on the debts Rs 1,99,850 at the same rate = Rs. 5,995-8-0, making a duty of Rs 541-8-0

The applicant however contends that duty should be calculated at 2½ per cent. on the net assets, Rs 18,1050 – Rs. 452-8 only—the difference in the two methods of calculation being in the present case Rs 89

The difficulty has I think arisen by reason of the Court Fees Act having been amended piecemeal from time to time Originally by the Act of 1870 duty was payable on the gross value of estates where such value exceeded Rs. 1,000, the words in Art. 11 of Sch. I being "if the amount or value of the property in respect of which the grant . . . . is made exceeds Rs 1,000."

Those words are, as pointed out in the case in *Collector of Maldah* v. *Nerode Kamini Dassy* (2), unmistakably a description of gross and not net value, and there was no provision then in the Act allowing for deductions.

In July 1871 by Financial Notification No. 2004 the Governor General in Council remitted the fees in respect of property to which a deceased person was entitled as a trustee, and thereafter it was the practice to exempt from payment of duty such portion of the estate as proved to be trust property.

In 1872 a question appears to have arisen with regard to the power of the Local Government to allow refunds of stamp duty in cases where the assets were subsequently proved to be of less value than had been estimated at the time the duty was paid, and power was given to the Local Government to sanction such refunds pending legislation on the point; subsequently also by a Notification No 2504, dated 18th April 1873, the Chief Executive authority under the Local Government was empowered to allow refunds of duty, if he thought right, in respect of such portion of the assets as had been actually applied in discharging the debts of the deceased.

These two matters were subsequently embodied as secs. 19A and 19B of the Court Fees Act by the amending Act of 1875.

In 1899 however secs. 19H to 19K were added to the Act by the amending Act XI of 1899 By sec. 19I of that Act it is provided that "no order entitling a Petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the Petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation."

Turning to the form in the third schedule it will be seen from para. 1 that the applicant is to set forth in Annexure A "all the property and credits of which the above named deceased died possessed or was entitled to at the time of his death, and which have come or are likely to come to my hands" and at the end of Annexure A it is stated "deduct amount shown in Annexure B not subject to duty."

From para. 2 of the affidavit it will be seen that the applicant is to set forth in Annexure B all the items which by law he is allowed to deduct, and from Annexure B itself it will be seen that the items he is allowed to deduct are debts due and

(2) 17 C. W. N. 21 (1912).

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owing from the deceased payable by law out of the estate :—

Funeral expenses; Mortgage encumbrances; Property held in trust; other property not subject to duty.

The result of this amendment by the Act of 1899, it is submitted, is that only the value of the estate in Annexure A after deduction of the value shown in Annexure B not subject to duty, is liable to duty. The Legislature, however, did not amend Art. 11 of Sch. I which still contains the words " in respect of which the grant is made." Hence the difficulty.

As I pointed out in my note to Mr Justice Fletcher when the duty was 2 per cent. it did not matter which way the calculation was made, but since the sliding scale was introduced by the Act of 1910 it makes a difference in the way I have pointed out.

If the Collector's method of calculating the duty at the higher rate leviable under the Act of 1910 on the gross amount, deducting duty calculated at the same rate on the value of the items set out in Annexure B is to be followed, it means that duty will have been calculated on items which are by this form of affidavit of valuation expressly stated to be not subject to duty.

The Administrator-General in a note he has made on this point, a copy of which he has sent me, draws attention to the words of Art. 11 of the 1st Schedule of the Court Fees Act "when the amount or value of the property in respect of which the grant is made," and he asks what is the amount or value of the property in a case where the estate is subject to a mortgage. He submits it is only the value of the equity of redemption as that is the only property which devolves upon the Administrator. He points out however that an Administrator would not be allowed to insert that in his affidavit of valuation inasmuch as the form in Sch III requires the property itself to be set out in Annexure A, and the mortgage incumbrance in Annexure B.

He also points out that where the deceased held property as trustee such property has (see the Form) to be shewn both in Annexure A and Annexure B, and if the Collector's principle is followed duty will have been taken on property not belonging to the deceased and which the Legislature has in the notification I have referred to exempted from payment.

I am requested by Messrs. Leslie & Hinds, Attorneys for the Administrator General, to refer this matter to the final decision of the Hon'ble the Chief Justice.

As the question is one of general importance I refer the same in pursuance of the provisions of sec. 5 of the Court Fees Act (VII of 1870) to His Lordship's final decision.

Mr. L. P. E. Pugh, for the Administrator-General of Bengal.

Mr. G. H. B. Kenrick, *K. C.* (*The Advocate-General*) with *Mr. B. C. Mitter*, (*The Standing Counsel*) for the Board of Revenue.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is a reference under sec. 5 of the Court Fees Act, 1870, made by the Taxing Officer on the Original Side of this Court. The circumstances under which the reference has been made are fully set out in the order of reference and need only be recited very briefly. An application has been made by the Administrator-General for probate of the last Will of Harriett Teviot Kerr. As the application has been made by the Administrator General, no affidavit of valuation such as is required in the case of an ordinary applicant by sec. 19H of the Court Fees Act has been filed, as laid down in *In Re Avdall* (1). But in accordance with established practice, the Administrator-General has set out in his petition a list of the estate, and in another list the debts payable out of the estate. The value of the estate in the first list is given at Rs. 2,17,896-13 7, and the amount of the debts in the second list at Rs. 1,99,830-10-1⅝, leaving a balance of Rs. 18,066-3-5⅜. The question for consideration is, what is the proper amount of duty payable in respect of the estate left by the deceased.

(1) I. L. R. 26 Cal. 104 (1899).

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Art. 11 of Sch. I to the Court Fees Act provides that on a Probate of a Will or Letters of Administration with or without Will annexed, when the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees, a fee of 2 per centum has to be paid on such amount or value. When such amount or value exceeds ten thousand rupees but does not exceed fifty thousand rupees, a fee of 2½ per centum on such amount or value has to be paid; when such amount or value exceeds fifty thousand rupees, a fee of 3 per centum on such amount or value has to be paid. On behalf of the Administrator-General, it has been argued that the fee payable ought to be calculated on the difference between the gross value of the estate and the amount of the debts, that is, in the present case, at the rate of two and one half per centum on Rs. 18,066. On the other hand, it has been contended on behalf of the Board of Revenue that the fee payable ought to be calculated in the manner following: namely, the fee payable on the gross value of the estate, reduced by the fee payable on the debts. In the case before us, according to this contention the fee payable would be the difference between three per centum on Rs. 217,896 and three per centum on Rs. 199,830. The question raised is of considerable nicety and by no means free from difficulty, which is attributable to the fact that the Court Fees Act has been amended piecemeal from time to time.

Sub-sec. 1 of sec. 19, of the Court Fees Act, which was inserted by Act XI of 1899, provides that no order entitling the Petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the Petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. II of the first schedule has been paid on such valuation. When we turn to the third schedule, we find that the Petitioner is required to state in the form of valuation that he has truly set forth in Annexure B all the items which he is by law allowed to deduct. Annexure A is a statement of the valuation of the moveable and immoveable properties of the deceased. On the face of the form, it is clear that the Petitioner is required to state the value of the property and is allowed to deduct the amount shown in Annexure B not subject to duty. The Petitioner has thus to state the net total of the valuation of the moveable and immoveable properties of the deceased. When we turn to Annexure B, we find that it is headed "Schedule of Debts, etc:" then follow five different items, as to each of which a statement of value has to be made. These are as follows: (1) amount of debts due and owing from the deceased, payable by law out of the estate; (2) amount of funeral expenses: (3) amount of mortgage incumbrances; (4) property held in trust, not beneficially or with a general power to confer a beneficial interest: (5) other property not subject to duty. It is plain that each of the first four items constitutes property not subject to duty; consequently, the principle formulated on behalf of the Board of Revenue, namely, that duty should be calculated upon the gross value of the estate as also upon the debts and the difference taken, is contrary to the legislative provision that the amount of debts due and owing from the deceased and payable out of the estate constitutes property not subject to duty. It is further clear from

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the second paragraph of the form of valuation, read with the last clause of Annexure A, and the first and the last clauses of Annexure B, that the Legislature intended that the fee should be payable, only on the difference between the gross value of the estate and the amount of debt; in other words, as debts constitute property not subject to duty, the difference between the gross value of the estate and the amount of debts, alone constitutes property subject to duty. But it has been urged on behalf of the Board of Revenue that Art. II of the first schedule militates against this view, inasmuch as, that article requires the fee to be paid on the amount or value of the property in respect of which the grant of probate or letters is made, and it cannot be disputed that the grant of probate or letters is made in respect of the entire estate. In my opinion, the true mode of interpretation of a statute like the Court Fees Act, which has been repeatedly amended, is not to consider individual sections, but to take them as a whole and to give effect to the legislative intent upon a particular matter. It is conceivable that in 1899 when by sec. 2 of Act XI of that year, sec. 19I was inserted in the Court Fees Act as originally framed, the language of Art. 11 of the first schedule was not carefully considered; it is also possible that in 1910 when by sec. 2, cl. (*i*) of Act VII of that year, a progressive scale of duty was introduced, the effect of the amendment upon questions likely to arise, was not specifically realised by the framers of the amending provisions. Still it is the duty of the Court to give effect, as far as practicable, to all the sections of the statute as it stands, in its amended form, and the Court cannot rightly be invited to place such a construction upon the new sections introduced as would unquestionably destroy their effect. When the Legislature states explicitly in the third schedule, which was inserted in 1899, that debts due and owing from the deceased are not subject to duty, that the Petitioner is by law allowed to deduct the amount of debts from the gross valuation of the estate, and that he is to state in Annexure A the net value of the estate, the Court should not interpret Art. 11 of the first schedule as an isolated provision; but the Court should give effect to the combined provisions of Art. 11 of the first schedule and the third schedule. From this point of view, it appears to me indisputable that the fee should be calculated upon the net value of the estate obtained by the deduction of the amount of the debts from the gross value of the estate.

But it has been argued, on behalf of the Board of Revenue, that the construction for which the Administrator-General contends is opposed to the principle diducible from a long series of judicial decisions. An examination of the cases shows, however, that there is no force in this contention; there is really no judicial decision in which the precise point now under consideration has been examined. In the case of *Collector of Maldah* v. *Nirode Kamini Dassy* (2), the question for consideration was, whether duty is payable in respect of an estate the gross value whereof exceeds Rs. 1,000, but the net value after deduction of debts falls short of Rs. 1,000. It was ruled upon a construction of sec. 19, cl. 8, that the estate was not exempted from liability to pay duty. It is not necessary to decide on the present occasion whether this view is well-founded; it is sufficient to say that I reserve my opinion upon this matter

(2) 17 C. W. N. 21 (1912).

with the remark that when it arises again, it may require re-examination and further consideration. But I do not appreciate how, in view of the provisions of cl. 7 of sec. 19H of the Court Fees Act, this Court reversed the decision of the primary Court in the case of *Collector of Maldah* v. *Nirode Kamini Dassy* (2). I further find it difficult to follow how this Court could interfere in the determination of the question of the duty payable by an applicant for Probate or Letters of Administration, upon even the most liberal interpretation of the scope of sec. 115 of the Civil Procedure Code or sec. 15 of the Charter Act.

The next case to which my attention has been drawn is that of *In the goods of Ram Chandra Das* (3). In this case, Sir Richard Couch, C. J., held, with the concurrence of Mr. Justice Markby, that in estimating the amount of the *ad valorem* fee chargeable under cl. 11 of the first schedule of the Court Fees Act, the fee must be paid in respect of the property without deducting the amount of the debt to be paid out of it. The learned Chief Justice referred to the provisions of the law on the subject in England (55 Geo. III, c. 184, sec. 51) and observed that the Court had not to make the law but to put a construction upon the language which the Legislature had used. This decision, it will be observed, was given in 1872, long before the amendment of the Court Fees Act in 1899, and the Court was called upon to consider only the question of the construction of Art. 11 as it stood at the time. The Court accepted the contention of the Advocate-General that the duty was payable on the whole amount and overruled the arguments of the applicant for Letters of Administration that the word "value" means "the value of the estate after the debts have been deducted." It is not necessary to examine the grounds of this decision, as in my opinion the law has been materially altered by subsequent legislation. But before I leave this case, I may state that I don't appreciate how a reference under sec. 5 of the Court Fees Act by the Taxing Officer of this Court on the Original Side was heard by a Bench of two Judges. Sec. 5 makes it plain that such reference is to be heard by the Chief Justice or by such Judge of the High Court as the Chief Justice may appoint. *Khachiera* v. *Kharag Singh* (4).

The other cases to which my attention has been drawn do not support the contention of the Board of Revenue. In the case of *In the goods of Peter Innes* (5), it was ruled by Norman, C. J., that when Letters of Administration are granted in respect of property subject to a mortgage, the value of the property, within the meaning of Art. 11 of the first schedule of the Court Fees Act, is the value of the entire property less the amount of the incumbrance because, this is the value of that with which the Administrator is to deal. The same view was accepted in *In the goods of Charles Edward Maclean* (6), where it was held that the term "value" in Art. 11 means "market value" and that the market value of mortgage property is the value of the equity of redemption and of that only. To the same effect is the decision of Westropp, C. J., in *In the goods of Ram Chandra Lakshmanji* (7). These deci-

(2) 17 C. W. N. 21 (1912).
(3) 18 W. R. 153 ; 9 B. L. R. 30 (1872).
(4) 7 All L. J. R. 842 (1910).
(5) 16 W. R. 253 ; 8 B. L. R. App. 48 (1871).
(6) 6 All. H. C. R. 214 (1874).
(7) I. L. R. 1 Bom. 1[illegible] (1876).

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We invite the attention of the Calcutta Small Cause Court Bar to the answer to their enquiry given by a Court Officer in Bombay regarding the scale of fees allowed at the Bombay Presidency Small Cause Court to Commissioners appointed in that Court from amongst the practitioners for taking evidence or making local inspection, &c. We had received the communication from the Bombay Court Officer about the time that our Courts closed for the Long Vacation. We held it over for publication after the vacation as it would attract more attention now than then. The Small Cause Court Bar will do well to draw the attention of the Chief Judge to the practice followed in Bombay, as it has everything to recommend it. We convey our thanks to the Court Officer in Bombay for favouring us from time to time with information concerning a matter of importance to practitioners and litigants in the Calcutta Small Cause Court.

The Privy Council and miscarriage of justice in a criminal case.

We invite attention to the decision of the Privy Council in *Louis Edouard Lanier* v. *The King*, reported at p. 98 of the last number of this journal. Their Lordships whilst affirming the general rule that the Judicial Committee will not lightly interfere in criminal cases, set aside the conviction of the Appellant for embezzlement by the Chief Justice of the Supreme Court of Seychelles, on the ground that justice had gravely and injuriously miscarried and the sentence pronounced against the Appellant constituted an invasion of the Appellant's liberty and the denial of his just rights as a citizen. Lord Shaw in delivering the judgment of the Board advisedly refrained from commenting on the various "peculiarities" of the case and confined himself to the barest narrative of the facts. These show that the Appellant under power derived from the guardian of certain minors was charged with the duty of getting in and investing moneys on behalf of the infants and for this purpose had opened an account in their favour with a firm, of which he himself was a member, and which in the course of their dealings with the minors' property not only paid a high rate of interest but at times made advances far in excess of the receipts. The investment was not only in fact advantageous to the minors but was approved by the guardian.

Guilty mind necessary to constitute the crime of embezzlement.

In November 1910, a sum of Rs. 35,313 became payable to the minors by a creditor who paid the amount to the firm's Banker, the amount being with his concurrence credited to the firm's account which at that moment was overdrawn. But the minors' account with the firm was at the same time duly credited with the amount. No concealment whatever was practised and the firm continued to make advances as before out of the money lying with them at interest. Lord Shaw points out that the crediting of the amount to the firm in their over-drawn account with their Banker was, as is clear, an irregularity. But every irregularity is not a crime. If it were so, says his Lordship, "all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in investment or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest." His Lordship says elsewhere, "the mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in a third, both irregular and

criminal. The distinctions between these cases require to be treated with the greatest judicial care so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being ex ended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility, which of course may be imposed by Statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him 'was moved by the guilty mind.''

Distinction between civil liability to account and criminal misappropriation.

In drawing the above distinction between criminal liability and the civil liability to account, his Lordship has merely applied to this class of cases the elementary rule that it is dishonesty of motive, guilty mind or *mens rea* alone which can convert an act, illegal or irregular though it may be, into a crime. Here on the facts there was a total absence of the guilty mind. When the amount was credited to the firm's over-drawn account, nobody concerned in the transaction had the remotest idea that anything criminal was being done. Not only that, but when on 20th June 1911 at a Family Council presided over officially by the Chief Justice, the Appellant was asked to show what cash he had in hand belonging to the minors and, on his making a full and fair statement, was further required to furnish a guarantee and security for the amount, he promptly fulfilled the requisition.

Risk of Prosecutor acting as Judge.

There was after this no room for doubting the Appellant's *bonâ fides*. And yet on the 27th June 1911, the very day on which the guarantee or security was given criminal proceedings, apparently at the instance of the Chief Justice, were initiated against the Appellant, and the Chief Justice again, as president of the Family Council, appointed two Counsel to conduct the prosecution and arranged about their fees, and finally after a trial at which the Appellant does not appear to have had given to him an opportunity to appear by Counsel, he was convicted of embezzlement by the Chief Justice. Lord Shaw in discussing the judgment of the Chief Justice bluntly observes that the distinction between criminal liability and civil liability to account hardly seems to have been present to his mind. The judgment of Lord Shaw is instructive from many points of view—but not the least so, because it brings into clear relief the danger of the prosecutor acting also as a Judge, even when the prosecutor from his high position may be [illegible] to be so far removed from common prejudices as a Chief Justice of the Supreme Court. Not only was the prosecution started without any reasonable foundation, it was pressed with a degree of vigour which probably would have been absent in an ordinary prosecution. It is to be hoped that the judgment of their Lordships will be carefully studied by those who oppose the separation of the executive and judicial functions in India and that the lesson derived from its perusal will not be lost on them.

Racial discrimination and membership of the Bar.

Noticing the increased number of calls to the Bar, the *English Law Journal* with its characteristic breadth of view makes the following observations:—

> This growth in the membership of the Bar does not mean an increase in the competition in our Courts It is attributable to the larger number of students who come to the Inns from the King's dominions beyond the seas. More than one-third of the newly called barristers bear names that unmistakably indicate that they belong to other climes than ours The Inns of Court, like the Judicial Committee, may thus be regarded as a link of Empire, and any action by which the link is weakened will be a misfortune both from the Imperial and professional point of view. If any of the students who come from remote parts of the Empire to qualify for the Bar desire to remain here after they are called, no obstacle ought to be placed in their way of pursuing the profession to which they have been admitted. A little time ago a Circuit mess declined to elect an Indian gentleman merely because of his complexion. Such a discrimination if generally maintained—and we are glad to say that it has not been—would be wholly unworthy of the traditions of the Bar, and might prove to be seriously prejudicial to the interests of the Empire.

We are glad to be assured by our contemporary that invidious distinctions of kind are condemned by enlightened legal opinion in England. It would certainly be disastrous for the Empire if acts promoting racial prejudice were not put down from the Bench and the Bar.

Privileges of Doctors of Law in Medieval Europe.

Dr. David Murray in his erudite but somewhat inappropriately styled book, "Lawyers' merriments" (Glasgow: James MacLehon and Sons, 1912), has given an interesting account of the privileges, which Doctors of Law enjoyed in medieval times and of which the following account appears in a notice of the work in the September number of the *Canadian Law Times*.

"A Doctor of laws might wear such golden rings and chains as were forbidden to the lesser of the nobility; might, in his coat of arms, display a helmet with the visor raised; might carry weapons when other persons were forbidden to wear them. If convicted of crime, he was to suffer only a mitigated punishment; and finally if a person were killed in the presence of a doctor and some other man, this other man was [illegible] to be the guilty slayer. But the Univ

which endowed a Doctor with all these privileges had need to be cautious as to whom they chose. For it was an arguable question whether any Faculty that had admitted to the degree an incompetent man might not be sued for damages by unsuccessful clients whose cases he had bungled. And the Doctor himself had his disadvantages; for he must not stand in a crowd to watch any sports, as this would be an unseemly loss of dignity."

Correspondence.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,—Owing to the closing of this Court in the current month under extraordinary circumstances I regret I could not comply earlier with Mr. Mullick's request in your issue of the 15th instant. I am glad the information I have furnished is found to be useful to the members of the Calcutta Small Couse Court Bar. There is no fixed scale of fees for remunerating the pleaders appointed as commissioners to examine accounts and report thereon, take measurements, make local investigations, etc. The fee, as I have already pointed out, varies in proportion to the amount of the claim and the quantity of the work to be done. As a rule, however, in suits for amounts exceeding Rs. 1,000 which are generally tried by the Chief Judge, the fee is Rs. 25 or 30 either side, that is to say, the Plaintiff and the Defendant have each to pay so much. If the accounts are lengthy or complicated and likely to occupy several hearings, the remuneration is occasionally increased even to Rs. 40 or 45, either side. In suits for Rs. 1,000 and under which are generally tried by the other Judges, the fee ranges from Rs. 7½ to Rs. 20 or even 25 at times, each side. In suits for very small amounts, between poor litigants, when the accounts to examine are not at all heavy the Judge fixes the fee as low as Rs. 5 only, either side. One noteworthy feature of the matter is that pleaders consider it their duty to take up the work for the work's sake and with a view to help the Court, no matter what fee the Judge fixes and the Judge has absolute discretion in the matter.

There is no officer on the establishment of the Court like an Accountant or Pundit to examine accounts, as there is, for instance, the Taxing Master in the High Court. Hence the necessity for appointing commissioners on each occasion, as required.

In exceptional cases, (though rarely) a pleader is deputed to take the evidence of an old infirm witness at his house, if he cannot attend in Court, or examine a person at his house who is exempt from such attendance. The evidence is generally finished in a day and the fee is, as a rule, Rs. 10, occasionally even Rs. 15.

SMALL CAUSE COURT: *Bombay, 28th September 1913.* Yours, etc.. OFFICER.

Review.

HINDU WOMAN'S ESTATE (Non-technical Stridhana). *By Bhagwan Das Sirvya, B. A., LL. B. Calcutta: Butterworth & Co., (India) Ltd., 1913.*

The limited interest which a Hindu woman enjoys in proper y inherited from male or female relations is so peculiar and has formed the subject of discussion in Courts and schools so often and from such a variety of stand-points, that there can be no question that a separate treatment of the subject is not only justified but absolutely necessary. As the book under notice clearly demonstrates, the literature on the subject has far outgrown the modest limits which only can be assigned to it in any general treatment, however thorough, of Hindu Law as a whole. But no one who has had occasion even to glance cursorily over the pages of this book need complain that the treatment accorded to it by the author is inadequate or partial. It is thoroughly exhaustive and to show this within the limits allowed to us, we cannot do better than summarise the chapter headings. Ch. I. The Hindu widow. Ch. II. Females other than widow. Ch. III. Exclusions and disabilities. Ch. IV. Obligations and subsequent disabilities. Ch. V. Nature of estate in property taken by female heirs. Ch. VI. Female heirs as representatives of the estate. Ch. VII. Two or more female heirs. Ch. VIII. Nature of estate in income and accumulation: Partition. Chs. IX. and X. Extent of her powers in dealing with the property. Ch. XI. Power of alienation. Ch. XII. Reversioners—their rights and remedies. Ch. XIII. Declaratory relief, Injunctions, Receivers. &c. Ch. XIV. Limitations, Court-fees and Jurisdiction. Ch. XV. Evidence and equities. Ch. XVI. Miscellaneous provisions and proceedings (*e.g.*, Succession Certificate, Probate and Letters of Administration, Guardianship, Registration, Stamp). Ch. XVII. Pleadings and procedure. There is besides an Introduction discussing the texts and their bearing on the law as at present administered, garnished here and there with generalisations of doubtful scientific value taken from books dealing with customs prevalent amongst savage tribes. In an appendix the author attempts to furnish graphical explanations of some of the leading principles underlying the subject, by means of geometrical figures. The book covers over 400 pages, every one of which is full of matter, and is printed at the Law Printing House, Madras, to whom every credit is due for its handsome get-up. From every point of view, the book deserves to hold an honoured place in the Indian lawyer's library.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—*Radley and anr. v. London County Council.* Before JUSTICES AVORY AND LUSH. 17th July 1913.

Tram conductor pursuing and injuring a boy. Held, *that the employer was not liable.*

This was an appeal from a decision of a County

Court. Small boys are in the habit of taking surreptitious rides on trams to the great annoyance of the tram conductors. A tram conductor one day being annoyed by the boys got down, and pursued some boy. The Plaintiff, a boy of 9 years, was mistaken for one of the naughty children, and in pursuing him as well, the conductor fell over him and broke the boy's arm. Hence this suit for damages against the County Council. The Court below non-suited and this appeal was dismissed. The Court held that the employer was not responsible for the servant's act. In the course of his judgment MR. JUSTICE AVORY said—

He thought the most favourable way in which the case could be put for the Plaintiff was that the conductor in doing what was complained of was either enforcing or endeavouring to enforce the by-laws of the Defendants which were put in evidence, or that he might be reasonably supposed to be enforcing or endeavoring to enforce those by-laws which dealt with the exclusion of unauthorized persons from the Defendants' tramcars and provided that the conductor should enforce or prevent the breach of the by-laws to the best of his ability. It was admitted that the act of the conductor was done not to prevent the Plaintiff from there and then entering the tramcar or otherwise infringing the by-laws, nor to prevent other boys from doing so, but to punish either this particular boy or other boys who had broken the by-law with a view to preventing them from doing so in the future. Mr. Doughty, while frankly admitting that, contended that even though the act was done with that object, it nevertheless was an act done by the conductor, *qua* conductor, in the course of his employment and within the scope of his authority. So far as the decisions which had been quoted were concerned he was not going to attempt either to reconcile them or to say that they could be reconciled. He believed, however, that the principle upon which the case ought to be decided was that which was clearly approved in the case of *Abrahams* v. *Deakin*, (1891) 1 Q. B. 516. That was a case in which the barman of a public-house had given a man into custody after having followed him into the street, on a charge of having passed bad money at the public house. An action for false imprisonment was brought against his master and it was held that he was not liable upon the ground that the barman had not implied authority to arrest the Plaintiff, inasmuch as the master's property was no longer in danger and the arrest was made only for the purpose of vindicating the law by punishing the Plaintiff for an offence which he was supposed to have already committed. It was clear in the present case that the act done by the conductor was an act done to punish, not an offender, because the Plaintiff was not an offender, but to punish one who was supposed to be an offender, or to punish somebody with the object of preventing others from repeating the offence. He could not see the distinction between the present case and that put during the argument of a conductor's going the day after an offence of that kind had been committed and seeking out either the boy who had committed the offence or some boy who resembled him or who belonged to the same class and was about the same age as the offender and giving him a hiding in order to act as a warning to other boys in the neighbourhood. In such a case he did not believe that there was any authority which would support an action against the employer for such an act done by the conductor. If the facts were not consistent with any other view than that there was no evidence to go to the jury, that the act of the conductor was one for which his employers could be held liable, the Deputy-Judge was right in non-suiting the Plaintiff.

Mr. Doughty for the Appellant.

Mr. Henderson for the Respondents.

B. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before FLETCHER AND N. CHATTERJEA, JJ. APPEAL FROM APPELLATE DECREE NO. 2421 OF 1911. RAKHAL CHANDER DAS MAITY, Appellant *v.* UMAPROSAD MISRI AND OTHERS, Respondents. Heard, 27th and 28th November. Judgment, 28th November 1913.

Declaratory suit—Right to compel recognition as tenant—Transferee of a portion of a putni tenure—Putni Regulation (VIII of 1819), secs. 5, 6—Bengal Tenancy Act (VIII of 1885), secs. 12, 14, 195 (e).

The Plaintiff was a partial transferee of certain properties comprised in a putni. It was contended that being only such a partial transferee, the provisions of Regulation VIII of 1819 did not apply to him and that he was entitled to be recognised by the landlords under secs. 12 and 17 of the Bengal Tenancy Act. The lower Appellate Court held that the Defendant were not bound to recognise the Plaintiff as a tenant.

Held, that the lower Appellate Court was right in so holding.

Babu Taruk Chunder Chuckerbutty for the Appellant.

Babu Harendra Nath Mukherji for *Babu Jyotis Chander Hajra* for the Respondents.

A. T. M. *Appeal dismissed.*

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We invite the attention of the Calcutta Small Cause Court Bar to the answer to their enquiry given by a Court Officer in Bombay regarding the scale of fees allowed at the Bombay Presidency Small Cause Court to Commissioners appointed in that Court from amongst the practitioners for taking evidence or making local inspection, &c. We had received the communication from the Bombay Court Officer about the time that our Courts closed for the Long Vacation. We held it over for publication after the vacation as it would attract more attention now than then. The Small Cause Court Bar will do well to draw the attention of the Chief Judge to the practice followed in Bombay, as it has everything to recommend it. We convey our thanks to the Court Officer in Bombay for favouring us from time to time with information concerning a matter of importance to practitioners and litigants in the Calcutta Small Cause Court.

The Privy Council and miscarriage of justice in a criminal case.

We invite attention to the decision of the Privy Council in *Louis Edouard Lanier* v. *The King*, reported at p. 98 of the last number of this journal. Their Lordships whilst affirming the general rule that the Judicial Committee will not lightly interfere in criminal cases, set aside the conviction of the Appellant for embezzlement by the Chief Justice of the Supreme Court of Seychelles, on the ground that justice had gravely and injuriously miscarried and the sentence pronounced against the Appellant constituted an invasion of the Appellant's liberty and the denial of his just rights as a citizen. Lord Shaw in delivering the judgment of the Board advisedly refrained from commenting on the various "peculiarities" of the case and confined himself to the barest narrative of the facts. These show that the Appellant under power derived from the guardian of certain minors was charged with the duty of getting in and investing moneys on behalf of the infants and for this purpose had opened an account in their favour with a firm, of which he himself was a member, and which in the course of their dealings with the minors' property not only paid a high rate of interest but at times made advances far in excess of the receipts. The investment was not only in fact advantageous to the minors but was approved by the guardian.

Guilty mind necessary to constitute the crime of embezzlement.

In November 1910, a sum of Rs. 35,313 became payable to the minors by a creditor who paid the amount to the firm's Banker, the amount being with his concurrence credited to the firm's account which at that moment was overdrawn. But the minors' account with the firm was at the same time duly credited with the amount. No concealment whatever was practised and the firm continued to make advances as before out of the money lying with them at interest. Lord Shaw points out that the crediting of the amount to the firm in their over-drawn account with their Banker was, as is clear, an irregularity. But every irregularity is not a crime. If it were so, says his Lordship, "all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in investment or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest." His Lordship says elsewhere, "the mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in a third, both irregular and

criminal. The distinctions between these cases require to be treated with the greatest judicial care so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility, which of course may be imposed by Statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind."

Distinction between civil liability to account and criminal misappropriation.

In drawing the above distinction between criminal liability and the civil liability to account, his Lordship has merely applied to this class of cases the elementary rule that it is dishonesty of motive, guilty mind or *mens rea* alone which can convert an act, illegal or irregular though it may be, into a crime. Here on the facts there was a total absence of the guilty mind. When the amount was credited to the firm's over-drawn account, nobody concerned in the transaction had the remotest idea that anything criminal was being done. Not only that, but when on 20th June 1911 at a Family Council presided over officially by the Chief Justice, the Appellant was asked to show what cash he had in hand belonging to the minors and, on his making a full and fair statement, was further required to furnish a guarantee and security for the amount, he promptly fulfilled the requisition.

Risk of Prosecutor acting as Judge.

There was after this no room for doubting the Appellant's *bonâ fides*. And yet on the 27th June 1911, the very day on which the guarantee or security was given criminal proceedings, apparently at the instance of the Chief Justice, were initiated against the Appellant, and the Chief Justice again, as president of the Family Council, appointed two Counsel to conduct the prosecution and arranged about their fees, and finally after a trial at which the Appellant does not appear to have had given to him an opportunity to appear by Counsel, he was convicted of embezzlement by the Chief Justice. Lord Shaw in discussing the judgment of the Chief Justice bluntly observes that the distinction between criminal liability and civil liability to account "hardly seems to have been present to his mind. The judgment of Lord Shaw is instructive from many points of view—but not the least so, because it brings into clear relief the danger of the prosecutor acting also as a Judge, even when the prosecutor from his high position may be presumed to be so far removed from common prejudices as a Chief Justice of the Supreme Court. Not only was the prosecution started without any reasonable foundation, it was pressed with a degree of vigour which probably would have been absent in an ordinary prosecution. It is to be hoped that the judgment of their Lordships will be carefully studied by those who oppose the separation of the executive and judicial functions in India and that the lesson derived from its perusal will not be lost on them.

Racial discrimination and membership of the Bar.

Noticing the increased number of calls to the Bar, the *English Law Journal* with its characteristic breadth of view makes the following observations:—

This growth in the membership of the Bar does not mean an increase in the competition in our Courts It is attributable to the larger number of students who come to the Inns from the King's dominions beyond the seas. More than one-third of the newly called barristers bear names that unmistakably indicate that they belong to other climes than ours. The Inns of Court, like the Judicial Committee, may thus be regarded as a link of Empire, and any action by which the link is weakened will be a misfortune both from the Imperial and professional point of view. If any of the students who come from remote parts of the Empire to qualify for the Bar desire to remain here after they are called, no obstacle ought to be placed in their way of pursuing the profession to which they have been admitted. A little time ago a Circuit mess declined to elect an Indian gentleman merely because of his complexion. Such a discrimination if generally maintained—and we are glad to say that it has not been—would be wholly unworthy of the traditions of the Bar, and might prove to be seriously prejudicial to the interests of the Empire.

We are glad to be assured by our contemporary that invidious distinctions of kind are condemned by enlightened legal opinion in England. It would certainly be disastrous for the Empire if acts promoting racial prejudice were not put down from the Bench and the Bar.

Privileges of Doctors of Law in Medieval Europe.

Dr. David Murray in his erudite but somewhat inappropriately styled book, "Lawyers' merriments" (Glasgow: James MacLehose and Sons, 1912), has given an interesting account of the privileges, which Doctors of Law enjoyed in medieval times and of which the following account appears in a notice of the work in the September number of the *Canadian Law Times*.

"A Doctor of laws might wear such golden rings and chains as were forbidden to the lesser of the nobility; might, in his coat of arms, display a helmet with the visor raised; might carry weapons when other persons were forbidden to wear them. If convicted of crime, he was to suffer only a mitigated punishment; and finally if a person were killed in the presence of a doctor and some other man, this other man was presumed to be the guilty slayer. But the Universities

which endowed a Doctor with all these privileges had need to be cautious as to whom they chose. For it was an arguable question whether any Faculty that had admitted to the degree an incompetent man might not be sued for damages by unsuccessful clients whose cases he had bungled. And the Doctor himself had his disadvantages; for he must not stand in a crowd to watch any sports, as this would be an unseemly loss of dignity."

Correspondence.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,—Owing to the closing of this Court in the current month under extraordinary circumstances I regret I could not comply earlier with Mr. Mullick's request in your issue of the 15th instant. I am glad the information I have furnished is found to be useful to the members of the Calcutta Small Couse Court Bar. There is no fixed scale of fees for remunerating the pleaders appointed as commissioners to examine accounts and report thereon, take measurements, make local investigations, etc. The fee, as I have already pointed out, varies in proportion to the amount of the claim and the quantity of the work to be done. As a rule, however, in suits for amounts exceeding Rs. 1,000 which are generally tried by the Chief Judge, the fee is Rs. 25 or 30 either side, that is to say, the Plaintiff and the Defendant have each to pay so much. If the accounts are lengthy or complicated and likely to occupy several hearings, the remuneration is occasionally increased even to Rs. 40 or 45, either side. In suits for Rs. 1,000 and under which are generally tried by the other Judges, the fee ranges from Rs. 7½ to Rs. 20 or even 25 at times, each side. In suits for very small amounts, between poor litigants, when the accounts to examine are not at all heavy the Judge fixes the fee as low as Rs. 5 only, either side. One noteworthy feature of the matter is that pleaders consider it their duty to take up the work for the work's sake and with a view to help the Court, no matter what fee the Judge fixes and the Judge has absolute discretion in the matter.

There is no officer on the establishment of the Court like an Accountant or Pundit to examine accounts, as there is, for instance, the Taxing Master in the High Court. Hence the necessity for appointing commissioners on each occasion, as required.

In exceptional cases, (though rarely) a pleader is deputed to take the evidence of an old infirm witness at his house, if he cannot attend in Court, or examine a person at his house who is exempt from such attendance. The evidence is generally finished in a day and the fee is, as a rule, Rs. 10, occasionally even Rs. 15.

SMALL CAUSE COURT: *Bombay, 28th September 1913.*

Yours, etc., OFFICER.

Review.

HINDU WOMAN'S ESTATE (Non-technical Stridhana). *By Bhagwan Das Sirvya, B. A., LL. B. Calcutta: Butterworth & Co., (India) Ltd., 1913.*

The limited interest which a Hindu woman enjoys in property inherited from male or female relations is so peculiar and has formed the subject of discussion in Courts and schools so often and from such a variety of stand-points, that there can be no question that a separate treatment of the subject is not only justified but absolutely necessary. As the book under notice clearly demonstrates, the literature on the subject has far outgrown the modest limits which only can be assigned to it in any general treatment, however thorough, of Hindu Law as a whole. But no one who has had occasion even to glance cursorily over the pages of this book need complain that the treatment accorded to it by the author is inadequate or partial. It is thoroughly exhaustive and to show this within the limits allowed to us, we cannot do better than summarise the chapter headings. Ch. I. The Hindu widow. Ch. II. Females other than widow. Ch. III. Exclusions and disabilities. Ch. IV. Obligations and subsequent disabilities. Ch. V. Nature of estate in property taken by female heirs. Ch. VI. Female heirs as representatives of the estate. Ch. VII. Two or more female heirs. Ch. VIII. Nature of estate in income and accumulation: Partition. Chs. IX. and X. Extent of her powers in dealing with the property. Ch. XI. Power of alienation. Ch. XII. Reversioners—their rights and remedies. Ch. XIII. Declaratory relief, Injunctions, Receivers. &c. Ch. XIV. Limitations, Court-fees and Jurisdiction. Ch. XV. Evidence and equities. Ch. XVI. Miscellaneous provisions and proceedings (*e.g.*, Succession Certificate, Probate and Letters of Administration, Guardianship, Registration, Stamp). Ch. XVII. Pleadings and procedure. There is besides an Introduction discussing the texts and their bearing on the law as at present administered, garnished here and there with generalisations of doubtful scientific value taken from books dealing with customs prevalent amongst savage tribes. In an appendix the author attempts to furnish graphical explanations of some of the leading principles underlying the subject, by means of geometrical figures. The book covers over 400 pages, every one of which is full of matter, and is printed at the Law Printing House, Madras, to whom every credit is due for its handsome get-up. From every point of view, the book deserves to hold an honoured place in the Indian lawyer's library.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—*Radley and anr.* v. *London County Council.* Before JUSTICES AVORY AND LUSH. 17th July 1913.

Tram conductor pursuing and injuring a boy. Held, that the employer was not liable.

This was an appeal from a decision of a County

Court. Small boys are in the habit of taking surreptitious rides on trams to the great annoyance of the tram conductors. A tram conductor one day being annoyed by the boys got down, and pursued some boy. The Plaintiff, a boy of 9 years, was mistaken for one of the naughty children, and in pursuing him as well, the conductor fell over him and broke the boy's arm. Hence this suit for damages against the County Council. The Court below non-suited and this appeal was dismissed. The Court held that the employer was not responsible for the servant's act. In the course of his judgment MR. JUSTICE AVORY said—

He thought the most favourable way in which the case could be put for the Plaintiff was that the conductor in doing what was complained of was either enforcing or endeavouring to enforce the by-laws of the Defendants which were put in evidence, or that he might be reasonably supposed to be enforcing or endeavoring to enforce those by-laws which dealt with the exclusion of unauthorized persons from the Defendants' tramcars and provided that the conductor should enforce or prevent the breach of the by-laws to the best of his ability. It was admitted that the act of the conductor was done not to prevent the Plaintiff from there and then entering the tramcar or otherwise infringing the by-laws, nor to prevent other boys from doing so, but to punish either this particular boy or other boys who had broken the by-law with a view to preventing them from doing so in the future. Mr. Doughty, while frankly admitting that, contended that even though the act was done with that object, it nevertheless was an act done by the conductor, *qua* conductor, in the course of his employment and within the scope of his authority. So far as the decisions which had been quoted were concerned he was not going to attempt either to reconcile them or to say that they could be reconciled. He believed, however, that the principle upon which the case ought to be decided was that which was clearly approved in the case of *Abrahams* v. *Deakin*, (1891) 1 Q. B. 516. That was a case in which the barman of a public-house had given a man into custody after having followed him into the street, on a charge of having passed bad money at the public house. An action for false imprisonment was brought against his master and it was held that he was not liable upon the ground that the barman had not implied authority to arrest the Plaintiff, inasmuch as the master's property was no longer in danger and the arrest was made only for the purpose of vindicating the law by punishing the Plaintiff for an offence which he was supposed to have already committed. It was clear in the present case that the act done by the conductor was an act done to punish, not an offender, because the Plaintiff was not an offender, but to punish one who was supposed to be an offender, or to punish somebody with the object of preventing others from repeating the offence. He could not see the distinction between the present case and that put during the argument of a conductor's going the day after an offence of that kind had been committed and seeking out either the boy who had committed the offence or some boy who resembled him or who belonged to the same class and was about the same age as the offender and giving him a hiding in order to act as a warning to other boys in the neighbourhood. In such a case he did not believe that there was any authority which would support an action against the employer for such an act done by the conductor. If the facts were not consistent with any other view than that there was no evidence to go to the jury, that the act of the conductor was one for which his employers could be held liable, the Deputy-Judge was right in non-suiting the Plaintiff.

Mr. Doughty for the Appellant.

Mr. Henderson for the Respondents.

B. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before FLETCHER AND N. CHATTERJEA, JJ. APPEAL FROM APPELLATE DECREE No. 2421 OF 1911. RAKHAL CHANDER DAS MAITY, Appellant *v.* UMAPROSAD MISRI AND OTHERS, Respondents. Heard, 27th and 28th November. Judgment, 28th November 1913.

Declaratory suit—Right to compel recognition as tenant—Transferee of a portion of a putni tenure—Putni Regulation (VIII of 1819), secs. 5, 6—Bengal Tenancy Act (VIII of 1885), secs. 12, 14, 195 (e).

The Plaintiff was a partial transferee of certain properties comprised in a putni. It was contended that being only such a partial transferee, the provisions of Regulation VIII of 1819 did not apply to him and that he was entitled to be recognised by the landlords under secs. 12 and 17 of the Bengal Tenancy Act. The lower Appellate Court held that the Defendant were not bound to recognise the Plaintiff as a tenant.

Held, that the lower Appellate Court was right in so holding.

Babu Taruk Chunder Chuckerbutty for the Appellant.

Babu Harendra Nath Mukherji for *Babu Jyotis Chander Hajra* for the Respondents.

A. T. M. *Appeal dismissed.*

IN THE GOODS OF HARRIETT TEVIOTT KERR.

sions clearly do not lend any support to the position taken up by the Board of Revenue. On the other hand, if we accept the interpretation of the term "value" as given in these cases, namely, "market value," the view may well be maintained that when probate is taken in respect of an estate out of which debts have to be paid, the value, that is, the market value, of the property is the value of the estate left after deduction of the amount of the debt. In essence, the estate is burdened with the payment of debts, and if the estate were put up to sale with the modification that whoever might purchase it, would have to pay thereout the debts of the deceased, a purchaser would pay for the property a proportionately reduced price. This, I venture to think, is a reasonable construction of the expression "value of the property" in Art. 11, and if this interpretation had been adopted in the case of *In the goods of Ram Chandra Das* (3), the complications which have followed would have been avoided. Whatever doubts, however, might have been entertained as to the true scope of Art. 11 as it stood in 1870, the effect of the legislation of 1899 is in my opinion obvious and plainly supports the contention of the Administrator-General.

I hold accordingly that the duty in this case must be charged at the rate of two and one half per centum on the sum which represents the difference between the gross value of the estate and the amount of the debts.

Messrs. Leslie and Hinds, Solicitors for the Administrator-General of Bengal.

Messrs. Sanderson & Co., Solicitors for the Board of Revenue.

(3) 18 W. R. 153; 9 B. L. R. 30 (1872).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 36 OF 1911.

BEACHCROFT, J. NEWBOULD, J. 1913, Heard, 24, June. Judgment, 25, July.	MAHARAJA SIR RAMESHWAR SINGH BAHADUR, Plaintiff, Appellant, *v.* SREEMUTY JANESHWARI BAHOOASIN and anr., Defendants, Respondents.

Babuana *grant by Darbhanga Raj—Liability to pay its share of revenue and cesses if a charge on subject of grant—Partition by two sons of grantee with concurrence of Raj subject to condition that non defaulting share would be sold for arrears after sale-proceeds of defaulting share found insufficient—Condition if creates a charge—Suit for arrears of one share—Death of owner thereof Substitution of the other co sharer as representative and widow not admitted as party at Plaintiff's instance—Decree against other co-sharer only—Civil Procedure Code (Act XIV of 1882), secs. 367, 368—Plaintiff to choose representative of deceased Defendant at his own risk—Claim to represent by person other than Plaintiff's nominee—Proper procedure Suit thereon, against estate in widow's possession, if maintainable—Limitation -Limitation Act (XV of 1877), Sch. II, Arts. 122, 132.*

The condition in a babuana *grant to a junior member of the Durbhanga Raj family that the grantee shall regularly pay the Government revenue and cesses due from the portion of the estate given in* babuana *to the Raj treasury, does not create a charge in favour of the Raj in respect of overdue arrears of revenue and cesses upon the property granted.*

Where on the grantee's death his two sons, with the concurrence of the holder of the Raj, divided the estate equally and separate accounts of their liabilities were opened, subject however to the condition that on default by either the Raj would be entitled to join the other in

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a suit to recover the arrears, and that in execution of the decree obtained the defaulter's share was to be put up for sale first and only on the proceeds proving insufficient the share of the other would be sold for the balance :

Held—*That the arrears payable by the defaulting co-sharer were not by this agreement made a charge on any portion of the estate granted, and, if at all, then on the share of the non-defaulting co-sharer only.*

On the death of one of the two co-sharers, dispute having arisen between his widow and the surviving co-sharer as to their right to represent the deceased's estate exclusively as his heir, the Raja in a suit instituted against the two co-sharers to recover arrears due on account of the share of the deceased only, applied for substitution of the surviving co-sharer in the place of the deceased and the widow's application to be added or substituted as representative of the deceased was on the Raja's opposition dismissed on the express understanding that she would not be bound by the decree and that her interests would in no way suffer, and subsequently, being unable to execute the decree as the share of the deceased was in the possession of his widow and the share of the surviving co-sharer could not be proceeded against under the agreement until the other share was sold, the Raja instituted a suit for a declaration that the share in the widow's possession was liable to pay the arrears covered by the decree in the previous suit and that the arrears were a charge on that share :

Held—*That the suit was not in the circumstances maintainable as a suit on a judgment, and the limitation of 12 years applicable to such a suit did not apply.*

RAMASWAMI CHETTIAR *v.* OPPILAMANI CHETTI (1), KADIR MOHIDEEN MARAKKAYAR *v.* MUTHU KRISHNA AYYAR (2), PROSUNNA CHUNDER BHATTACHARJEE *v.* KRISTO CHYTUNNO PAL (3) ***distinguished.***

That as the arrears in question were not a charge on the share, the suit could not be treated as one to enforce a charge and the 12 years' limitation applicable to such a suit also did not apply.

When a Defendant dies it is for the Plaintiff to choose against whom he proposes to proceed, and if some one else with an adverse claim to the nominee wishes to be made the representative, he should be added as a party. The provisions of sec. 367 of Act XIV of 1882 applied only in the case of the death of the Plaintiff and had no application to the case of the death of a Defendant.

This was an Appeal preferred on the 14th of February 1911 against a decree of Babu K. M. Sikdar, Subordinate Judge, 1st Court of Zillah Bhagulpur, dated the 21st of November 1910.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, Babus Ram Charan Mitra and *Jogendra Nath Mukerjee* for the Appellant.

Babus Baldeo Narain Singh and *Naresh Chandra Sinha* for the Defendants.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff in the suit out of which this Appeal arises is the Maharaja of Darbhanga. The facts, which are not disputed, are that the grandfather of the Plaintiff granted certain properties, mentioned in the schedule, to his youngest son, Nitreshwar Singh, in accordance with

(1) I. L. R. 33 Mad. 6 (1909).
(2) I. L. R. 26 Mad. 230 (1902).
(3) I. L. R. 4 Cal. 342 (1878).

a family custom by which portions of the estate, which is impartible, are given to junior members of the family for maintenance, subject to the condition that the grantees should regularly pay the Government revenue and cesses due from these portions of the estate, to the Raj treasury. These grants are well known as *babuana* grants.

Nitreshwar Singh died leaving two sons, Ekradeswar who is the second Defendant and Janeswar, whose widow is the first Defendant. These two sons succeeded jointly to the *babuana* property but subsequently separated, each taking half of the property.

Ekradeswar and Janeswar having made default in payment of revenue and cesses, a suit was instituted in 1898 by the then Maharaja, the elder brother of the Plaintiff, to recover the arrears due, which were for a period of nearly three years.

The Plaintiff succeeded to the Raj during the pendency of that suit and in April 1899 a compromise was effected between him and the two brothers. By the compromise the shares of the two brothers in the *babuana* property were defined and declared to be equal, and a separate account of their liabilities was opened, but it was also agreed that if in future either of the two brothers made default the Raj would be entitled, though not bound, to make the co-sharer of the defaulter a co-Defendant in any suit which it might be necessary to bring subject to this condition that in execution of the decree obtained in such suit the Raj would be entitled to put up for sale in the first instance only the share of the defaulter, but that if the proceeds of the sale of that share were insufficient to satisfy the decree, the share of the co-sharer might be brought to sale for the balance.

Subsequently in 1905 the Plaintiff brought a suit against Janeswar to recover Rs. 18,738-15-6 on account of arrears of revenue and cesses due for Janeswar's moiety share.

In accordance with the terms of the compromise entered into in 1899, Ekradeswar was also made a Defendant in that suit. During the pendency of that suit Janeswar died and a dispute arose between Ekradeswar and the widow of Janeswar as to the title to succession to the estate of Janeswar. The dispute culminated in a suit brought by Ekradeswar against the widow for possession of the estate. Ekradeswar succeeded in the first Court, but on appeal to this Court it was held that the widow was the successor and legal representative of the deceased and the suit was dismissed. An appeal is now pending before the Privy Council.

The suit instituted by the Plaintiff in 1905 against Janeswar had meanwhile proceeded, Ekradeswar having been substituted in place of the deceased Janeswar. Finally the principal claim was admitted by Ekradeswar though the interest claimed was disputed. On the 27th July 1906 the Court decreed the full amount claimed.

The substitution of Ekradeswar in place of the deceased Janeswar had not been effected without protest from the widow. The Plaintiff reported the death of Janeswar and applied for the substitution of Ekradeswar on the 21st May and the order for substitution was made the same day. On the 19th June the widow applied to the Court to be substituted in place of Janeswar. On the 25th June the application was heard and as no objection was offered by Plaintiff's pleader an order was made substituting the widow for Janeswar, though there was no order cancelling the previous order for substitution.

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On the 20th July two petitions were put in by the Plaintiff's pleader, one on his own behalf and one on behalf of the Plaintiff. The first, after referring to the application to substitute Ekradeswar for Janeswar and the order passed thereon, stated that when the petition of the widow to be substituted had been presented the Court had enquired from him if he had any objection to her being made a party and he had in exercise of his own discretion stated that he had no objection to her being made a party and the case being proceeded with in presence of both parties, but he never meant to admit that she was the legal representative of Janeswar or should be recorded as such.

The other petition was to the same effect though it contains an allegation which is absent from the pleader's petition, *viz*, that when the Court enquired from the pleader if he had any objection to the widow being made a party, he said he had not, if she wished to be added, though he submitted that Ekradeswar was the legal representative of deceased. The petition went on to say that Ekradeswar alone ought to be a party as representative of the deceased and that the widow had no right to be substituted for Janeswar or even to be added as a party to the suit, and there was a prayer that the order adding her as a party should be revoked and the case tried in the presence of Ekradeswar alone. On both these petitions the widow's pleader noted his objection.

I may here for a moment to remark that these petitions do not bear the stamp of *bona fides*. The petition of the widow asking to be substituted was ordered to be heard on the date fixed for hearing the suit—it was put up on that date—the Court asked the pleader if he had any objection to offer: the pleader according to his own petition understood the enquiry of the Court to be whether he objected to her being added as a party and he said he had not according to the petition filed by him on behalf of the Raj, he urged also that Ekradeswar was the legal representative, yet in spite of his submission the Court did not merely add her as a party, but made an order for substitution in her favour and recorded that the Plaintiff's pleader had no objection to this course. It is difficult to imagine that the Court, understanding as it did that the widow's application was one for substitution, should in the face of the pleader's argument that Ekradeswar was the legal representative, have recorded that the pleader did not object to an order for substitution, if the pleader was merely not opposing her being added as a party.

When the petition of the Plaintiff was put up for hearing the widow's pleader opposed it. However, as is evident from the order of the 20th July, it was stated on behalf of the Plaintiff that he did not want a decree against her, and the result was that the Subordinate Judge struck her off the record, considering it inadvisable that she should remain on it against the wishes of the Plaintiff, and remarking that she would not be bound by any decree that might be passed and her interests would not suffer. Finally, as already remarked, the suit was decreed with this significant passage in the ordering portion of the judgment—the decree, I may remark, has not been exhibited in the case, but presumably is in accordance with the judgment—"this order will not enable the Plaintiff to make any portion of the estate of Janeswar in the hands of any person, other than the Defendant, liable for the decree."

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When the widow was successful in the suit brought against her by Ekradeswar the Plaintiff who had supported Ekradeswar in that suit was in this difficulty that he could not under the terms of the compromise proceed against Ekradeswar's share in the maintenance tenure, until Janeswar's share had been sold, and he could not proceed against Janeswar's share which was not in the hands of the widow on the decree against Ekradeswar.

The result was the present suit, in which the Plaintiff asks (1) for a declaration that Janeswar made default to the extent of Rs. 18,738 15 9, (2) that the Court should hold that the widow being in possession of the estate under the High Court decree is liable to pay the arrears covered by the decree in the suit of 1905, (3) a decree for the amount with interest from the date of the previous decree, (4) for a declaration that the arrears are a charge on Janeswar's share of the maintenance tenure. There are also the usual prayers for costs and other reliefs.

It is alleged in the plaint that on Janeswar's death Ekradeswar attempted to get possession of the estate and succeeded to a great extent, and that some time afterwards the widow succeeded in getting possession. The allegation that Ekradeswar succeeded in getting possession to a great extent is traversed in the written statement of the widow and the only evidence that there is on this point in the very short examination of the three witnesses who were called in the case is in her favour.

It is also alleged in the plaint that the reason why the widow was not brought on the record as representative of Janeswar in the suit of 1905 was misconception on the part of the Plaintiff's agent. This misconception, it is argued, was a reasonable one in view of an alleged family custom that maintenance tenures never devolved on females, a custom which the Plaintiff tried to support in Ekradeswar's suit against the widow. Now whatever may be the truth as to the existence of the alleged family custom, it is quite clear that the Plaintiff was put on notice of the widow's claim by her petition of the 16th June 1906, a petition in which it was definitely asserted that Ekradeswar had made an attempt in the Court of the District Judge to get possession of the estate and had failed.

The learned Subordinate Judge dismissed the suit on two grounds (1) that in the previous suit the Plaintiff was satisfied with a decree against the assets in the hands of Ekradeswar and deliberately refrained from seeking a decree against the assets in the hands of the widow, and consequently the suit was barred by the provisions of sec. 43, C. C. P., (2) that the suit was barred by limitation.

It is now argued that sec. 43 has no application, for the Plaintiff was not splitting up his claim but that on the contrary he claimed the whole amount due from the estate of Janeswar. I am of opinion that this contention is sound and that sec. 43 has no application to the circumstances of the case.

It is next argued that the suit is not barred by limitation, for it is in fact a suit on a judgment, the period of limitation for which is 12 years. To support this contention it is argued that the decree in the previous suit binds the estate, though in fact the wrong person may have been substituted in place of Janeswar in that suit, and reliance is placed on the cases of *Ramaswami Chettiar* v. *Oppilamani Chetti* (1), *Kadir Mohideen*

(1) I. L. R. 33 Mad. 6 (1909).

Marakkayar v. *Muthu Krishna Ayyar* (2), and *Prosunna Chunder Bhattacharjee* v. *Kristo Chytunno Pal* (3).

I am of opinion that none of these cases support the contention of the Appellant. In the case of *Ramaswami Chettiar* v. *Oppilamani Chetti* (1), the person who was brought in to represent the estate of the deceased was his natural father, who was in fact in possession of the estate and who claimed under a Will which at the time had after contest been held to be genuine, though subsequently the Will was found not to be genuine. In the case of *Kadir Mohideen Marakkayyar* v. *Muthu Krishan Ayyar* (2), the person who was brought on the record to represent the deceased was one of three sons and three daughters of the deceased. He raised no objection that he was not the sole representative of the deceased, and the other heirs, whose interests were identical with his, did not apply to be brought on the record. The learned Judges remark "it will of course be open to any other person who is or claims to be the legal representative or one of the legal representatives of the deceased to apply to have his name also entered in the record as a legal representative in place of the deceased Defendant. . . . If the true legal representative or all the legal representatives do not intervene, it can be due only to his or their laches." In the case of *Prosunna Chunder Bhattacharjee* v. *Kristo Chytunno Pal* (3), deceased had been living with one Bibhuti as his wife. After his death, no relatives appeared and she continued to live in deceased's house and was in possession of his property. A creditor of deceased got a decree against Bibhuti as representing him. When he tried to execute it he found Prasanna, a distant relative of deceased, in possession claiming, not as an heir, but under a Will, of which he had obtained probate after the creditor had got his decree. It was found that the creditor had brought his suit in good faith believing Bibhuti to be the representative of the deceased. It was held, though with some hesitation, that the party who took possession of the estate of the deceased should be treated for some purposes as his representative, and that the judgment obtained against such a representative was not a mere nullity and was sufficient to enable the creditor to sue the executor to have the decree satisfied.

The essential features of these cases are wanting in the present case. The interests of Ekradeswar and the widow were not identical, the widow and not Ekradeswar was in possession, the widow appeared and claimed to represent the estate, but not only was she finally not even made a party but was removed from the record on which she had been placed, on the application of the Plaintiff, on the express understanding that she would not be bound by the decree and that her interests would in no way suffer.

An attempt has been made to throw the blame for the substitution of Ekradeswar in place of Janeswar on the Court, it being argued that the Court ought to have decided who was the proper person to represent Janeswar, and that the application to substitute Ekradeswar was *bonâ fide*. Now, not only have I grave doubts as to the *bonâ fides* of the application to substitute Ekradeswar, especially in face of the opposition of the widow, but it is clear that sec. 368 of Act XIV of

(1) I. L. R 33 Mad 6 (1909).
(2) I. L. R. 26 Mad. 230 (1902).
(3) I. L. R. 4 Cal. 342 (1878).

1882 does not lay on the Court the duty which the Appellant seeks to impose upon it. On the contrary, it is for the Plaintiff to choose against whom he proposes to proceed and if some one else with an adverse claim to the nominee wishes to be made the representative he should be added as a party. The provisions of sec. 367 apply only in the case of the death of the Plaintiff and have no application to the case of the death of a Defendant. The reason for the different treatment of the two cases is obvious.

Now not only is it clear that in the circumstances the decree cannot be held to bind the widow but it is perfectly clear that if a suit could be brought on the judgment it would be wholly infructuous as against her when that very judgment expressly decided that the decretal amount could be realised by the sale of the estate in the hands of Ekradeswar alone and that no portion of the estate in the hands of any other person was to be made liable.

It is next contended that the arrears are a charge upon the estate in whosoever's hands the asssets may happen to be, and as such the period of limitation is 12 years. The widow, it may be here noted, admits that the arrears were in fact due. It is argued that as from the nature of the agreement the maintenance holder is only to take the profits of the estate provided that he pays the Government revenue to the Maharaja, the payment of the Government revenue should be considered a charge upon the estate. To support this proposition reference is made to the case of *Durgadut Singh* v. *Rameshwar Singh* (4) in which their Lordships of the Privy council remarked "it never could be permitted that the subject of the grant could be enjoyed and the condition upon which it was made disregarded." But their Lordships were merely dealing with the question whether a maintenance estate was inalienable or not; and in the very sentence from which the above passage is quoted they remark that the Maharaja may sue for the amount of Government revenue paid by him and recover it by sale of the interest granted for maintenance. No authority has been shown to us to support the view that such a payment creates a charge. To support the opposite view, Respondent's pleader relies on the Full Bench decision of *Kinu Ram Das* v. *Mazaffer Hussain Shaha* (5). That case is distinguished on the ground that it was a suit brought by a co-sharer in a revenue-paying estate, who had paid the whole revenue due to save the estate from sale and that the real remedy of a co sharer in such a case is by a suit for contribution, a remedy which would not be available in the present case.

In that case Wilson, J., pointed out that there was no general rule of equity to the effect that any person having an interest in an estate, who makes a payment to save the estate, obtains a charge on the estate. No doubt the Maharaja has an interest in the maintenance estate in this sense that it is never separated from the zemindari, *Gunesh Dutt Singh* v. *Moheshur Singh* (6), and that on the failure of heirs the estate would revert to the Raj; but there is this difference between *Kinu Ram's* case (5) and one like the present, that in the former case there is no contract between the parties, whereas in the present there is, and in the

(4) 18 C. W. N. 1013; s. c. I. L. R. 36 Cal. 943; L. R. 36 I. A. 176 at p 183 (1909).

(5) I. L. R. 14 Cal. 809 (1887).

(6) 6 M. I. A. 164 at p. 197 (1855).

former case the charge claimed was based on the theory that the payment saved the estate, whereas in the present case the claim of a charge is not based on the ground that the Maharaja had made a payment to save the estate, for he would have to pay the whole Government revenue due from the Raj in any event, but on the ground that Janeswar failed to carry out his contract to make certain payments to the Raj treasury. I am of opinion that that case has no bearing on the present question.

In reply it was attempted by the Appellant's pleader to support the theory of a charge on the analogy of the Bengal Tenancy Act, which provides that rent shall be a first charge on a tenure or holding, though the learned pleader expressly repudiated the applicability of that Act in the present case. It is obvious that an analogy cannot be drawn from the provisions of a Statute intended to meet a particular case.

A charge can be created only by operation of law or act of parties. In the present case there is no question of the first method. If a charge was created it must have been by the second method. The Subordinate Judge has disposed of the question by saying there is no evidence of a charge. All that we have is what is contained in the plaint, the first 12 paragraphs of which the Defendant admits to be correct. From that all that we know of the terms of the grant is contained in the statements that the grant was one for maintenance and that the grantee was to pay the Government revenue and cesses to the Raj treasury. Such conditions do not in my opinion suffice to create a charge.

But it was urged by the learned pleader who replied on behalf of the Appellant,—and I may note that this suggestion was not made by Dr. Rash Behary Ghose in opening the appeal,—that para. 10 of the plaint modified the original contract and created a charge. If that argument be correct then the theory of an original charge cannot be invoked to support the suit.

In my opinion the agreement which is recited in para. 10 of the plaint did not create a charge. What appears from the plaint to have happened was this. The grant was to the father of Ekradeswar and Janeswar and on his death the brothers divided the property. The Maharaja would apparently only recognise the partition on conditions one of which was that if the sale-proceeds of the share of one co-sharer was insufficient to satisfy a decree in case of default, the share of the other was to be liable to sale. The provision was really in favour of the brother, as it restricted the liability to sale in the first instance to the share in default. If no charge existed before, I do not think this compromise created one; if it created one at all it only created it on the share of one co-sharer, in respect of default by the other co-sharer.

I would therefore dismiss the Appeal with costs.

NEWBOULD, J.—I agree.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE No. 161 OF 1911.

JENKINS, C. J.
RAY, J.
1913,
10, April.

BEJOY CHAND MAHTAP, Plaintiff, Appellant,
v.
SASHI BHUSAN BOSE, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 169 (c)—Rent accrued due between the date of sale and confirmation thereof—Liability whether judgment-debtor's or auction purchaser's—Liability of the

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surplus sale proceeds—Civil Procedure Code (Act V of 1908), sec. 65.

In view of the alteration in the law made by sec. 65 of the Civil Procedure Code of 1908, the liability of the surplus sale proceeds under sec. 169 of the Bengal Tenancy Act is limited to arrears accrued due up to the date of the sale and cannot be extended to arrears due up to the date of confirmation thereof.

Arrears accrued due between these dates cannot be recovered from the judgment-debtor.

This was an Appeal preferred on the 24th of January 1911 against a decree of Babu Jnanendra Nath Mukerjee, Subordinate Judge of Zillah Hughly, dated the 27th of September 1910, affirming a decree of Babu Benode Behary Ray, Munsif of Arambag, dated the 30th of March 1910.

The facts of the case were as follows :—

In execution of a rent decree obtained by the Plaintiff-Appellant a tenure held by the Defendant was sold on 15th April 1909 and purchased by one Chakrapani Dutt and the sale was confirmed on 16th June 1909. After the sale the Plaintiff applied under sec. 169 of the Bengal Tenancy Act to take out the surplus sale proceeds for the rent which had accrued due between the date of institution of the suit and the date of confirmation of sale. The surplus fell short by Rs. 191-2-6, and this amount the Plaintiff sued to recover from the Defendant in the suit out of which the present appeal arose.

The Defendant urged that as under sec. 65 of the present Civil Procedure Code the title in the property sold vested in the purchaser from the date of the sale and not from the date of the confirmation of sale as was provided in sec. 316 of the old Civil Procedure Code, the Plaintiff should have sued Chakrapani Dutt, the purchaser, for whatever portion of the arrears fell due since the date of the sale.

The Court of first instance upheld the Defendant's plea holding that under sec. 169 of the Bengal Tenancy Act, the surplus sale-proceeds, and not the judgment-debtor personally, were made liable to pay the arrears which accrued between the date of sale and date of confirmation thereof and this decision was affirmed by the lower Appellate Court.

The Plaintiff preferred this Second Appeal.

Babu Shoroshi Charan Mitra for the Appellant.

No one appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—In our opinion the decree of the lower Appellate Court must be confirmed. The point turns upon the effect of sec. 169, cl. (*c*) of the Bengal Tenancy Act, in view of the alteration in the law occasioned by sec. 65 of the new Civil Procedure Code as to the date of the vesting of property sold in execution. The scope of cl. (*c*) is limited to the rent that may have fallen due to the decree-holder in respect of the tenure or holding, between the dates mentioned. It must have fallen due from some person and that person must, I think, be the judgment-debtor. But as a consequence of the alteration occasioned by sec. 65, the judgment-debtor is not liable for rent beyond the time when the property is sold and the liability of the proceeds under cl. (*c*) must be similarly limited, so as to correspond with this. This view does not involve any inconsistency in the law or any conflict with

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the express words of cl. (*c*). All that it involves is that it is no longer necessary to carry matters up to the more extended margin of time permitted by that clause.

For these reasons, the decree must be confirmed. There will be no order as to costs as there is no appearance on the part of the Respondent.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 426 OF 1911.

N. R. CHATTERJEA, J. WALMSLEY, J. 1913, Heard, 2, July. Judgment, 1, August.	RAJ KUMAR GIRJA NANDAN SINGH, Judgment-debtor, Appellant, *v.* KANHAYA PROSAD SAHU and anr., Respondents.

Receiver, powers of—Receiver, if can give discharge of debt—Minor owner—Limitation—Limitation Act (IX of 1908), sec. 7.

A Receiver upon whom the Court has conferred all the powers of realisation that an owner has, can himself give a discharge in respect of a debt. He is not fettered by the restrictions which are laid upon any one of several joint creditors or upon a next friend.

Where a decree on a bond was passed on 5th August 1904 in favour of the Plaintiffs, some of whom were minors, the suit having been filed on 21st June 1904 through their Manager and ammukhtear, who was appointed Receiver by the District Judge on 15th September 1905 in a suit between the Plaintiffs and was put in charge of the whole business of the Plaintiffs with all its "pending and impending litigation," and a Receiver was in charge from that time onwards; and no steps were taken in execution of the decree until 11th May 1910 when one of the minors applied for execution alleging that he had attained majority on 5th June 1907,

Held, ***that the application for execution was barred by limitation.***

That the decretal debt vested in the Receiver when he was appointed on 15th September 1905 and, from that date onwards he was competent to give a discharge; when once the debt had vested in him the minority of one or more of the decree-holders ceased to have any importance for the rights of the minor no less than the rights of the majors were all absorbed by the Receiver.

JAGAT TARINI DASI *v.* NABA GOPAL CHAKI (1) *referred to.*

This was an Appeal preferred on the 25th of August 1911 against an order of Babu Hriday Nath Majumdar, Subordinate Judge of Zillah Muzufferpur, dated the 30th of June 1911.

The facts of the case will appear from the judgment.

Babu Lachmi Narain Singh and *Moulvi Khursaid Hossain* for the Appellant.

Babus Baldeo Narain Singh and *Shoroshi Charan Mitra* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The judgment-debtor is Appellant; he borrowed money from Gajadhar Pershad Sahu, Baldeo Pershad Sahu, and Mahadeo Pershad Sahu, and executed a bond in their favour. On August 5th, 1904, an *ex parte* decree on the bond was passed in favour of Gajadhar and Mahadeo, and the three sons of Baldeo who was then dead. Baldeo's sons were described in the plaint as follows:—Jagannath Pershad Sahu,

(1) I. L. R. 34 Cal. 305 (1907).

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major, Mohan Pershad Sahu, minor, Kanhya Pershad Sahu, minor, under the guardianship of Jagannath Pershad Sahu, his full brother.

No steps were taken in execution of the decree until May 11th, 1910, when Kanhya filed an application for execution alleging that he had attained majority on June 5 h, 1907.

The judgment-debtor asser'ed that Kanhya had attained majority more than three years before the date of his application, and further urged that the application was barred because a discharge could have been given to him without the applicant's concurrence. He pressed this contention on three grounds, firs ly, because the applicant and his brothers formed a joint family, and Jagannath as *karta* of the family could have given a discharge: Secondly, because the money was lent by a banking firm and any one of the partners could have given a discharge; and, thirdly, because the banking business was in the hands of a Receiver appointed by the Court, and the Receiver could have given a discharge.

The learned Subordina'e Judge held that Kanhya had established that he attained majority in June 1907, so that his application for execution was made within three years of the date on which his disability ceased. We have read the evidence and think it warran's that finding, and we hold that Kanhya became of age in June 1907.

The learned Subordinate Judge went on to give reasons for holding that while Kanhya was a minor there was no one who could give a discharge without his concurrence, and therefore he could apply for execution within three years from the date on which he became a major.

We think, however, that this finding is wrong in respect of the third ground of the judgment-debtor's contention.

It appears that the suit in which the decree against Appellant was passed was filed on June 21, 1904, through Dr. Hindmarsh as Manager and ammukhtear of Gajadhar, Mahadeo, Jagannath, Mohan and Kanhya. In the same year a suit was instituted by Gajadhar against Mahadeo, wi h Jagannath, Mohan and Kanhya and in that suit a Receiver was appointed by the District Judge on September 15, 1905. The person chosen for appointment was Dr. Hindmarsh, and the order makes it clear that he was put in charge of the whole banking business with all its "pending and impending litigation." Dr. Hindmarsh was succeeded by Mr. Stevens on June 26, 1906, and on January 17, 1910, Babu Bhubaneswar Bose was appointed Receiver. This Bhubaneswar Babu was still Receiver when Kanhya made his application for execution, for mention is made of him in the last column of the petition.

It has not been suggested that at any time the banking business passed out of the hands of the Receiver, and we must hold that there was a Receiver in charge from September 15, 1905, onwards.

The learned Subordinate Judge has held that this particular debt is not proved to have vested in the Receiver. We think however that this view is wrong: it was not necessary for each individual debt and decree to be mentioned: the words of the District Judge are very wide, and must be held to include this decre'al debt. This is the more certain when it is remembered that Dr. Hindmarsh was chosen to be Receiver because he had been acting as Manager, and as Manager he had filed the suit in which the decree

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was passed against the appealing judgment-debtor.

The powers of a Receiver were discussed at length in the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (1), and it was held that a Receiver could sue in his own name; and in commenting on the duties performed by a Receiver the learned Judges remarked: "All suits to collect or obtain possession of the property must be prosecuted by the Receiver, and the proceeds received and controlled by him." If the Receiver has the power to sue in his own name we do not think there can be any room for doubt that he can himself give a discharge. He is not fettered by the restrictions which are laid upon one of several joint creditors, or upon a next friend. The Court may confer upon him all the powers of realisation that an owner has, and in the present case the District Judge did so. We hold therefore that this decretal debt vested in the Receiver when he was appointed on September 15, 1905; and from that date onwards he was competent to give a discharge. When once the debt had vested in him the minority of one of the decree-holders ceased to have any importance, for the rights of the minor no less than the rights of the majors were all absorbed by the Receiver.

It is not necessary to discuss the other points.

We hold that Kanhya's application for execution was barred by limitation, and we therefore decree this appeal; the order of the lower Court is set aside, and the application for execution is rejected. The Respondent will pay costs in both Courts. The costs in this Court are assessed at 5 gold mohurs.

H. C. S. *Appeal allowed.*

(1) I. L. R. 34 Cal. 305 (1907)

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES NOS. 36 AND 42 OF 1910.

CHITTY, J.	JITENDRA KUMAR
TEUNON, J.	CHATTOPADHYA and ors.,
1912,	Plaintiffs, Appellants,
Heard, 18 and,	v.
19, July.	NITYA GOPAL MUKHOPADHYA and others,
Judgment	Defendants, Respondents.
24, July.	

Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), sec. 77—Absolute gift by Will to Hindu widow—Property acquired after date of Will—Rule of law that will speaks from the death of the testator, before and after the Hindu Wills Act.

A Hindu testator executed a Will at Benares in which he provided: "Upon my death my wife shall get the lands, jamas, cash money, Government promissory notes, etc., and all other immoveable and moveable properties of which I am in possession and enjoyment save and except the lands and buildings mentioned in the schedule and possess and enjoy the same with the right to transfer by gift or sale, and no one will be entitled to raise any objection regarding any gift or sale to be made by her." The testator after the date of the Will purchased a house at Benares of which he was in possession and enjoyment at the time of his death:

Held—*That the widow did not get merely a widow's estate in the property bequeathed but she took it as an absolute heritable estate.*

That the Hindu Wills Act did not apply to the property in Benares.

That the words "upon my death my wife shall get all my properties of which I am in possession" meant that she was to take all the property which the testator would possess at the time of his death and

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there was no intestacy so far on the house at Benares was concerned.

Sec. 77 of the Succession Act which is incorporated in the Hindu Wills Act enacts in other words that the Will speaks from the death of the testator. The Hindu Wills Act did not vary the mode of construction of Wills in this respect nor is it correct to hold that in parts of India where the Act does not apply the ordinary rule that the Will speaks from the death of the testator does not obtain.

This was an Appeal preferred on the 24th of January 1910 against a decree of Babu Mohim Chandra Sircar, 2nd Subordinate Judge of Zillah 24-Pergunnahas, dated the 29th of September 1909.

The material facts will appear from the judgment.

In No. 36.

Babus Golap Chandra Sarkar and *Sashi Sekhur Bose* for the Appellants.

Babus Umakali Mukerjee, *Sasadhar Roy*, *Susil Madhub Mullick* and *Ambica Pada Chowdhury* for the Respondents.

In No. 42.

Babus Umakali Mukerjee and *Sasadhar Roy* for the Appellants.

Babus Golap Chandra Sarkar, *Sashi Shekhur Bose*, *Susil Madhub Mullick* and *Ambica Pada Chowdhury* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

The decision of these Appeals turns upon the construction to be put upon the Will of Tara Prosad Banerjee, dated the 13th August 1902. Tara Prosad Banerjee died at Benares on 20th April 1906 leaving his third wife, Durga Sundari Debi, and two grandsons, the sons of his daughter Khetra Moni Debi. One of these sons, Sanat Kumar Chatterjee, has since died and is represented by his sons Tarack Das and Durga Das, Plaintiffs Nos. 2 and 3. Plaintiff No. 1, Jitendra Kumar Chatterjee, is the other son of Khetra Moni.

By his Will, cl. (2), the testator said, 'upon my death, my wife, Sreemati Durga Sundari Debi shall get the taluks, rent-bearing, rent-free and Jabo Bahali (confirmed or held valid after resumption) lands and jamas, orchards, gardens, tanks, and cash money and Government promissory notes, etc., and all other immoveable and moveable properties of which I am in possession and enjoyment save and except the lands and the buildings mentioned in the schedule and marked with the letters (*cha*) and (*chha*), and she will possess and enjoy the same, with the right to transfer by gift or sale; and no one will be entitled to raise any objection regarding any gift or sale to be made by her." By cls. (3), (4) and (5) the testator left the properties specified in schedules (*cha*) and (*chha*) to his daughter Khetra Moni Debi, and, after her, to her sons, and he declared that his wife should not have any right, possession or claim in respect thereof. He appointed his wife Durga Sundari Debi to be the executrix of his Will.

The suit has been brought by the Plaintiffs to recover possession of the properties left by the testator on the ground that Durga Sundari, the widow, only took a widow's estate in the property left to her by her husband and that, on her death which occurred on 29th January 1908, the property passed to the Plaintiffs as heirs of the testator. The Subordinate Judge has decided against the Plaintiffs on this contention. He has given them a decree in respect of a house at Benares on the ground that

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was purchased by the testator after the date of the Will, and did not, therefore, pass under the bequest contained in cl. (2) of the Will. He has held that there was an intestacy as to this item of the property and that the Plaintiffs are entitled to succeed as heirs-at-law to this and to the moveable property specified in schedule (*ga*).

Appeal No. 36 is presented by the Plaintiffs against the main decision in the case while Appeal No. 42 is presented by Defendants Nos. 1 and 2 and relates to the house at Benares and the moveable property in schedule (*ga*).

It was conceded that a simple gift by Will by a Hindu to his widow will give her merely a widow's estate in the property bequeathed, and it was argued by the learned pleader for the Appellants that the words in cl. (2) conferring upon her the right of alienation were not sufficient to enlarge that gift into an absolute heritable estate. We must not, however, in considering this Will, restrict ourselves to the consideration of cl. (2). The Will must be read as a whole and the intention of the testator gathered from it. We may, however, state that the cases referred to by the learned pleader for the Appellants do not, in our opinion, support his contention. In the case of *Shumsool Hooda* v. *Shewukram* (1), their Lordships of the Privy Council intimated that had the gift to the lady stood alone, they would have regarded it as an absolute gift; and that it was only because it was followed by a gift over that they held it to confer merely a widow's estate. The same was the case in *Hara Kumari Dasi* v. *Mohim Chandra Sarkar* (2). There the testator said to his widow: "You will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties." There had been no clear and absolute gift to the widow preceding these words; but the learned Chief Justice remarked that, if the Will had stopped there, it might have been difficult to say that the widow did not take the property absolutely. But very important words followed to which effect had to be given, namely, a gift over to Haramoni Dasi after the widow's death. Here, we not only have no such gift over, but Khetra Moni, the testator's daughter, is specially provided for by a bequest of the properties contained in schedules (*cha*) and (*chha*). Further, in cl. (5), it is clearly indicated that Khetra Moni will only get the properties in (*cha*) and (*chha*) for her life and that her sons will get them after her death. The sons were, after their mother, the testator's heirs and it is difficult to suppose that, if the testator really meant to cut down his widow's estate in the properties bequeathed to her, he would not have done so in the same express terms as he has cut down the bequest of properties to his daughter. We have no hesitation, therefore, in holding with the Subordinate Judge that, by his Will, the testator intended to leave all his property of whatever kind to his widow Durga Sundari with the exception of those portions left to his daughter Khetra Moni and her sons.

Turning to Appeal No. 42, it was argued that, because the present tense is used in cl. (2)—"all other immoveable and moveable properties of which I am in possession and enjoyment"—the Will did not operate to dispose of any property acquired after its date, *i.e.*, 13th August 1902. Sec. 77 of the Succession Act

(1) L. R. 2 I. A. 7 (1874).
(2) 12 C. W. N. 412 (1908).

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which is applied by the Hindu Wills Act (1870) enacts that the description in a Will of property, the subject of a gift, shall, unless a contrary intention appears by the Will, be deemed to refer to and comprise the property answering that description at the death of the testator: in other words, the Will speaks from the death of the testator.

This corresponds to sec. 24 of the English Wills Act. It was argued that, in this case, the Will was made at Benares and the property in question in this appeal is situate at Benares and that, therefore, the Hindu Wills Act (1870) had no application. This is so; but, in our opinion, it makes no difference. No authority has been cited to us to show that the mode of construction of Wills in this respect was varied by the passing of that Act or that, in parts of India to which the Act does not apply, the ordinary rule that the Will speaks from the death of the testator does not obtain. In England, it has been frequently held that a mere use of the present tense is not sufficient to prevent property from passing under a Will which may have been acquired between the date of the Will and the testator's death. (See Theobalds on Wills, 7th edition, pp. 145 and 146). The Courts will certainly not, where the testator has purported to make a complete disposition of his property, decide in favour of an intestacy as to a portion of that property unless it is absolutely unavoidable. The words in cl. (2) "Upon my death, my wife shall get all my property of which I am in possession" clearly indicate that she was to take all the property which the testator would possess at the time of his death. This is made the more clear by the inclusion in that bequest of cash money. It cannot be suggested that the testator intended to bequeath to his wife only the identical rupees which he might then have in his possession and to die intestate with regard to any other cash, which he might hold at the date of his death.

The result is that Appeal No. 36 will be dismissed and Appeal No. 42 will be allowed. The Plaintiffs' suit will be dismissed with costs in both the Courts. We assess the hearing-fee in Appeal No. 36 at Rs. 100 for Defendant No. 1 and Rs. 50 for Defendant No. 3 and in Appeal No. 42 at Rs. 200.

Suit dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1759 OF 1910.

CHITTY, J.
TEUNON, J.
1913,
Heard, 25 and 26, June.
Judgment, 30, June.

SARADINDU NARAIN ROY, Defendant No. 1, Appellant
v.
BENODE BEHARY MOHATA and others, Plaintiffs, Respondents.

Village Chowkidari Act (Ben. Act VI of 1870), secs. 58 59, 60, 61—Determination by a commissioner under sec. 61—Fraud—Review by subsequent commissioner—Civil suit.

An order by a Commissioner appointed under sec. 58 of the Village Chowkidari Act determining that certain lands are chowkidari chakran lands is final and conclusive.

Such orders cannot be reviewed by a second Commissioner even if the previous order was fraudulently obtained. An order under sec. 61 of the Village Chowkidari Act may be set aside on proof of fraud or of non-compliance with the provisions of the law, if at all, only in a regular suit by a Civil Court.

This was an Appeal preferred on the 25th of May 1910 against a decree of

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S. B. Choudhury, Esq, District Judge of Zillah Birbhum, dated the 19th of April 1910, affirming a decree of Babu Kunja Behary Biswas, Munsif of Doberajpur, dated the 27th of September 1909.

This suit Plaintiffs instituted for recovery of possession of a quantity of 7½ bighas of land, on the declaration of the Plaintiffs' right and by ejecting the Defendants. The allegations in the plaint mainly were as follows: That the lands in suit were included within the Plaintiffs' jote under one of the Defendants. That the Collector of District of Birbhum made an order against law that the lands in suit were chowkidari chakran lands and transferred these lands in favour of the zemindar Defendant by his order, dated 26th February 1908, who dispossessed the Plaintiffs. That the real chowkidari chakran lands were ascertained long before and transferred by the Government to the landlord Defendant. That the landlord Defendant subsequently sued the Plaintiffs for recovery of possession of the said lands with *wasilat* but was unsuccessful as the Plaintiffs were never in possession of those lands. That the landlord Defendant thereupon with the object of taking some of the jote lands of the Plaintiffs applied to the Collector of Birbhum stating that the lands that were assigned to him were not the real chowkidari chakran lands, and that the real chakran lands were in the possession of Madhusudan Mahata. That thereupon the aforesaid illegal order of the Collector was made.

The defence was that the previous resumption was effected through the fraud of Madhusudan Mahata, the predecessor of the Plaintiffs, the Panchayet, who fraudulently suppressing the real chowkidari lands submitted a false report giving the boundaries of a fictitious waste land and stating the same as chowkidari land. That thereupon when the fraud was detected, the real chowkidari chakran lands were ascertained by Babu Bijoy Behary Mukerjee who was a Commissioner for ascertaining the chowkidari lands, under sec. 58, of the Chowkidari Act. That his order was final and conclusive under sec. 61 of the Chowkidari Act and cannot be challenged in a Civil Court. Both the Courts below decreed the suit and Defendant No. 2 appealed to the High Court. The appeal came on for hearing before Chitty and Teunon, JJ., who on the 16th December 1912 sent down an issue to the lower Appellate Court for a finding as to "whether the first resumption was made in consequence of an order of a Commissioner appointed under the Chowkidari Act stating that the land was chowkidari chakran land under sec. 61 of the Chowkidari Act."

As to the first part of the issue the finding was that the chakran lands were resumed by Babu Harish Chandra Banerjee who was a Commissioner under Chowkidari Act. As to the second part of the issue the finding was "that the Commissioner made no statement to the effect that the lands were chowkidari chakran lands under sec. 61 of the Act."

Dr. Rash Behary Ghose (with *Babus Bepin Behary Ghose* and *Bankim Chandra Mukerjee*) for the Appellant submitted that the first resumption was not by a Commissioner appointed under sec. 58 of the Chowkidari Act. There was no determination by Harish under sec. 61 of the Act. He never purported to act under the said section.

[CHITTY, J.—He transferred them as a Commissioner.]

Dr. Ghose.—The mere fact that he

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transferred them, and that he was a Commissioner under the Chowkidari Act is not enough. He must have purported to act under sec. 61 of the Act in order that his determination may have the finality referred to in the section. If he transferred under sec. 50 of the Act it cannot have the same effect. Refers to secs. 48, 49, 50, 58, 59, 60 and 61 of the Chowkidari Act.

[TEUNON, J.—The question as to whether these lands were chowkidari chakran lands must have arisen before Harish, and if he determined that, it would be within sec. 61 of the Act.]

Dr. Ghose.—The transfer here was under sec. 50 of the Act.

[CHITTY, J.—Order under sec. 61 is not forthcoming. Can it not be presumed?]

Dr. Ghose.—I submit not; refers to *Nobo Krista* v. *The Secretary of State for India* (2), *Narendra Lal Khan* v. *Jogi Hari* (3), *Madhu Sudan Banerjee* v. *Girish Chandra Ghosh* (4).

Secondly, I submit that even if it be assumed that the land was resumed by a Commissioner that order could be discharged by a subsequent Commissioner if he was induced to do so by the fraud of Plaintiff's father. *Syed Tuffuzzool* v. *Rughoonath* (5).

Babu Brajendra Nath Chatterjee for the Respondent.

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

The suit out of which this Second Appeal arises relates to 7½ bighas of land transferred to the zemindar Defendant by revenue officers acting, it is said, under the provisions of secs. 58 to 61 of the Village Chowkidari Act, 1870 (Ben. Act VI of 1870). It appears that in 1900 a different plot of land, measuring some 6 bighas, was resumed by the revenue authorities as the chowkidari chakran land of this Mouzah Bagkhela and was transferred to the zemindar. The zemindar sued for possession of that plot in 1905 and having succeeded in his suit he next in 1907 preferred an application to the Collector asserting that the proceedings in 1900 were vitiated by fraud and praying that the true chowkidari chakran lands should be correctly ascertained and made over to him. Proceedings were accordingly taken in the Court of the Commissioner appointed under sec. 58 of the Act, and by an order made by that office, under sec. 61, the lands now in suit were determined on the 24th February 1908 to be the chowkidari chakran lands of the village. By his order of the 20th March 1908 made under sec. 50 of the Act, the Collector accordingly transferred these lands to the zemindar. On the 25th February 1909, the Plaintiff sued to recover possession on the ground that the lands were not in fact the chowkidari chakran lands of the village but formed part of the jote chak Bagkhela.

The suit having been decreed in both the Courts below the zemindar Defendant appeals and his contention here is that by virtue of the provisions of sec. 61 of the Village Chowkidari Act, 1870, the Commissioner's order of the 24th February 1908 was final and conclusive.

On the authority of an expression of opinion to be found in the case of *Hira Lal Mukerjee* v. *Premamoyee Debi* (1) and ignoring the decision of this Court in the cases

(2) I. L. R 11 Cal. 632 (1885).
(3) 2 C. L. J. 107 : s. c. I. L. R. 32 Cal. at p. 124 (1905).
(4) 2 C. L. J. 302 (1905).
(5) 14 M. I. A. 40 at pp. 47-48 (1871).

(1) 2 C. L. J. 306 (1905).

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of *Nobo Krista Mukerjee* v. *Secretary of State for India* (2), *Narendra Lal Khan* v. *Jogi Hari* (3) and *Madhu Sudan Banerjee* v. *Girish Chandra Ghosh* (4), the Courts below overruled this contention, but here the answer of the Respondent is that the determination of the chakran lands in 1900 was also by an order under sec. 61 made by a Commissioner appointed under sec. 58 and that this order was final and conclusive and could not be reviewed by a second Commissioner in 1908.' The Appellant contends that the transfer in 1900 was made by a Collector in a summary manner and not after proceedings before a Commissioner appointed under sec. 58. Though in the judgments of the subordinate Courts in connection with the proceedings in 1900 there were references to a Commissioner appointed under sec. 58 of the Act, we found it necessary to remand the case for clear findings of fact on the questions raised The findings have been returned and it is now clear that the proceedings in 1900 were before one Harish Chandra Banerjee who had been appointed a Commissioner under sec. 58 of the Act by a Government notification, dated 26th June 1899. It is true that no order under sec. 61 has been produced but that is sufficiently explained by the fact that all the papers relating to the chowkidari chakran lands of this village and to the proceedings of 1900 have been destroyed. That the Commissioner, Babu Harish Chandra Banerjee, made an order under sec. 61 is clear from the references to such an order in Ex. IX, the order-sheet in the proceedings taken in 1907-8, see more particularly the orders numbered 10, 16 and 18. In order No. 16, the second Commissioner distinctly refers to his predecessor's order and professes to review it.

The proceedings in 1900 having been before a Commissioner appointed under sec. 58 of the Act and the Commissioner having made an order under sec. 61 we may safely presume that he acted in accordance with law and in his order set out the lands he had determined to be the chowkidari chakran lands and the boundaries thereof. In making this presumption we are fortified by the references in Ex. IX to the "old sanad": by the fact that in 1905, the zemindar Appellant sued to recover possession of specified lands, and by the fact that his application to the Collector in 1907 was one for rectification of boundaries.

The order made in 1900 being final and conclusive, we are clearly of opinion that the said order could not be reviewed by a second Commissioner in 1908, and that the proceedings of the second Commissioner in determining the lands now in suit to be the chowkidari chakran lands of the village Bagkhela were *ultra vires* and contrary to law.

It may be that, as held in the case of *Nobo Krista Mukerjee* v. *Secretary of State for India* (2), an order under sec. 61 may be set aside on proof of fraud or of non-compliance with the provisions of the law, but any such proceedings, we are of opinion, must be taken in the Civil Courts and in the present case the findings indicate that fraud, if fraud there were, was in connection with the second determination and not with the first.

This Appeal is accordingly dismissed with costs, three gold mohurs in all.

Appeal dismissed.

(2) I. L. R. 11 Cal. 632 (1885).
(3) 2 C. L. J. 107 at p. 118 : s. c. I. L. R. 32 Cal. 110 at p. 124 (1905).
(4) 2 C. L. J. 304 (1905).

(2) I. L. R. 11 Cal. 632 (1885)

CRIMINAL APPELLATE JURISDICTION.]

APPEAL No. 288 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 18 and
21 July.
Judgment,
28, July.]

NAFAR SHEIKH,
Appellant,
v.
KING-EMPEROR,
Respondent.

Criminal Procedure Code (Act V of 1898), sec. 422—Indian Oaths Act (X of 1873), secs. 5, 6 and 13—Evidence Act, sec. 118—Order admitting appeal on ground of sentence only, if legal—Trial by jury—Examination of child witness without affirmation, without investigation as to child's capacity to understand affirmation—Infant if may be sworn in a criminal case—Duty of Judge before examination—Non-interrogation by Judge to test child's capacity if invalidates trial—Question of capacity of witness, Judge's duty to determine—Understanding oath or affirmation if relevant to competency to testify.

The Appellant who was found guilty under secs 376/511, *I. P. C, by the unanimous verdict of the jury and sentenced to rigorous imprisonment for 5 years preferred an appeal to the High Court which was admitted by a Bench of the High Court for consideration of the sentence only. On the appeal coming on for hearing before another Bench a direction was made enlarging the scope of the order of admission. The appeal subsequently came on for hearing before a third Bench and was disposed of on a consideration of the grounds taken by the Appellant besides the question of sentence.*

An appeal admitted under sec. 422, Cr. P. C., is the whole appeal and consequently all the grounds taken in the petition of appeal are open for consideration at the final hearing and the Appellant cannot be restricted to any selected ground out of those specified in his petition and a restrictive order for admission is clearly not contemplated by sec. 422 and must be deemed ultra vires.

In the Sessions Court a girl of six years and two others of four years each were examined as witnesses without being affirmed, the Sessions Judge having assumed without investigation that the children were of so tender an age that they could not appreciate the value and significance of an affirmation :

Held—*That the three child-witnesses were examined in contravention of sec. 6 of the Oaths Act and the Sessions Judge should not have adopted the course he did.*

Quære :—*Whether the irregularity is cured by sec. 13 of the Oaths Act, when the omission to take the affirmation is the result of a deliberate act of the Court.*

Held—*That in view of sec. 118 of the Evidence Act it is not obligatory on a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness before the actual examination commences, and the mere circumstance that the Sessions Judge did not interrogate the witnesses before their examination began with a view to test their capacity did not invalidate the trial.*

FAKIR *v.* EMPEROR (11) *referred to.*

That the question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury although after he has decided in favour of the competency of a witness it is for the jury to determine the amount of credit to be given to the statements made by such a witness.

MOOKERJEE, J.—*An infant may be sworn in a criminal prosecution provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath ;*

(11) 11 C. W. N. 51 (1906).

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in other words, a Court has to ascertain from the answers to questions propounded to such a witness whether he appreciates the danger and impiety of falsehood.

Per BEACHCROFT, J.—*The question whether a witness understands the nature and obligations of an oath or affirmation is foreign to the question of competency to testify. Intellectual capacity is the only test.*

The High Court set aside the verdict of the jury on the ground of contravention of sec. 6 of the Oaths Act and because it appeared that the evidence of the child-witnesses had been admitted without consideration of their competency to testify with reference to the provisions of sec. 118 of the Evidence Act, and directed a retrial.

This was an Appeal preferred on the 1st of April 1913 against the order of S. C. Mullick, Esq., Sessions Judge of Zillah Nadia, dated the 23rd of January 1913.

The facts of the case will appear from the judgment.

Babu Debendra Nath Bagchi for the Appellant.

Mr. Bagram for the Crown.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The Appellant, Nafar Sheikh, has been convicted of an offence under sec. 376 read with sec. 511 of the Indian Penal Code and sentenced to rigorous imprisonment for five years. The jury unanimously found him guilty, but recommended a light sentence on the ground that he is a young man and has got a young wife. The Sessions Judge accepted the verdict of the jury, but did not give effect to their recommendation for a light sentence. The appeal to this Court was in the first instance admitted by Harington and Coxe, JJ., for consideration of the sentence only, in view of the representation of the jury. The appeal, thus admitted, came to be heard by the Chief Justice and Sharfuddin, J., who held that, in view of the provisions of sec. 422 of the Criminal Procedure Code, 1898, the appeal could not be admitted on a limited ground, and directed the scope of the order of admission to be enlarged. As the direction thus given was not formally recorded, it is desirable to draw attention to the terms of secs. 421 and 422 of the Criminal Procedure Code. Sub-sec. 1 of sec. 421 lays down that on receiving the petition of appeal, accompanied by a copy of the judgment or order appealed against or a copy of the heads of the charge in cases tried by a jury, under sec. 419 or sec. 420, the Appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. Sec. 422 then provides that if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the Appellant or his pleader and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall on the application of such officer, furnish him with a copy of the grounds of appeal. It is plain that the appeal which has thus to be heard is the whole appeal; consequently, all the grounds taken in the petition of appeal are open for consideration at the final hearing, and the Appellant cannot be restricted to any selected ground out of those specified in his petition. A restrictive order for admission is clearly not contemplated by sec. 422 and must be deemed *ultra vires*. This view is strengthened by a consideration of the terms of sec. 422. It is worthy of note that a similar view has been taken by this Court with regard to appeals under the Civil Procedure Code. *Srinivas* v. *Ram-*

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chandra (1). Fresh notice of the appeal has been given to the Crown, and the appeal has been argued before us on behalf of the accused and the Crown.

The verdict of the jury has been assailed on behalf of the Appellant as erroneous by reason of three circumstances, namely, first, that the Sessions Judge allowed to be placed before the jury the evidence of three persons who had not made an affirmation as required by sec. 6 of the Indian Oaths Act, 1873; secondly, that the Sessions Judge has not considered, whether these three persons were, by reason of their tender years, prevented from understanding the questions put to them or from giving rational answers to those questions, within the meaning of sec. 118 of the Indian Evidence Act, 1872; and, thirdly, that the Sessions Judge has failed to call the attention of the jury to material portions of the evidence.

In support of the first ground, reliance has been placed upon secs. 5 and 6 of the Indian Oaths Act. Sec. 5 provides that oaths or affirmations shall be made by all witnesses, that is to say, all persons who may lawfully be examined or give or be required to give evidence by or before any Court, or by person having by law or consent of parties authority to examine such persons or to receive evidence. Sec. 6 provides that where the witness is a Hindu or Mahomedan, he shall, instead of making an oath, make an affirmation. In the case before us, the complainant Zobeda, a girl six years old, and, two other girls, Haliman and Mowla, each four years old, were examined, though they did not make an affirmation. In fact, the Sessions Judge deliberately did not give them an opportunity to make an affirmation. The Judge appears to have assumed, without investigation, that the children were of so tender an age that they could not appreciate the value and significance of an affirmation. It is plain that the Judge should not have adopted this course. As was laid down in the case of *King* v. *Braxier* (2), an infant, even though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath; in other words, a Court has to ascertain from the answers to questions propounded to such a witness, whether he appreciates the danger and impiety of falsehood. The course pursued by the Sessions Judge has led to the result that these witnesses were examined in contravention of the provisions of sec. 6 of the Indian Oaths Act. On behalf of the Crown, however, it was suggested that the irregularity in the proceeding, if any, may be shown, if necessary, to have been cured by the provisions of sec. 13 of the Indian Oaths Act. Sec. 13 lays down that no omission to make any affirmation shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. In support of this view, reliance has been placed upon the decision of a majority of the Full Bench in *Queen* v. *Shew Bhogta* (3). On behalf of the Appellant, this position has been controverted and it has been argued that where there is an omission by a witness to take an oath or to make an affirmation by reason of the deliberate act of the Court, sec. 13 is of no assistance. The question raised is

(1) 14 C. L. J. 146; s. c. 16 C. W. N. 921 (1911).

(2) 1 Leach 199; 1 East P. C. 443 (1779).

(3) 14 B. L. R. 294; 23 W. R. Cr. 12 (1874).

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by no means free from difficulty, as is amply indicated by the divergence of judicial opinion on the subject. In this Court, judicial opinion has not been uniform, as appears from an examination of the decisions in *Queen* v. *Itwaria* (4), *Queen* v. *Annunto* (5) and *Queen* v. *Shew Bhogta* (3). It is further worthy of note that in the case of *Nandolal* v. *Nistarini* (6), when it was argued on the authority of some of the decisions just mentioned that sec. 13 of the Indian Oaths Act applied to cases where the omission to take the oath or affirmation was the result of the deliberate act of the Court or of the witness, Sir Francis Maclean, C. J., with the concurrence of Mr. Justice Macpherson and Mr. Justice Hill, described the contention as at once novel and startling. There has been a similar divergence of judicial opinion in the other High Courts, as is indicated by the cases of *Queen* v. *Maru* (7), *Queen* v. *Lal Sahai* (8), *Empress* v. *Shava* (9) and *Empress* v. *Viraperumal* (10). In view of this divergence of judicial opinion and of the course we propose to take with regard to the second ground urged by the Appellant, I reserve my opinion upon the difficult question of the true scope and effect of sec. 13 of the Indian Oaths Act.

In support of the second ground it has been contended that the record makes it reasonably clear that the Sessions Judge has not considered, whether the three girls mentioned were by reason of their tender years, prevented from understanding the questions put to them, or from giving rational answers to those questions. It has further been argued that under sec. 118 of the Indian Evidence Act, he was bound to ascertain, before those children of tender years were examined as witnesses, whether they had capacity to understand and to give rational answers. Reliance has been placed upon the decision in *Fakir* v. *Emperor* (11), which, it has been urged, is an authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness, before the actual examination commences. It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement; but, in my opinion, the proposition thus widely formulated is not justified by the terms of sec. 118 of the Indian Evidence Act. That section lays down that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years. The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must, by a preliminary examination, test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness, before the actual examination commences. In fact, the case of *Queen* v. *Whitehead* (12) shows that the incompetency of a witness may very well appear in the course of his examina-

(3) 14 B. L. R. 294; 23 W. R. Cr. 12 (1874).
(4) 14 B. L. R. 54; 22 W. R. Cr. 14 (1874)
(5) 14 B. L. R. 295 (note); 22 W. R. Cr. 5 (1874).
(6) I. L. R. 27 Cal. 428, 440 (1900).
(7) I. L. R. 10 All. 207 (1888).
(8) I. L. R. 11 All. 183 (1888).
(9) I. L. R. 16 Bom. 359 (1891).
(10) I. L. R. 16 Mad. 105 (1892)
(11) 11 C. W. N. 51 (1906).
(12) L. R. 1 C. C. R. 33 (1866).

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tion-in-chief, and that the evidence of a witness so found to be incompetent may at that stage be withdrawn from the jury. The true rule on the subject is concisely stated by Brewer, J., in *Wheeler* v. *United States* (13), in these terms: "The decision of this question (whether the child witness has sufficient intelligence) primarily rests with the trial Judge who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will not be disturbed on review, unless, from that which is preserved, it is clear that it was erroneous." The mere circumstance that the Sessions Judge did not interrogate the witnesses before their examination began, with a view to test their capacity, does not, in the view I take of the true effect of sec. 118 of the Indian Evidence Act, invalidate the trial. But, in the present case, there are circumstances which, in my opinion, rendered it plainly desirable that such a course should have been pursued. In the first place, with regard to the girl Mowla, the Committing Magistrate had recorded the note that she was too young to make any rational statement, and, on this ground, he did not receive her testimony. In the second place, as regards the girl Zobeda, the Committing Magistrate had recorded the note that "she can hardly give rational answer to questions put to her." It further appears from the record that, on the first day that Zobeda was examined before the Magistrate, she could not answer the questions put to her, though, on the day following, she gave full answers. In the third place, as regards all the three girls, Haliman, Mowla, and Zobeda, the Sessions Judge deliberately omitted to follow the procedure prescribed by sec. 6 of the Indian Oaths Act; from this circumstance, the accused has invited us to draw the inference that, in the opinion of the Judge, the children were of too tender an age to be able to appreciate the distinction between truth and falsehood and the significance of an affirmation. The record of the Sessions Judge, as already stated, does not throw any light on these points, and there is nothing to show that his attention was drawn to the remarks made by the Committing Magistrate or that the provisions of sec. 118 of the Indian Evidence Act were present to his mind. Under these circumstances, I am of opinion that it would not be safe to affirm the conviction. I am not unmindful that the Sessions Judge did invite the attention of the jury to the circumstance that the girls had not made an affirmation; this observation was, however, made, not with a view to exclude their testimony but with a view to make the jury consider the question of the weight to be attached to their evidence. The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury although after he has decided in favour of the competency of a witness it is for the jury to determine the amount of credit to be given to the statements made by such witness. *Queen* v. *Hosseine* (14). The second ground urged by the Appellant must consequently prevail. In this view, it is unnecessary to consider the third ground in detail, though I must state that I was not impressed by it.

The result is that this Appeal is allowed,

(13) 159 U. S. 523

(14) 8 W. R. Cr. 60 (1867).

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the conviction and sentence set aside, and the case remitted to the Sessions Judge to be retried in accordance with law. The three girls mentioned must be examined in conformity with the provisions of sec. 6 of the Indian Oaths Act and sec. 118 of the Indian Evidence Act. It may be usefully added that children of six or even five years of age have been allowed to testify, upon the Court being satisfied as to their capacity to give rational testimony. *R.* v. *Holmes* (15), *R.* v. *Perkins* (16), *R.* v. *Brasier* (2).

BEACHCROFT, J.—I agree that the conviction should be set aside and a retrial ordered, on the ground that it is not clear that some of the evidence, and that the most important evidence, was admissible. The remarks of the Magistrate regarding the children Mowla and Zobeda raise a doubt as to their competency to testify and as the learned Judge does not appear to have considered the question from the point of view of sec. 118 of the Evidence Act, the conviction has been based on evidence, the admissibility of which is doubtful.

I respectfully dissent from the dictum in *Fakir* v. *Emperor* (11) that the Judge must form his opinion as to the competency of a witness before his actual examination commences. In many cases it may be desirable to take that course, but to lay it down as a positive rule of law is to read words into sec. 118 of the Evidence Act which are not there.

In my opinion the question whether a witness understands the nature and obligations of an oath or affirmation is foreign to the question of competency to testify. Intellectual capacity is the only test. But the Judge was bound under the provisions of the Oaths Act to have an affirmation made by the witnesses. The effect of the omission in this instance it is unnecessary to discuss.

In regard to the arguments as to misdirection I desire to refer only to one point. It was argued that the Sessions Judge in his charge to the jury had not pointed out to them that the medical evidence was consistent only with a case of attempted rape and therefore contradicted the evidence of the girl. This reading of the medical evidence depends on the view that vaginal penetration is necessary to complete the offence of rape. The extent of penetration required has not been defined in the Indian Penal Code, but it is open to argument whether vulval penetration, with which the medical evidence is consistent, is not sufficient to establish rape and whether the accused ought not in this case to have been committed on a charge of the completed offence and not on a charge of attempt only. I express no opinion in this point for it was not argued before us.

Retrial ordered.

(2) 1 Leach 199 ; 1 East. P. C. 443 (1779).
(11) 11 C. W. N. 51 (1906).
(15) 2 F. & F. 788 (1861).
(16) 2 Moody C. C. 135.

THE

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Contents.

NOTES.

Christmas and New Year holidays.

The High Court of Calcutta will be closed on all its sides after Court on Monday the 22nd of December and will re-open on Friday the 2nd of January next.

The Viceroy in Calcutta.

We accord a hearty welcome to His Excellency the Viceroy and Governor-General of India to this city. It would be an affectation to say that the citizens of Calcutta have not felt deeply on the question of the transfer of the seat of the capital from Calcutta to Delhi. We have no doubt consoled ourselves with the sentiment that we should not grudge the historic capital of India being restored to its former glory. But selfish instincts of men often get the better of nobler sentiments and the citizens of this the second city in the British Empire have not yet got reconciled to her dethronement after being the capital of British India from the very foundation of British rule in India. But all the same the people of the Presidency of Bengal are under deep obligation to His Excellency the Viceroy for the annulment of the Partition of Bengal and the raising of the Province to the status of a Presidency Government. The firm and eminently fair attitude that His Excellency has recently taken with regard to the South African question has also enhanced the high esteem and regard in which the people of Bengal have always held him. We do hope that the visit of the Viceroy in future years will extend to some weeks and not merely days and the city which has given birth to the British power in India will continue to enjoy the privilege and honour of welcoming him annually as in the past.

Jury trial in Bengal.

At a meeting of the Bengal Council held on the 1st of December last the Hon'ble Mr. Surendra Nath Ray interpellated the Government with regard to the extension of the Jury trial in the Bengal districts within the last twenty years. The Government in reply stated that in 1897, Jury trial was extended to Chittagong, Mymensingh, Rajshahi and Jessore, &c., in 1905 to Khulna. Thus it will be seen that within the last seven years no advance has been made in this direction. Having regard to the spread of education and, more especially the increasing desire amongst the educated public to participate in public duties, we think it is time for Jury trial to be extended to all Municipal towns in Bengal.

Repentant criminal and reduction of sentence.

The facts of the case of *Rex* v. *Albert Porter*, where the Court of Criminal Appeal in England reduced the sentence of the prisoner from one of penal servitude to six months' imprisonment with hard labour are both instructive and interesting. The prisoner in this case had pleaded guilty to charges of larceny. The circumstances under which he was apprehended were that he had confessed to having led a career of crime to an officer of the Salvation Army who urged him to make a clean breast to the police of his latest unpunished offence so that he might make such restitution as was still possible to the victims and then begin a new chapter of life. He accordingly confessed, and this led to the restoration of some of the properties to their rightful owners. From this and other evidence the Court of Appeal was satisfied that the repentance of the prisoner was genuine and the Court was of opinion that a long term of imprisonment was not calculated to promote the reclamation of the prisoner to an honest life.

Proof of attestation of mortgage bond when witness dead.

The case of *Gobardhan Dass* v. *Hori Lal*, I. L. R. 35 All 364, is worth noticing. The Plaintiff sued on a mortgage in his favour by three illiterate persons who executed the deed by

affixing their marks thereto. When the suit was brought all the three executants as also all the attesting witnesses to the deed were dead. The Plaintiff sought to prove the deed by (1) the statement of a witness examined in the case who claimed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructury mortgage executed by one of the executants of the mortgage in suit and the representative of the two other executants which referred to and recognised the genuineness of the mortgage in suit and (3) a deed of sale executed by the representatives or some of the representatives of the executants of the deed in suit which recognised the genuineness of the aforesaid usufructuary mortgage. The Plaintiff contended that the two documents produced by him proved indirectly that the signatures of the three executants were in their handwriting.

Their Lordships held that the evidence produced by the Plaintiff to prove the signatures of the deed in suit did not comply with sec. 69 of the Evidence Act and consequently the deed was not properly proved. It is pointed out that sec. 69 of the Evidence Act reproduces as regards attesting witnesses part of a rule of English law according to which where a document is required by law to be attested one attesting witness must be called with this exception, among others, that if the attesting witnesses are dead, insane, out of the jurisdiction or cannot be found, secondary evidence of the execution may be given by proof of the handwriting of the witnesses or if this is not obtainable by presumptive or any other available evidence. But the Indian law does not in a case of this kind allow a party to rely on presumptive or other evidence of execution where he is unable to fulfil the conditions laid down in sec. 69 of the Evidence Act as regards the attestation by the witnesses or execution by the executants. The Judges, it seems to us, placed a very narrow interpretation on the section, and, in the particular instance, it has undoubtedly led to a failure of justice.

Criminal misappropriation of Municipal water.

In *Emperor* v. *Bimala Charan Roy*, I. L. R. 35 All. 361, the charge against the Petitioner was criminal misappropriation of Municipal water. The Petitioner was the waterworks inspector of the Cawnpur Municipality. Within the Municipal area he owned two houses one of which he let out to tenants. On being asked by them to get water connection in the house occupied by them the Petitioner had the Municipal main pipe tapped by plumbers who were his subordinates and had water laid on to the house and to his garden. He represented to his tenants that the Municipal tax for the two pipes amounted to Rs. 9 which was to be paid by him and them in equal shares and for some time the tenants' share was collected from them by the Petitioner. Subsequently it turned out that the Petitioner had the water connection without informing the Municipality thereof and had of course paid no tax for it. Their Lordships held that the Petitioner as a member of the Municipality, one of his duties being to supervise and check the distribution of water from the Municipal water works had dominion over the water belonging to the Municipality and in deliberately misappropriating that water for his own use and for the use of his tenants for which he paid no tax he committed the offence described in sec. 408, I. P. C.

CURRENT INDIAN CASES.

(CIVIL.)

Sale of property subsequently found invalid—refund of purchase money.

WAHDAD KHAN v. JANAK SINGH, I. L. R. 35 All. 370

The Defendant sold certain zemindari property to the Plaintiffs who were then minors. On a suit by third parties the Plaintiffs were dispossessed. The Plaintiffs having been unable to obtain a refund of the purchase money from the Defendant brought a suit for its recovery and also for the costs incurred in the litigation with the third parties.

Held—That the Plaintiffs were entitled to recover from the Defendant the purchase money which the latter had received from them.

Indian Limitation Act (IX of 1908), sec. 20—"Interest" meaning of.

ABDUL AHAD v. MAHTAB BIBI, I. L. R. 35 All. 378.

The word interest in sec. 20 of the Limitation Act means the interest or any part of the interest due on a debt.

Hindu joint family—Power of managing member.

ACHHAIBAR SING v. RAM SORUP SAHU, I. L. R. 35 All. 380.

The managing member of a joint Hindu family can execute decrees on behalf of the family and can receive payment and give good receipts on behalf of the family which are binding on the family.

Pre-emption.

KHETTAR CHANDRA BOSU v. NOBIN KALI DEVI, I. L 35 All. 385.

A certain house in Benares City was sold for a certain amount. The purchaser again sold the property for a much larger amount. Held on a suit for pre-emption, that the second sale must be taken to have been made subject to the right of pre-emption and the pre-emptor was only bound to pre-empt the first sale making the subsequent vendee a party to the sale so as to bind him by the proceedings.

Limitation—Execution of decree—Step in aid thereof.

TADAR MALL v. PHOLA KUNWAR, I. L. R. 35 All. 389

An application for transfer of a decree is an essentia

and necessary step preliminary to the making of an application for execution in a Court which passed the decree. Such an application is an application to take a step in aid of execution.

Mahomedan law—Wakf.

MAHOMED IBRAHIM *v.* ABDUL LATIF, I. L. R. 37 Bom. 447.

A trust-deed which is an attempt to create a perpetuity in the nature of a family settlement under the guise of a wakfnama is void.

Presidency Towns Insolvency Act—Right of audience of attorneys before officer appointed under sec. 6.

In re THE ADVOCATE-GENERAL OF BOMBAY, I. L. R. 37 Bom. 464.

Attorneys of the High Court have a right of audience before the officer appointed by the Chief Justice in the exercise of the powers conferred upon him under sec. 6 of the Presidency Towns Insolvency Act.

Civil Procedure Code (Act V of 1908, sec. 60—Attachment—Policy of insurance.

SHANKER *v.* UMABAI, I. L. R. 37 Bom 471.

A policy of insurance effected upon one's own life but expressed to be for the benefit of another is attachable under sec. 60, C. P. C., as a security or other saleable property belonging to the judgment-debtor.

Civil Procedure Code (1908), sec. 97—Appeal—Finding on preliminary issue without formal decree.

SAKHARAM *v.* SADASHIV, I. L. R. 37 Bom. 480.

In a suit for redemption an issue was raised whether any of the Plaintiffs were agriculturists and it was found that one of the Plaintiffs was but no decree on this preliminary finding was drawn up. After the final decree for redemption was made one of the Defendants appealed taking *inter alia* the ground that the lower Court was wrong in finding that one of the Plaintiffs was an agriculturist. It appeared that the Defendant did not ask the Court to draw up the preliminary decree.

Held—That the Defendant had not waived his right to appeal and the Court of Appeal was entitled to consider the ground in question.

Dekkan Agriculturists Relief Act, sec. 20.

BALAHAND *v.* CHUNI LAL, I. L. R. 37 Bom. 486.

A Court cannot apply (for granting instalments) sec. 20 of the Dekkan Agicultarists Relief Act to the case of a judgment-debtor who was not an agriculturist when the decree was obtained but who by discarding trade and limiting himself more exclusively to profits in land came an agriculturist at the time of the execution of the decree.

Civil Procedure Code (1908), Or. 21, r. 100—Decree transferred to Collector, execution of—Objection of wrongful ouster, who to dispose of.

RAGHO CHANDRA RAO *v.* HANMATI CHANDRA RAO, I. L. R. 37 Bom. 488.

Where at a sale held by the Collector in execution of decree transferred to him the property was purchased by one A and the Collector put him in possession. Thereupon B applied to the Civil Court for restoration of possession on the ground that he had been in possession of the property on his own account and not on behalf of the judgment-debtor.

Held—That under Or. 21, r. 100 the Court had no jurisdiction to entertain such application complaining of ouster or dispossession but the proper officer to be applied to was the Collector.

Easement—Eaves for discharging water.

CHOTALAL *v.* MANILAL, I. L. R 37 Bom. 491.

The possession of eaves for the discharge of water overhanging another man's land is an easement.

(CRIMINAL.)

Bombay prevention of Gambling Act (IV. Bomb. of 1887), secs. 6, 7.

EMPEROR *v.* JAFFUR MAHOMED, I. L. R. 37 Bom. 402.

The Bombay prevention of Gambling Act is a penal statute and must be construed strictly. The presumption under sec. 7 that a house in which cards, &c., are found is a gambling house will only arise where the house in question is entered under a warrant issued under sec. 6 of the Act.

Indian Penal Code—Murder.

EMPEROR *v.* KANHAI, I. L. R. 35 All. 329.

Four persons were convicted of murder the facts being that at a time of the year when there was a great demand for water the deceased was irrigating his field one morning when the four accused persons came armed with *lathis* and asked the deceased to stop irrigating his field so that they might irrigate their own. A wrangle ensued and the deceased received such injuries that he died in consequence thereof. It was contended on behalf of the defence that the common intention of the accused could not possibly have been more than to voluntarily cause a grievous hurt to the deceased.

Held—That in the circumstances of the case the accused were rightly convicted of murder. The fourth clause of sec. 300, I. P. C., applied to the case.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before IMAM AND CHAPMAN, JJ. REV. No. 932 OF 1913. SADHU CHARAN MAHUNTY AND OTHERS, Petitioners *v.* KING-EMPEROR, Opposite Party. 13th August 1913.

Indian Penal Code (Act XLV of 1860), sec. 147—Rioting—Technical offence—Absence of moral turpitude—Sentence, consideration of—Criminal Procedure Code, sec. 106—Bond for keeping the peace.

The Petitioners were convicted by the Deputy Magistrate of Bhadrak under sec. 147, I. P. C., and sentenced each to rigorous imprisonment for two months and two of them were sentenced to pay a fine of Rs. 50 each in addition and the rest to smaller fines. All the Petitioners were further ordered to execute bonds under sec. 106, Cr. P. C.,

in the sum of Rs. 50 each to keep the peace for one year.

The facts will appear from the following portion of the judgment of the Sessions Judge before whom the Petitioners preferred an appeal which was dismissed.

"It appears that some time in January last the house of the zemindar was destroyed by fire. He proceeded to levy contributions of straw and bamboos, from the villagers his tenants. On the night of *Dol purnimah* the zemindar attempted through his servants to levy a further contribution from one Dinai Barik, the informant in the present case. Denai Barik objected on the ground that he had already complied with a previous requisition. Then under orders of the zemindar the accused persons went to the threshing floor of the informant and committed rioting in an attempt to forcibly take straw assaulting both informant and his son."

Their Lordships delivered the following judgment in this case :—

The Petitioners have been convicted of the offence of rioting, it being alleged against them that in order to levy contribution on some tenants for the zemindar they went in a body and used violence against those tenants. We have considered the facts and circumstances of the case and we do not find in them any such magnitude as to raise the occurrence to the dignity of a riot, though technically that term may have an application. It was a very small village quarrel due to the zemindar's demanding from the tenants contribution of straw, etc., for the rebuilding of his house which had been burnt down by fire. The demand of the zemindar was in conformity with the custom that prevails in the country that when a zemindar's house is burnt down the tenants contribute towards the rebuilding of the house just in the same way as when a tenant's house is burnt down the zemindar contributes towards the rebuilding of the tenant's house. No doubt it is true that legally the zemindar was not entitled to levy any such contribution and therefore the conduct of those who acted on his behalf or in his interest is contrary to the provisions of the law. But there was no moral misconduct on the part of the Petitioners, or the zemindar in what they did nor was there any moral turpitude in the offence which he is said to have been committed. For the purpose of the law, sentence of fine ought to have been quite enough in a case of this character.

In the case of the Petitioners, Makar Jana and Sankar Jana, we reduce the sentence to a fine of Rs. 5 each and, in default, to rigorous imprisonment for a term of a week in each case. In the case of Sadhu Charan Mahanty, Bholai Mahapatra and Korban Khan we reduce the sentence to a fine of Rs. 25 each and, in default, to a rigorous imprisonment for a fortnight in each case. The order binding down the Petitioners to keep peace under sec. 106 is set aside, the Rule is made absolute.

The Petitioners will be discharged from bail.

Mr. J. N. Roy for *Babu Monmatha Nath Mukherjee* for the Petitioners.

No one appeared for the Opposite Party.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before BEACHCROFT, J. APPEAL FROM APPELLATE DECREE No. 1426 OF 1912. AKHOY KUMAR ROY AND OTHERS, Plaintiffs, Appellants *v.* Monsur and on his death his legal representative CELAMATULLA AND OTHERS, Defendants, Respondents. 1st December 1913.

Estoppel—Landlord and tenant—Dispossession of tenant in execution proceeding—Regaining possession.

The Appeal was by the Plaintiff in a suit for declaration of title and ejectment. The Plaintiff alleged that he had let out the land to four persons, his tenants, and that those four sublet to one Monsur, who was the contesting Defendant. The Munsif found that the Plaintiff was entitled to only 15½ annas share and he gave the Plaintiff a decree for joint possession with the Defendant to that extent. An appeal by the Plaintiff was dismissed. It was admitted that the Plaintiff was entitled to 15½ annas share; and the only question in the second appeal was as regards the remaining half anna share.

An issue was framed during the trial before the Munsif as to whether the Defendant was a subtenant under the four tenants of the Plaintiff or not, and the finding of the Munsif was that he was a co-sharer of the four tenants of the Plaintiff. It was contended in second appeal that the effect of ejectment proceedings in 1909 was to remove the bar of estoppel which would stand in the way of the Defendant, or in other words, the ejectment order had the effect of dissolving the tenancy, if one existed, and that the Defendant having subsequently gained possession in a claim case under Or. XXI, r. 100 of the Code of Civil Procedure, could be taken to be holding as a trespasser and, therefore, in a position to deny the Plaintiff's title.

Held, that the fact that the Defendant was dispossessed in execution and regained possession in the claim case would not have the effect of dissolving the tenancy.

Babus Jadu Nath Kanjilal and *Braja Lal Chuckerbutty* for the Appellants.

Babu Ambica Churn Das for the Respondents.

A. T. M. *Appeal allowed: Case remanded.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
7, November.

RAJKUMARI BHUBANESHWARI KUMAR, Appellant,
v.
THE COLLECTOR OF GAYA, Respondent.

Court Fees Act (VII of 1870, as amended by Act XI of 1899), sec. 19H, cl. 4—Probate and Administration Act (V of 1881), sec. 98—Indian Succession Act (X of 1865), sec. 277—Application by Collector for valuation of estate—Period of limitation—Inventory to be filed by executor or administrator, nature of.

Where after the issue of Letters of Administration with the Will annexed the applicant for the same filed a list of immoveable properties belonging to the estate of the deceased and some time after filed a list of the moveables of the estate but no document was filed which contained a full and true estimate of the properties and the Collector after the expiration of more than six months applied to the District Judge under sec. 19H, cl. (4) of the Court Fees Act for an enquiry into the valuation of the estate :

Held—*That the six months provided in cl. (4) of sec. 19H of the Court Fees Act runs from the lodging of an inventory as required by sec. 98 of the Probate and Administration Act and no inventory satisfies the statutory requirement which does not contain a "full and true estimate of all the property in possession."*

It did not satisfy the provision of cl. (4) that six months had elapsed from a period when a certain document which might be classed as or denominated an inventory satisfied a particular Judge.

That the application of the Collector was not barred under cl. (4) of sec. 19H of the Court Fees Act.

Quære :—*Whether the inventory contemplated by sec. 98 of the Probate and Administration Act should not be embodied in one document.*

This is an Appeal from a judgment and order of the High Court of Judicature at Fort William in Bengal, dated the 25th May 1909, on an application for the exercise of its revisional jurisdiction in respect of the judgment and order of the District Judge of Gaya, dated the 19th September 1908 and 2nd March 1909, respectively.

The main question for determination in this Appeal was whether a valuation of the property and assets of an estate, of which Letters of Administration with the Will annexed had been granted, made under sec. 19H, cl. (4) of the Court Fees Act, XI of 1899, should be set aside or not.

The facts connected with this litigation are shortly as follows :—

On the 31st March 1890 Raja Ran Bahadur Singh of Tekari died. He was the owner in possession of a seven annas share of the Tekari Raj.

He left a Will, dated the 23rd March 1890, by which he devised 10 villages to Mussamut Rameshwar Kumar, his son's widow, the Appellant above-named, for her maintenance, and the rest or residue of his estate to his and her daughter, Raj Kumari Ratan Kumar.

On the 7th April 1890 Raj Kumari Ratan Koer applied to the Court of the District Judge of Gaya for Letters of Administration with the Will annexed to the estate of the said Raja Ran Bahadur.

She estimated in her Petition the value of the estate at 11 lakhs of rupees.

Caveats were entered against the said grant.

On the 16th February 1891 the District Judge held the Will not proved, and dismissed the said application.

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On the 1st September 1891 the High Court at Calcutta on appeal reversed the said decision, held the Will proved, and made an order for Letters of Administration with the Will annexed to issue.

On the 8th December 1894 the judgment and order of the High Court were affirmed by the Privy Council.

On the 26th May 1893 Raj Kumari Ratan Koer died, having been in possession and enjoyment of the estate in the interim, but without having taken out the said Letters of Administration.

She left a Will, dated the 25th May 1895, of which she appointed her mother, the said Mussamut Rameshwari Kumar, and her husband, Babu Rajeshwari Prasad Narayan Singh, the executrix and executor respectively, and by which she devised the whole of her properties including the said seven annas Tekari Raj to her daughter, Raj Kumari Bhubaneshwari Kumar, as also residuary legatee.

On the 30th May 1895 the said executrix and executor applied for Probate of the Will of the said Raj Kumari Ratan Kumar.

On the 31st January 1896 probate issued. The Court-fee stamps paid amounted to Rs. 22,000 on an estimated valuation of the estate at Rs. 11 lakhs.

On the 9th January 1897 Rajeshwari Prasad Narayan Singh, the executor, died, and Mussamut Rameshwari Kumar, the executrix, remained in sole possession of the said estate of her daughter, including the estate of Raja Ran Bahadur Singh.

On the 13th August 1902 Mussamut Rameshwari Kumar applied as executrix of the Will of the said Raj Kumari for Letters of Administration with the Will annexed to the estate of the said Raja Ran Bahadur.

She again estimated the value of the said estate at 11 lakhs of rupees, and the Court-fee payable at Rs. 22,000.

On the 18th August 1902 an order was made for the Letters of Administration to issue, and for notice to be given to the Collector of Gaya, under the Court Fees Amendment Act [XI of 1899, sec. 19H, cl. 2]

On the 23rd August 1902 Letters of Administration issued to the applicant, and notice was sent to the Collector.

On the 18th September 1902 the Deputy Collector, in pursuance of the powers vested in him under the said Act, wrote to the District Judge and asked for a copy of the list of the properties of the estate and their valuation.

On the 22nd September 1902 the District Judge replied that there was no such list.

From that time onward the Collector entered upon an enquiry, and endeavoured to get information as to the real valuation of the said estate of which Letters of Administration had been granted to the said Appellant.

On the 13th May 1905 a list of immoveable properties belonging to the said estate was filed by the said Mussamut Rameshwari Kumar in the Court of the District Judge in response to a notice from him of the 8th April 1905, and a copy of the said list was sent by him to the Collector on the 23rd May 1905.

On the 28th July 1905 the Collector applied to the District Judge for a list of the moveables of the said estate, and on the 17th August a list thereof was supplied to him.

On the 21st May 1907 the Collector applied to the District Judge that she be ordered to file the inventory of the estate

as required by law, *i.e.*, under sec. 98 of the Probate and Administration Act.

On the 7th June 1907 a notice was issued to her to file an inventory.

On the 16th August 1907 she applied for cancelment of the said order, upon the ground, amongst others, that under the law she could not be called upon to furnish an inventory of the estate of the said Raja, and that she had already filed lists of the immoveable properties belonging to his estate, and also that a list o moveables was upon the record.

The District Judge thereupon considered that no further action was necessary, holding that the said lists constituted an inventory.

On the 14th January 1908 the Collector again applied to the District Judge for an inventory under sec. 98 of the Probate and Administration Act, but with no result.

On the 8th June 1908 the Collector issued a notice to Musammut Rameshwari Kumar under the Court Fees Act, XI of 1899, sec. 19H, cl. (3), valuing the said estate at Rs. 54,03,424, and calling upon her to pay an additional Court-fee duty in respect of the excess, *i.e.*, upon Rs. 43,03,424.

On the 16th July 1908 the Collector applied under the said Act, sec. 19H, cl. (4), to the District Judge to enquire into the valuation of the said estate, and on the 17th July 1908 a notice was issued to Musammut Rameshwar Kumar to appear at the said enquiry.

On the 15th September 1908 a petition of objection to the said enquiry was filed by the said Musammut Rameshwari Kumar in which she raised various contentions, and, amongst others, the following pleas in bar:—

(*a*) That her application of the 13th August 1902 was not a new application under sec. 64 of the Probate and Administration Act, but was covered by sec. 20 thereof, and was unaffected by the provisions of the Court Fees Act, XI of 1899, sec. 19H, which had not retrospective effect in regard thereto.

(*b*) That the application of the Collector for an enquiry as to valuation was barred by limitation [sec. 19H, cl. (4)], inasmuch as an inventory of the estate had been filed by her, *i.e.*, in 1905.

On the 19th September 1908, the Collector filed a written statement in answer to the said objection, and on the said date the said pleas in bar were heard as preliminary issues by the District Judge, who delivered judgment thereon, deciding against the said executrix on all the points raised by her.

On the last-mentioned date the District Judge appointed Babu Rakhal Das Mukherji as Commissioner to hold an enquiry for the purpose of ascertaining the true value of the said estate, and directed him to report the result to the Court.

On the 25th February 1909 the said Commissioner made and filed his Report.

On the 26th and 27th February 1909 the hearing of the said proceeding took place before the District Judge on the consideration of the Commissioner's Report and on the 2nd March 1909 he passed his final orders.

He held that the valuation of the estate had been underestimated by a sum of Rs. 24,10,894 8. 24, that a further Court-fee at 2 per cent. on the said sum had still to be realized amounting to Rs. 48,217. 14. 2 and he made an order and decree against the Appellant for payment of the said amount with costs.

On the 29th April 1909 the Appellant

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applied for and obtained from the High Court at Calcutta exercising its Revisional jurisdiction, a Rule Nisi under sec. 115 of the Code of Civil Procedure on the Respondent to show cause why the said Order should not be set aside on the ground of material irregularities committed by the District Judge in the exercise of his jurisdiction.

The Respondent showed cause against the said Rule Nisi, and on the 25th May 1909 the High Court (Stephen and Vincent, JJ.) delivered judgment and discharged the same with costs.

It affirmed the decision of the District Judge on the preliminary issues above referred to, which formed the ground for the Appellant's said application, and held that consequently it was unnecessary to consider the questions raised by the Respondent as to whether the High Court had jurisdiction in its Revisional jurisdiction under sec. 115 of the Civil Procedure Code or otherwise to set aside or vary the said order and decree of the District Judge.

Hence this appeal.

Mr. L. DeGruyther, *K. C.*, and *Mr. Bhugwandin Dube* for the Appellant submitted that the Respondent's application under the Court Fees Amendment Act, sec. 19, cl. 4, (Act XI of 1899) was barred by time. The object of the section was to protect the revenue of the State, and the Collector was given only 6 months to make the necessary inquiry as to the valuation of the property. The lists of moveable and immoveable properties that we filed and of which the Collector had due notice were quite sufficient for enabling the Collector to estimate the value. They constituted an inventory within the meaning of sec. 98 of the Probate and Administration Act, 1881. It was a full and true estimate of all the property inspite of the fact that the value of each immoveable property was not separately given. Further it was none the less an inventory because in the lists the debts were not shewn—there were no debts owing to the estate, there were heavy debts due from the estate. The District Judge whose jurisdiction it was to refuse or to accept the inventory as satisfying the provisions of sec. 98 held that they were good inventories. That being so, it could not be contended now after the lapse of years that they were not inventories simply because they might have been more full and more detailed and more true if the District Judge had objected. The section (19H, cl. 4) is for the protection of the subject, and it was the Collector's fault that he did not enquire into the value of the properties earlier than he did.

Sir Erle Richards, *K. C.*, and *Mr. Dunne* for the Respondent were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal from a judgment and order of date the 25th May 1909, which was pronounced by the High Court of Judicature at Fort William in Bengal, and which affirmed a judgment and order of date the 23rd September 1908, and the 2nd of March 1909, of the District Judge of Gaya.

The present proceedings were instituted on the 16th of July 1908 by an application which was made by the Collector to the District Court under sec. 19H, cl. 4, of Act XI of 1899. Before reading that section it may be stated that the general nature of the application was to declare that no inventory of the estate of the deceased as required by law had been filed,

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and that the Appellant was not willing to amend the valuation of the estate to the satisfaction of the Collector.

In the defence lodged to those proceedings this declinature and inability were re-affirmed by the Appellant, and accordingly the proceedings have taken their course.

The section of the Act of 1899 to which particular reference is made, defines the function of the Collector in the following terms:—"The Collector, within the local limits of whose revenue-jurisdiction the property of the deceased or any part thereof is, may at any time inspect or cause to be inspected, and take or cause to be taken copies of the record of any case in which application for probate or letters of administration has been made; and if, on such inspection or otherwise, he is of opinion that the Petitioner has under-estimated the value of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the Petitioner (either in person or by agent) and take evidence and enquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been under-estimated, may require the Petitioner to amend the valuation."

The Collector, having a strong opinion as to the valuation emerging as a lump figure in the previous proceeding, initiated these proceedings under discussion. What the Appellant before their Lorships pleads is that the action or proceeding on the part of the Collector is excluded by the proviso of sub-sec. 4 of the Statute last quoted. That proviso is "that no such motion shall be made after the expiration of six months from the date of the exhibition of the inventory required by sec. 277 of the Indian Succession Act, 1865, or, as the case may be, by sec. 98 of the Probate and Administration Act, 1881."

It is, in the opinion of their Lordships, not a justifiable construction of this proviso to date the period of running from anything less than the lodging of the inventory required by the Statute. It will not satisfy this proviso that six months have elapsed from a period when a certain document, which might be classed as or denominated an inventory, satisfied a District Judge or any Judge. What he has to be satisfied of is that the *punctum temporis* from which the six months runs is the lodging of an inventory as required by sec. 98. It was admitted by the learned Counsel for the Appellant that accordingly the correct decision to be arrived at here depended upon the construction of certain words in sec. 98, and as those are of general importance, the following citation is made:—"An executor or administrator shall, within six months from the grant of probate or letters of administration, exhibit in the Court by which the same has or have been granted an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character." The remainder of the section has no bearing on the subject in dispute in these proceedings.

Their Lordships are clearly of opinion that no inventory satisfies this statutory requirement which omits the essential of this detail, namely, that its contents shall include "a full and true estimate of all the property in possession." This being the statutory provision, it is not alleged by the Appellant that any one document did contain such a full and true estimate,

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The argument presented to their Lordships was that by massing together a variety of documents, including two which will now be referred to, and a mass of documents in another case, none of which have been brought in detail before the notice of the Board, there was, in the result, produced to the Court an inventory containing a full and true estimate.

In their Lordships' opinion, the first objection to this operation, even although the operation itself as distinguished from the production of one document containing the details were legitimate, is that the first document to which reference is made is a list of the immoveable property belonging to the deceased. It has been not obscurely suggested in these proceedings that the immoveable property bore the relation to the moveable property of no less than at least nine in ten. So that with regard to nine-tenths of the estate of the deceased nothing is supplied except a list of the properties, a list without a single figure, and containing nothing, even by approximation to the words of the Statute, in the nature of a full and true estimate of the property in possession.

In their Lordships' opinion that is sufficient for the disposal of the case. Their Lordships are satisfied that a just conclusion has been arrived at by the Courts below, and they will therefore humbly advise His Majesty that this Appeal should be dismissed, and that the Appellant should pay the costs.

Solicitors: *Messrs. W. W. Box & Co.* for the Appellant.

Solicitor: *India office* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 4107 OF 1910.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
25, February.

TINKARI MUKERJEE, Defendant, Appellant,
v.
SATYA NIRANJAN CHAKRABUTTY, Plaintiff, Respondent.

Land Registration Act (VI B. C. of 1876), sec. 78—Village Chowkidars Act (VI B. C. of 1870), sec. 51—Resumed chowkidari chakran land—Effect of transfer to zemindar—Non-registration under the Land Registration Act, if bar to suit for rent.

Where the Plaintiff zemindar claimed rent for land which was originally chowkidari chakran and was upon resumption settled with his predecessor in interest, and the Defendant resisted the claim on the ground that the name of the Plaintiff was not registered in the books of the Collector under sec. 78 of the Land Registration Act of 1876:

Held—*That under sec. 51 of the Village Chowkidars Act of 1870, the effect of transfer of resumed chakran lands to the zemindar was not to impart to such land the character of an "estate" for all purposes, and sec. 78 of the Land Registration Act was no bar to the Plaintiff's suit.*

This was an Appeal preferred on the 15th of December 1910 against a decree of R. N. Dutta, Esq., District Judge of Zillah Birbhum, dated the 30th of September 1910, reversing a decree of Babu Hemanta Kumar Haldar, Munsif of Suri, dated the 16th of February 1910.

The facts of the case will appear from the judgment.

Babu Harenda Krishna Mukerjee for the Appellant.

Babu Sarat Chandra Khan for *Babu Bidhu Bhusan Ganguli* for the Respondent.

TINKARI MUKERJEE v. SATYA NIRANJAN CHAKRABUTTY.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Defendant in a suit for rent. The rent is claimed for land which was originally chowkidari chakran and was, upon resumption, settled with the zemindar, the predecessor in interest of the Plaintiff. The Defendant resists the claim on the ground that the name of the Plaintiff has not been registered in the books of the Collector under sec. 78 of the Land Registration Act of 1876. Upon this question the Courts below have taken divergent views. The Court of first instance held that the objection was well-founded and dismissed the suit. Upon appeal the District Judge has held that sec. 78 has no application and has accordingly decreed the suit.

Sec. 78 of the Land Registration Act of 1876 provides that no person shall be bound to pay rent to any person claiming such rent as proprietor of an estate in respect of which he is required by the Act to cause his name to be registered, unless the name of such claimant shall have been registered under the Act. We have consequently to determine whether the Plaintiff is, within the meaning of this section, a proprietor of an estate with respect to which he is required by the Act to cause his name to be registered. The question is apparently one of first impression and is by no means free from difficulty. Sec. 51 of the Village Chowkidars Act of 1870 describes the effect of transfer of resumed chakran lands to the zemindar. It provides that the order of the transfer shall operate to vest in the zemindar lands therein mentioned subject to the amount of assessment. Sec. 52 then provides that the amount of such assessment shall be a permanent yearly charge on such land and shall be payable to the collecting member of the Punchayet yearly in advance by the persons for the time being entitled to recover rent of such lands from the occupier thereof. The District Judge has held that inasmuch as the amount of assessment is payable to the collecting member of the Punchayet, it is not 'revenue' within the meaning of that word as used in the definitions of the terms 'estate' and 'proprietor' in cls. 2 and 8 of sec. 3 of the Land Registration Act of 1876. We are not prepared to accept this view as well founded. But the provisions of the Village Chowkidars Act which are really relevant to the question in controversy are to be found in secs. 54 and 55. These describe the procedure for service of notice of arrears upon the defaulter as also the mode and effect of sale of the land in the event of non payment of the assessment. Sec. 55 provides that unless the arrears are paid within the time mentioned in the notification for sale issued under sec. 6 of Act XI of 1859 such land shall be sold according to the provisions of Act XI of 1859, as if such lands were an estate within the meaning of Act VII of 1868. The language used here may lend some support to the contention that resumed chakran lands, when transferred to the zemindar, constitute an estate. But sec. 55 does not indicate that the resumed lands are to be deemed an estate for all purposes; it merely provides that the sale is to take place as if such lands were an estate within the meaning of Act VII of 1868. Consequently it would not be right to infer, merely from the language used in secs. 54 and 55, that resumed lands, when transferred to the zemindar have the character of an estate impressed upon them for all purposes We are fortified in this view, when we find that the Board of Revenue has in the

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matter of the preparation of the registers contemplated by the Land Registration Act acted on the theory that lands so resumed and transferred to the zemindar do not constitute an estate within the meaning of that Statute. This circumstance completely destroys the force of the objection urged by the Defendant. For even if it be assumed that the Board of Revenue has proceeded upon an erroneous interpretation of the provisions of the Statute, the fact remains that no register is maintained by the revenue authorities of the registration of transfers of such lands, in which the name of the Plaintiff could have been registered. It has been established conclusively that, under the orders of the Board of Revenue, the only register maintained in respect of this land is a register in which the land is shown as settled with the zemindar: transfers are recorded only when such transfers have taken place by reason of sales held for realisation of arrears in accordance with sec. 65 of the Village Chowkidars Act of 1870. But the revenue authorities have expressly ruled that in such register no entries are to be made of intermediate private alienations. Consequently if the Plaintiff had applied to have his name registered, his application would have been refused. We are not prepared to hold that sec. 78 is a bar to the suit; in our opinion, that section cannot rightly be applied to penalise the Plaintiff for failure to do what it was impossible for him to perform. We hold accordingly, that sec. 78 does not bar the claim, although not for the reasons assigned by the District Judge. In this view the decree of the District Judge must be affirmed: but it has been pointed out that the District Judge upon the findings of the Court of first instance which were not challenged before him by the Plaintiff should have allowed credit to the Defendant for Rs. 71-3 instead of Rs. 69. The decree will be amended in this respect. Subject to this variation the decree will stand affirmed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 565 OF 1909.

MOOKERJEE, J.
BEACHCROFT, J.
1912,
Heard, 2 & 3, July.
Judgment, 3, July.

SUNDARMANI DEI,
Petitioner-Appellant,
v.
GOKULANAND CHOWDHURY and anr.,
Objectors, Respondents.

Guardians and Wards Act (VIII of 1890), secs. 8, 11, 21—Application by relative or friend of minor—Notifying such application, object of—Stepmother if disqualified from being guardian of person of stepson, where parties governed by Mitakshara school of Hindu law—Purdanashin lady if may be appointed guardian of person and property of infant—Minor stepmother if competent to act as guardian of infant adopted son—Considerations which should guide Courts in appointing guardian—Appointment of stranger as guardian of person.

One Dayanidhi died leaving a widow S. a daughter and an infant son whom he had adopted during the lifetime of his first wife before marrying S. The widow applied to be appointed guardian of the person and property of the infant; the application was opposed by the relations of her husband. The objection was that the widow was herself a minor and was not competent as a purdanashin lady to take effective charge of the person and property of the infant and that the application in substance was not made bonâ fide *in the best interests of the minor concerned. One*

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of the objectors proposed that G, a pleader, who was related both to the widow and to the infant should be appointed guardian and the Collector also acting under sec. 8 of the Guardians and Wards Act intimated to the District Judge that a guardian should be appointed, and that the other objector was the most suitable person available for appointment as guardian. The District Judge appointed G guardian of the person and property of the infant :

Held—*That the petition of objection suggesting the appointment of G as guardian was in substance an application by a relative or friend of the minor for the appointment of a guardian within the meaning of sec. 8, cl.* (b) *of the Act and the fact that this application was not notified in accordance with sec. 11 did not constitute a fatal defect inasmuch as the object of sec. 11 is to bring the application to the notice of persons interested in opposing it and in the present case all the persons interested in the matter of the appointment of a suitable guardian for the minor were present before the Court.*

That under the Mitakshara school of Hindu law the stepmother is not the heir of her stepson and she cannot be deemed disqualified from being appointed guardian of the stepson on that ground.

That it cannot be laid down as an inflexible rule of law that a purdanashin *lady should not be appointed guardian of the person and property of her infant son but in the circumstances of the present case the widow could not be appointed guardian of the property of the infant with any prospect of advantage to the infant.*

That sec. 21 of the Act clearly refers to the guardian of the person of an infant and there is much force in the contention that the section is wide enough to cover the case of an adopted son and the stepmother, even if a minor, is competent to act as guardian of the person of the infant adopted son.

That in the matter of choosing a guardian of an infant the Court must be guided entirely by the interests of the ward and in the circumstances of the present case the stepmother should be appointed guardian of the person of the infant, such appointment being for the benefit of the infant.

The effect of the appointment of a stranger as the guardian of the person of a minor considered.

This was an Appeal preferred on the 3rd of December 1909 against the order of L. C. Adami, Esq., District Judge of Cuttack, dated the 31st of July 1909.

The facts of the case will appear from the judgment.

Babu Susil Madhub Mullick for the Appellant.

Babus Braja Lal Chuckerbutty and *Hira Lal Chuckerbutty* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This Appeal is directed against an order appointing a guardian of the person and property of an infant under the Guardians and Wards Act of 1890. It appears that one Dayanidhi Patnaik died on the 8th August 1908 leaving properties, moveable and immoveable, of considerable value. During the lifetime of his first wife, Dayanidhi adopted a son. The adoption took place in 1899 and the adopted son by name Bangsidhar Patnaik is the minor in respect of whose person and property the guardian has been appointed. After the death of his first wife, Dayanidhi took the Appellant, Sundarmani Dei, as his second wife in February 1908. The the family at the time of the

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death of Dayanidhi therefore was, that he left a widow, a daughter and an adopted son. On the 14th December 1908, the widow applied to be appointed guardian of the person and property of the infant son of her husband. This application was opposed by two relations of her husband, Durga Charan Mahapatra and Sreekrishna Mahapatra, and also by one Lakshindhar Mahanty. The objectors contended that the widow was herself a minor and was not competent as a *purdanashin* lady to take effective charge of the person and property of the infant. They also urged that the application in substance was not made *bonâ fide* in the best interest of the minor concerned. One of the objectors, Sreekrishna, also proposed that Babu Gokulanand Chowdhury, a leading pleader of the Cuttack Bar, who was related both to the widow and to the minor, should be appointed guardian. The Collector of the District also took action under sec. 8, cl. (b) of the Guardians and Wards Act and intimated to the District Judge his opinion that a guardian should be appointed and that the most suitable person available was Durga Charan Mahapatra. The position, therefore, was that the District Judge had before him an application by the widow for appointment of herself as guardian, there was a suggestion by the Collector that Durga Charan should be appointed guardian; there was also a proposal by one of the objectors that Babu Gokulanand Chowdhury should be appointed guardian. The District Judge took evidence and came to the conclusion that the mother should not be appointed, but that Babu Gokulanand Chowdhury was the best person to act as guardian of the infant. The learned Judge accordingly appointed him. Since the order was made, Babu Gokulanand Chowdhury has furnished security and has intimated his willingness to accept the position of a guardian. In the present appeal which has been filed by the widow, the order of the District Judge has been assailed substantially on two grounds; namely, first, that Babu Gokulanand Chowdhury should not have been appointed guardian as the provisions of secs. 8 and 11 of the Guardians and Wards Act had not been strictly followed: and, secondly, that the application of the widow has been refused on grounds erroneous in fact and insufficient in law.

In so far as the first contention is concerned, our attention has been invited to the provisions of the Guardians and Wards Act applicable to the matter. Sec. 7 provides that where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, the Court may make an order accordingly. Sec 8 then provides than an order under sec. 7 shall not be made except on the application of the person desirous of being or claiming to be, the guardian of the minor or any relative or friend of the minor or the Collector of the District or other local area within which the minor ordinarily resides or in which he has property or the Collector having authority with respect to the class to which the minor belongs. Sec. 10 defines the contents of an application under sec. 8 by a person other than the Collector. Sec. 11 then provides that if the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for hearing thereof and cause notice of the application and of the date fixed for the hearing to be served. On behalf of the Appellant

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it has been pointed out that the present case does not fall within cl. (a) of sec. 8, because there was no application by Babu Gokulanand Chowdhury, nor does cl. (c) of sec. 8 cover the case because there was no application by the Collector such as was entertained by the District Judge in conformity with the provisions of the Statute. On behalf of the Respondent reliance has however been placed upon the petition of one of the objectors, Sreekrishna Mahapatra, dated the 14th June 1909, in which it was suggested that Babu Gokulanand Chowdhury should be appointed guardian of the person and property of the infant. It has been contended that this petition of objection might be treated in substance as an application by a relative or friend of the minor for the appointment of Babu Gokulanand Chowdhury as guardian. In answer, it has been contended that if the application be treated in this manner, it ought to have been notified as provided in sec. 11, and it has been suggested that the failure to comply with the provisions of that section is a fatal defect which invalidates the proceedings of the District Judge. In our opinion, there is no substance in the contention of the Appellant. As already stated, there was an application by the widow for the appointment of herself as guardian. There was also an application by a relation for the appointment of Babu Gokulanand Chowdhury as guardian. No doubt the application was not notified in accordance with sec. 11, but that did not constitute fatal defect. The object of sec. 11 is to bring the application to the notice of persons interested in opposing it. There is no room for controversy that all the persons interested in the matter of the appointment of a suitable guardian for the minor, were present before the Court, and the evidence shows that the question of the suitability of Babu Gokulanand Chowdhury as a guardian was fully considered by the Court. The case of *Jaiwanti Kumri* v. *Gajadhar* (1), where it was ruled that a guardian cannot be appointed without an application under the Guardians and Wards Act, has no application to the case before us. In that case, the Court proceeded to appoint the Nazir as guardian though his name had not been suggested by any of the parties to the proceeding. We are, therefore, of opinion that the order of the District Judge has been made substantially in conformity with the provisions of the Act and cannot be set aside on any technical ground.

In so far as the second contention is concerned, it has been argued that each of the three reasons assigned by the District Judge for the refusal of the application of the widow is unsound. One of the reasons assigned is that the Petitioner, as the stepmother, was the next heir and it was consequently undesirable that she should be appointed guardian of the person of the infant. This view, it must be conceded, cannot be supported. As was pointed out by this Court in the cases of *Lala Joti Lal* v. *Musst. Durani Kowar* (2) and *Jahaldai Kumri* v. *Gaya Pershad Sahu* (3) and by the Allahabad High Court in the case of *Rama Nand* v. *Surgiani* (4), under the Mitakshara school of Hindu Law the stepmother is not the heir of her stepson. Consequently, the applicant cannot be deemed disqualified on this ground. The second reason as-

(1) 15 C. W. N. 676 (1911).
(2) W. R. Gap. No. 173 (1864).
(3) I. L. R. 37 Cal. 214 : s. c. 14 C. W. N. 443 (1909).
(4) I. L. R. 16 All. 221 (1894).

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signed is that the Petitioner is herself a *purdanashin* lady and that the estate which is apparently of considerable value cannot possibly be effectively managed by her. No doubt, it cannot be laid down as an inflexible rule of law that a *purdanashin* lady should not be appointed guardian of the person and property of her infant son. But in the case before us, the circumstances show that in so far as the property of the infant is concerned, the Petitioner cannot be appointed guardian with any prospect of advantage to the infant. She is herself a young widow, and the estate, if she is appointed guardian must be managed on her behalf by her father. Her father, it has been pointed out, is in embarrassed circumstances and it would, therefore, be not beneficial to the infant to place his estate practically in charge of the father of his stepmother. The third ground assigned is that the Petitioner herself is an infant, and is, therefore, not competent to be appointed guardian of the person and property of her infant son. The evidence as regards her minority points, we think, to the conclusion that the estimate of the age of the Petitioner, as made by the Dirtrict Judge, is approximately correct. But it has been pointed out that even in that view, the Petitioner has now attained majority, and that whatever disqualification might have existed at the time of the application, there is no disqualification at the present time. Our attention has also been drawn to sec. 21 of the Guardians and Wards Act which provides that a minor is incompetent to act as guardian of any minor except his own wife or child, or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family. This clearly refers to the guardian of the person. In so far, therefore, as the question of the appointment of guardian of the property is concerned, the District Judge was right in the view he took. The conclusion, therefore, follows that the order of the District Judge, in so far as it appoints Babu Gokulanand Chowdhury as guardian of the property of the infant, must be affirmed. In so far, however, as the District Judge has appointed Babu Gokulanand Chowdhury to be the guardian of the person of the infant, the order must be discharged. Sec. 21, it has been contended, is wide enough to cover the case of an adopted son, and the stepmother, even if a minor, is competent to act as guardian of the person of the infant. There is much force in this contention [see *Rangubai* v. *Gopal* (5), *Lakshmibai* v. *Shridhar* (6)]. But even if the section was strictly construed, as the applicant has now attained majority, she is entitled to be appointed guardian of the person of the infant. We are further of opinion that, in the circumstances of the case, it is for the benefit of the infant that he should not be separated from his stepmother and his sister, and he has plainly indicated his preference for the family circle, to which fact some weight must be attached. *Ex parte Edward* (7). The effect of the appointment of a stranger as the guardian of the person of the minor would be that he would be removed from the family, but it is not desirable that the feeling between the stepmother and the infant son or between the sister and the brother should be estranged ; at the same time, there are advantages in family life which cannot be altogether ignored.

(5) 5 Bom. L. R. 542 (1903).
(6) I. L. R. 3 Bom. 2 (1878).
(7) 3 Atk, 519 (1747).

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The only question is, whether suitable provision can be made for the education of the infant, if the stepmother be appointed guardian of his person. We are of opinion that necessary safeguards may be provided by suitable directions. We accordingly appoint the Petitioner as guardian of the person of the infant, as, after all, the Court, in the matter of choosing a guardian of an infant, must be guided entirely by the interests of the ward, *Johnstone* v. *Beathe* (8). We direct, however, that the infant should reside at Cuttack. A house will be taken for him and he will live with his mother and sister. As regards his education suitable directions will be given by the District Judge. Possibly the best course will be, as the estate is of considerable value, to appoint for him a tutor, and to place him in one of the schools in the town. It has been apprehended by the Respondent that the infant may be removed from the town, but we are assured by the learned Vakil for the mother that the fears are groundless. At any rate, if the mother as guardian does not carry out the directions of the District Judge she will be guilty of contempt of Court and will be liable to removal from her office of guardian.

The result is that this Appeal is allowed, in part; the order of the District Judge in so far as the appointment of Babu Gokulanand Chowdhury as guardian of the property is concerned, is affirmed; but in so far as the guardianship of the person is concerned, the order is varied and the mother is appointed such guardian. There will be no order for costs for any party other than Babu Gokulanand and the mother, who as guardians will be entitled to their costs out of the estate of the infant.

Appeal allowed in part.

(8) 10 Cl. & F. 42 (1843).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3000 OF 1910.

N. R. CHATTERJEA, J.
WALMSLEY, J.
1913,
Heard, 26 and 27, June.
Judgment, 27, June.

PALTOO PANDEY, and others, Defendants, Appellants,
v.
SRI NEWAS PROSAD SINGH, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885) as amended by Act III, B. C. of 1898, sec 105—Excess land, settlement of rent on, if may be made on application for settlement of fair rent—Jurisdiction of Revenue officer—Question arising under sec. 106, if may be dealt with.

In a proceeding under sec. 105 of the Bengal Tenancy Act as it stood in 1904, the Settlement Officer had jurisdiction to settle fair rent and to direct settlement of fair rent on excess land found in the tenant's possession.

RAMESWAR SINGH *v.* BHUBANESSWAR JHA (1) *relied on.*

LUKHI NARAIN SEROWJI *v.* SRI RAM CHANDRA BHUIYA (2) *referred to.*

Even if settlement of additional rent on excess land did not come within the purview of that section, and the matter was really one to be dealt with under sec. 106, the settlement of fair rent on excess land in a proceeding under sec. 105 would not be beyond the jurisdiction of the settlement officer.

PRITHEE CHAND LAL CHOWDHURY *v.* BASARAT ALI (3) *referred to.*

This was an Appeal preferred on the

(1) I. L. R. 33 Cal. 837 (1906).
(2) 15 C. W. N. 921 (1911).
(3) I. L. R. 37 Cal. 30 (1909).

PALTOO PANDEY *v.* SRI NEWAS PROSAD SINGH.

6th of September 1910 against the decree of M. Smither, Esq., District Judge of Zillah Shahabad, dated the 28th of May 1910, affirming the decree of Babu Kishori Mohan Sikdar, Subordinate Judge, 1st Court, of that District, dated the 9th of October 1909.

The facts of the case will appear from the judgment.

Babus Mahendra Nath Roy and *Monmotha Nath Roy* for the Appellants.

Babus Provash Chunder Mitra and *Susil Madhub Mullick* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This Appeal arises out of a suit for rent. The rent claimed is at the rate of Rs. 274 and odd, that being the rent settled in the year 1904 by the direction of the Special Judge on appeal, in a proceeding under sec. 105 of the Bengal Tenancy Act. The amount thus fixed, included Rs. 35 and odd, the rent assessed on the excess land. It appears that the Defendants brought a suit for a declaration that the Special Judge had no power to direct assessment of additional rent for the excess land in a proceeding under sec. 105, Chap. X, of the Bengal Tenancy Act, as it stood after the amendment in 1898. That case came up in Second Appeal to this Court and it was held by Mr. Justice Carnduff that the Special Judge had jurisdiction to do so. On appeal under the Letters Patent, however, it was held that the suit could not be maintained having regard to the provisions of sec. 109 of the Bengal Tenancy Act because it was a suit concerning a matter which had been the subject of an application made and proceedings taken under sec. 105 of that Act; and the learned Judges observed :—"How far it may be open to the present Appellant in some ulterior proceeding to raise the objections that have been urged in this suit is a matter which it is premature for us to discuss or decide at this stage." The Courts below have in the present case given a decree to the Plaintiff at the rate of Rs. 274 and odd relying on the said decision of the Special Judge and the Defendants have appealed to this Court.

The only question that we have to decide in this Appeal is whether the Settlement officer had jurisdiction to settle fair rents and whether the Special Judge had the jurisdiction to direct settlement of fair rent on excess lands in a proceeding under sec. 105 of the Bengal Tenancy Act as it stood in 1904. Now, sec. 105, cl. (1) provides :—"When either the landlord or the tenant applies for a settlement of rent, the Revenue officer shall settle a fair and equitable rent in respect of the land held by the tenant." The words "in respect of the land held by the tenant" are wide enough to include excess lands held by the tenant. Under sec. 102, the Revenue officer may be required to record, among other particulars, the situation, quantity, and one or more of the boundaries of the land held by each tenant or occupier; and the record-of-rights ordinarily include the excess land as well and we do not see any reason to hold that the Revenue officer when asked to settle the rent has the power to settle only the rent of the land originally let out to the tenant and not of any excess land which may have been found in his possession. Sec. 52, cl. (5) says "when in a suit under this section the landlord or tenant is unable to indicate any particular land as held in excess, the rent to be added on account

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of the excess area may be calculated at the average rate of rent paid on all the lands of the holding exclusive of such excess area;" and sec. 105, cl. (4) provides:—"In settling rents under this section, the Revenue officer shall have regard to the Rules laid down in this Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be." It is difficult, therefore, to see how the Revenue officer can, in a case coming under sec. 52 where the landlord is unable to indicate any particular land as held in excess, determine the land originally let out to the tenant or settle the rent thereof leaving the rent of the excess area unassessed. It was contended that sec. 104, cl. (2) of the Act before its amendment by Act III (B. C.) of 1898 expressly provided for settlement of rent on excess lands and the omission of that clause from sec. 105, sub sec. (1) of the amending Act shows that the power to settle rent on excess lands has been taken away by the amending Act. No doubt, the power of the Revenue officer on his own motion to settle rent under sec. 104 (1) and (2) has been taken away by the amending Act; but, in so far as the Revenue officer was empowered to settle rent on excess lands under sec. 104, cl. (2), we think that that power has not been taken away by the provisions of sec. 105, cl. (1). Sub-sec. (1) of sec. 104 of the Act before its amendment provided:—"When it does not appear that the tenant is holding land in excess of or less than that for which he is paying rent and neither the landlord nor the the tenant applies for a settlement of rent, the officer shall record the rent payable by the tenant and the land in respect of which the rent is payable;" and sub-section (2) laid down "When it appears that a tenant is holding land in excess of, or less than, that for which he is paying rent or either the landlord or the tenant applies for a settlement of rent or in any case under sec. 101, sub-sec. (2), cl. (d), the officer shall settle a fair and equitable rent in respect of the land held by the tenant." It appears, therefore, that sec. 105, cl. (1) consolidates the provisions contained in sub secs. (1) and (2) of the Act as it stood before the amendment only with the modifications pointed out. The words "in respect of the land held by the tenant" include a case in which there is no excess land, that is, a case under sec. 104, sub-sec. (1) as well as a case in which there is excess land, that is, a case under sec. 104, sub-sec. (2), and it is to be noticed that sec. 105 (1) uses the very same words, namely, that the Revenue officer shall settle a fair and equitable rent in respect of the land held by the tenant as were used in sec. 104 (2). We are accordingly of opinion that the omission of the express provision contained in sub-sec. (2) of sec. 104 of the old Act has not taken away the power of the Revenue officer to settle rent on excess lands. In the case of *Rameswar Singh* v. *Bhubanesswar Jha* (1), in considering the question whether a Second Appeal lay to this Court, it was observed by the learned Judges that "the operation of sec. 105, sub-sec. (1) cannot be limited to variation of rents on the grounds specified in sec. 30 but necessarily includes variations contemplated by sec. 52," and that notwithstanding that sec. 104 has been repealed. Sec. 113 indicates that the Revenue officer has, under sec. 105, sub-sec. (1), power to increase rent on the ground of excess area or to decrease the rent of a holding, if it

(1) I. L. R. 33 Cal. 837 (1906).

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be found to contain less land than that for which the landlord was getting rent." In another case, however (*Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya* (2), where a Second Appeal was preferred in a proceeding under sec. 105 for settlement of fair and equitable rent on excess land, and a preliminary objection was taken on behalf of the landlord Appellant that the appeal was entirely incompetent, it was held that, although the proceedings had been nominally described as framed under sec. 105, questions had been raised and decided which appropriately fell within the purview of sec. 106. It seems that according to the view taken in that case, settlement of rent on excess land does not come within the purview of sec. 105. But even assuming that it does not come under sec. 105 but that it comes under sec. 106, it cannot be said that the Revenue officer had no jurisdiction to go into the question. As pointed out in *Prithee Chand Lal Chowdhury* v. *Basarat Ali* (3), "it is quite possible that the same officer having to deal with proceedings under sec 105 and suits under sec. 106, matters coming under either section are indiscriminately dealt with in the same proceeding, even if it is headed as one under sec. 105, and that this practice has prevailed for a series of years.". Assuming therefore, that the case did not come properly under. sec. 105, the Revenue officer and therefore the Special Judge on appeal had jurisdiction to assess rent on the excess lands, although the proceedings might have been headed as being one under sec. 105. In this view the Appeal fails and must be dismissed with costs.

Appeal dismissed.

(2) 16 C. W. N. 421 (1911).
(3) I. L. R. 37 Cal. 30 at p. 41 (1909).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

NOS. 2100 AND 2157 OF 1910.

COXE, J.
RAY, J.
1913,
Heard, 16 & 17, June.
Judgment, 17, July.

HARI MOHAN MAJUMDER, Plaintiff Appellant,
v.
SRI MOHAN GHOSH, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 158—Tenant holding same land under separate leases of undivided shares from co-sharers if may proceed against co-sharers separately.

An application under sec. 158 of the Bengal Tenancy Act to determine the incidents of a tenancy cannot be made against persons who have only a portion of the proprietary interest in the land of the tenancy even when the tenant applicant appears to have taken separate leases from different landlords of their respective undivided interests therein.

These were Appeals preferred on the 1st of July 1910 against the decrees of F. Roe, Esq., District Judge of Zillah 24-Pergunnahs, dated the 24th of March 1910, reversing the decrees of Babu Mohim Chandra Sarkar, Subordinate Judge of that District, dated the 18th of September 1909.

The material facts will appear from the judgment

Babus Ram Chundra Majumdar and *Hira Lal Chuckerbutty* for the Appellant.

Babu Gunada Charan Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

COXE, J.—A preliminary objection is taken in these cases that no appeal lies. I think, however, that sec. 187 is clear on

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this point and that the objection must fail.

The appeals themselves however must, in my opinion, be dismissed on the ground that an application under sec. 158 to determine the incidents of a tenancy cannot be made against persons who have only a portion of the proprietary interest in the land of the tenancy. In this case the applicant obtained separate leases from different landlords of their respective undivided interests in the same land. They, of course, can collect their rent separately from him but it seems to me concluded by authority that there is only one tenancy. This follows from the decision of the Full Bench in *Guni Mahomed* v. *Moran* (1). I may refer also to *Gopal Chandra Das* v. *Umesh Narain Choudhry* (2) and *Baidya Nath De Sarkar* v. *Ilim* (3) and *Hari Charan Bose* v. *Runjit Singh* (4), and this view seems to me only common sense. How is it possible to take a lease of an undivided share in land for the purpose of cultivation? And even when the bulk of the land is sublet to tenants there is usually some nij-jote in khas possession. How can anybody cultivate an undivided share of land? And it is easy to see the difficulties that must necessarily arise in the case of a lease of an undivided share of land cultivated by sub-tenants when the boundaries of the land are uncertain and it is not known what land cultivated by sub-tenants near the boundaries is included in the lease and what is not.

The learned Judge relies on the case of *Moheeb Ali* v. *Ameer Ali* (5), in which it was held that an application under sec. 158 cannot be made by a co-sharer landlord and he holds that the converse must apply. In this I think, he is right. I can certainly see no reason why when a co sharer landlord is precluded from having the incidents of a tenancy determined against a tenant, the tenant should be allowed to have the incidents determined as against a co-sharer landlord.

The tenant in this case had brought four separate applications against different co-sharers. These have been decided separately and probably, they have been decided differently. What then is the result? The tenancy, in my opinion, is one and the same and it cannot be doubted that the land is one and the same. It is surely impossible to hold that the Court can decide that the same land is of a certain area, and lies within specified boundaries as against one co sharer and is of quite a different area and lies within different boundaries as against another. And as against a third co-sharer both decrees would be evidence and neither conclusive, so that the whole matter would have to be threshed out again. And if one co-sharer who had obtained a decree became also by purchase or inheritance the representative in interest of another co-sharer, who had obtained another decree, two contradictory decisions would be final and conclusive between him and the tenant. I would therefore dismiss the appeals.

A cross-objection has been put in on the question of costs. The Subordinate Judge directed that all the costs should be paid by the landlord. The District Judge decreed the appeals and dismissed the suits, but added 'I make no order as to costs either in appeal or in the lower Court.'

I think it is impossible that the learned

(1) I. L. R. 4 Cal. 96 (1878).
(2) I. L. R. 17 Cal. 695 (1890).
(3) I. L. R. 25 Cal. 917 (1897).
(4) I. L. R. 25 Cal. 917n (1896).
(5) I. L. R. 17 Cal. 538 (1890).

Judge meant by this that the decision of the first Court on the question of costs should stand, that the successful landlord should be saddled with almost all the costs of suits which in the opinion of the Judge were not maintainable at all. He probably intended that the parties should bear their own costs and did not advert to the question of the cost of the local investigation by a Commissioner. I would accordingly direct that the landlord pay half the cost of the enquiry and that otherwise the parties bear their own costs in all Courts.

Ray, J.—I agree in holding that four different applications under sec. 158 of the Bengal Tenancy Act by the same person and in respect of the same land do not lie. The words "the landlord or the tenant of the land" occurring in this section clearly mean the landlord or the tenant of the whole land and not of a share of it. If there are several landlords or several tenants they must all join. The landlord means the whole body of landlords and the tenant means the whole body of tenants, if there are more than one. This is the ordinary meaning of the words. It is immaterial whether the rights of the landlords or the tenants are of the same kind or not. Thus if A is proprietor of a half share of a tract of land and B is putnidar of another half share, A and B must join in an application under this section. So if X holds a half share of the same land as a tenant in one right, Y holds the other half share in another right, X and Y must join in an application under it. It is immaterial whether there is one or several tenancies over the land. There will arise no difficulty in following the provisions of the section and that is what the section contemplates. There is to be one proceeding under the section and all matters pointed out in the section are to be determined under it. In this case the tenant was bound to proceed by one application and as he has not done that his applications must fail and I would dismiss them.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

Appeal from Order
No. 227 of 1911.

Mookerjee, J. Beachcroft, J. 1913, Heard, 19 and 26, March. Judgment, 26, March.

Chandra Nath Tewari Judgment-debtor, Appellant, *v.* Protap Udai Nath Sahi and others, Decree-holders, Respondents.

Chotanagpur Tenancy Act (VI of 1908, B C.), secs. 208, 211 (1)—Decree for rent against some only of registered tenants—Exemption from sale of share of persons not represented in suit—Decree if may be executed as rent decree against remaining share—Bengal Rent Recovery Act (VIII of 1865, B. C.), sale under, nature of.

If a claim has been allowed in respect of some interest in a tenure under sub-sec. (1) of sec. 211 of the Chotanagpur Tenancy Act, the decree cannot be executed as a decree for rent under sec. 208 of the Act. It is open to the decree-holder to treat the decree as a decree for money and to execute it in the ordinary Civil Court.

Madan Mohan Nath Sahi v. Protap Uday Nath Sahi (1) *distinguished.*

Where a decree for rent was obtained against persons who did not represent the entire tenure, the registered holder of a fourth share in it having been left out of the suit, and on the application of the latter his share of the tenure was exempted from sale

(1) 16 C. W. N. 1024 (1912).

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under sec. 211, cl. (1) of the Chotanagpur Tenancy Act,

Held, *that the decree could not be executed as a rent decree under sec. 208 of the Act as against the remaining three-fourths share of the tenure.*

The Bengal Rent Recovery Act of 1865 contemplates the sale of an entire tenure.

A decree obtained against some only of the registered tenants cannot be executed as a decree for rent.

This was an Appeal preferred on the 17th of May 1911 against the order of D. H. Kingsford Esq., Judicial Commissioner of Zillah Chota Nagpore, dated the 20th of March 1911, affirming the order of Moulvi Mohamad Yusuf Ali, Deputy Collector of Ranchi, dated the 16th of December 1910.

The material facts are set out in the judgment.

Babus Ram Chundra Majumdar, Biraj Mohan Majumdar and *Nogendra Nath Ghose* for the Appellant.

Babu Jogesh Chandra Dey for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal is directed against an order for execution of a decree for rent, obtained by the Respondent on the 13th July 1907 under the Chota Nagpore Landlord and Tenant Procedure Act of 1899. On the 14th April 1910, the decree-holder applied for execution of the decree. On the 11th July following, two persons, not parties to the decree, preferred claims under sec. 211 of the Chota Nagpore Tenancy Act of 1908 which had come into force after the date of the decree and before the date of the application for execution. On the 16th September 1910, the claim was allowed in respect of one of these claimants who established his interest to the extent of a fourth share in the defaulting tenure. It was found in substance that the decree for rent had been obtained against persons who did not represent the entire tenure and that the holder of a fourth share had been left out of the suit, although his name had been registered in the books of the landlord. As soon as the claim was allowed, the decree-holder prayed that the decree might be executed against the remaining three-fourths share of the tenure. The owners of this three-fourths share thereupon objected that the sale could not take place under sec. 208 of the Chota Nagpore Tenancy Act of 1908, and, that, in any view, they could be held liable only in respect of a proportionate share of the rent due. This objection has been overruled by the Courts below and sale directed of a three-fourths share of the tenure. In our opinion, this order cannot be supported.

Sec. 208 of the Chota Nagpore Tenancy Act of 1908 provides that when a decree passed by a Deputy Commissioner is for arrears of rent due in respect of a tenure, the decree-holder may apply for the sale of such tenure and the tenure may thereupon be brought to sale in execution of the decree according to the provisions for the sale of under-tenures under the Bengal Rent Recovery Act of 1865, all the provisions whereof, except secs. 12, 13, 14 and 15, shall, as far as may be, apply to such sale. It cannot be seriously contended that this sub-section contemplates the sale of a share of a tenure. In fact, the provisions of the Bengal Rent Recovery Act of 1865 clearly contemplate the sale of an entire tenure. It has been argued however on behalf of the decree-holder

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Respondent upon the authority of the decision in *Madan Mohan Nath Sahi* v. *Protap Uday Nath Sahi* (1), that it is competent to the Court to execute a decree for rent against a share of a tenure. In our opinion, the case mentioned is clearly distinguishable and is of no assistance to the Respondent. In that case, the Commissioner had prohibited the sale of a portion of a tenure under cl. (a) of the proviso to sub-sec. (1) of sec. 208. Under these circumstances, it was held that the remainder of the tenure, the sale whereof had not been prohibited by the Commissioner, might be sold under sec. 208, read with the provisions of the Bengal Rent Recovery Act of 1865 as if it were a tenure by itself and that the purchaser at such sale would acquire the same status as the purchaser of an entire tenure. That case obviously bears no analogy to the one before us. Here the decree-holder originally sought to bring to sale the entire tenure in accordance with sub-sec. (1) of sec. 208. He now finds himself unable to sell the entire tenure, because an order adverse to him has been made in favour of a claimant under sub-sec. (1) of sec. 211. It is, therefore, impossible for us to hold that an application for sale of the remainder of the tenure stands on the same footing as an application for sale of a part of a tenure the remainder whereof has been exempted from sale by an order of the Commissioner under cl. (4) of the proviso to sub-sec. (1) of sec. 208. This view is confirmed by an examination of the provisions of sub-sec. (1) of section 211. That sub-section provides that if, before the day fixed for the sale of a tenure in pursuance of sec. 208, a third party appears before the Deputy Commissioner and alleges that he and not the person against whom the decree has been obtained was in lawful possession of or had some interest in the tenure when the decree was obtained, the Deputy Commissioner shall examine such party according to the law for the time being in force relating to the examination of witnesses; and if he sees sufficient reason for so doing, and if such party deposits in Court, or gives security for, the amount of the decree, the Deputy Commissioner shall stay the sale and shall, after taking evidence, adjudicate upon the claim, provided that no transfer of a tenure shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner. It is worthy of note that this sub-section, though based upon sec. 125 of the Chota Nogpore Landlord and Tenant Procedure Act of 1897 which substantially reproduced the terms of sec. 106 of the Bengal Rent Recovery Act of 1859 differs from the corresponding provisions of the earlier statutes in one important respect. Under the statutes of 1859 and 1897, a claim could be preferred only by a person who asserted that he was the owner of the entire tenure sought to be brought to sale. Under sec. 211 of the statute of 1908 the claimant could allege that he was in lawful possession of or had some interest in the tenure, when the decree was obtained. Consequently it is open to a person who has some interest only in the tenure sucessfully to assert his claim under sec. 211. But although a claim by such a person is admissible under the section, yet he has to furnish security for the entire amount of the decree, and, if his claim is established, what is stayed is the sale, that is, the entire sale and not merely the sale in respect of the

(1) 16 C. W. N. 1024 (1912).

interest asserted by him. The inference may legitimately be drawn that the Legislature intended that if the claim has been allowed in respect of some interest in the tenure under sub-sec. (1) of sec. 211, the decree should not be executed as a decree for rent under sec. 208. This view is in accordance with the well-established principle that a decree obtained against some only of the registered tenants cannot be executed as a decree for rent. *Anund Kumar* v. *Hari Das* (2) and *Giris Chandra Guha* v. *Khagendra Nath Chatterjee* (3). It follows therefore that the decree-holder is not entitled to execute the decree against a three-fourths share of the tenure under the provisions of the Chota Nagpore Tenancy Act of 1908. It is open to him, however, to treat the decree as a decree for money against the judgment-debtor and to execute it in the ordinary Civil Court. The contention of the judgment-debtors that they cannot be held liable for the entire rent cannot be entertained at this stage. The defence might have been available to them if it had been urged in the course of the suit for recovery of arrears of rent; they cannot now be permitted to get behind the decree; nor is it open to them to invite the Court to break up the decree. Consequently the decree must be executed, as it stands, against the judgment-debtors, if an appropriate application is presented to a Civil Court competent to execute such a decree.

The result is that this Appeal is allowed, and the order of the Court below discharged. The application for execution will be forthwith returned to the Respondent decree-holder with an endorsement by the Deputy Registrar that it has been so returned for presentation to the proper Court. When it is so presented, whether any question of limitation will arise or not must depend upon the applicability of the terms of sec. 14 of the Indian Limitation Act. That, however, will be a question for the execution Court to determine, if the objection of limitation is urged there. The Appellants are entitled to their costs throughout these proceedings. We assess the hearing-fee in this Court at two gold mohurs.

Appeal allowed.

(2) I. L. R. 27 Cal. 548 (1900).
(3) 13 C. L. J. 618 (1911).

[CIVIL REVISIONAL JURISDICTION.]
RULE NO. 440 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
23, May.

ASHI BHUSAN DASI,
Petitioner,
v.
PELARAM MONDOL,
Opposite Party.

Execution of decree—Claim against deceased debtor decreed against alleged adopted son represented by deceased's widow as guardian—Adoption set aside before execution—Execution if may be had against widow—Substitution.

A who had a claim against B, on B's death sued C, an infant alleged to be the adopted son of B, B's widow D being appointed guardian ad litem *of C, and obtained a decree. Before execution was taken out it was declared in a separate suit that C had not been validly adopted. A then applied for substitution of D in the place of C and for execution against D:*

Held—*That D was not bound by the decree and it was not competent to execute the decree against D.*

This was a Rule granted on the 18th of April 1913 against the order of Babu Bepin Behary Ghosh, Munsif of Midnapur, dated the 25th of February 1913.

The material facts will appear from the judgment.

Ashi Bhusan Dasi *v.* Pelaram Mondol.

Babu Hirendra Nath Ganguly for the Petitioner.

Babu Abinash Chandra Chuckerbutty for the Opposite Party.

The Judgment of the Court was as follows :—

We are invited in this Rule to set aside proceedings in execution of a decree for money, which have been taken under circumstances of a somewhat exceptional character. On the 18th February 1909, Pelaram Mondal, the Opposite Party in this Rule, obtained a decree for mesne profits against Surendra Nath Ray whom he described as the infant adopted son of Panchanon Ray. His claim was against Punchanon Ray; but before he could commence his suit, Punchanon died. He accordingly sued the alleged infant adopted son represented by Ashi Bhusan Dasi as mother and guardian *ad litem*, and obtained a decree. Before execution could be taken on the basis of this decree, in another suit tried by a Court of competent jurisdiction, it was declared that the infant had not been validly adopted. The decree-holder, however, proceeded to attach properties which formed part of the estate of Punchanon Ray. Objection was thereupon taken by Ashi Bhusan Dasi, who claimed to be in possession as the widow of Punchanon Ray. The objection was allowed, and there is no room for controversy that it was allowed very properly. The decree-holder then proceeded to make an application that Ashi Bhusan Dasi might be substituted in place of Surendra Nath Ray in the decree, and that execution might proceed against her. The order was made *ex parte*, and in proceedings in execution the properties in the hands of Ashi Bhusan Dasi have been sold and purchased by the decree-holder himself. In our opinion, these proceedings are entirely without jurisdiction and must be set aside. The decree was obtained against Surendra Nath Ray as the representative of Punchanon Ray, and could be executed against him to the extent of the assets in his hands. Admittedly there are no assets in his hands, because he is not the adopted son of Punchanon Ray. The decree holder has not got any decree against Ashi Bhusan Dasi and he is not entitled to ask that her name be substituted in the place of Surendra Nath Ray. If we were to give effect to the contention of the decree-holder, the result would be really a new decree in his favour against Ashi Bhusan Dasi. But it has been argued that she is bound by the decree against Surendra Nath Ray, the alleged adopted son, because she acted as his guardian *ad litem*. It is plain, however, that she is in no way bound by the decree made against Surendra Nath Ray [*Mohunt Das* v. *Nil Komul Dewan* (1) and *Joy Chandra Banerjee* v. *Sreenath Chatterjee* (2)]. The remedy of the decree-holder may possibly be by way of a suit against Ashi Bhusan Dasi, if it be still open to him to sue her successfully, in view of the provisions of the statute of limitation; but it is clear that it is not competent to him to execute the decree against Ashi Bhusan Dasi.

The result is that this Rule is made absolute and the order of the Court below set aside. The sale will stand cancelled. The Petitioner is entitled to his costs of this Rule. We assess the hearing-fee at one gold mohur.

Rule made absolute.

(1) 4 C W N. 288 (1899).
(2) I. L. R. 32 Cal. 357 (1904).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 163 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J
1913,
19, March.

NITYANUND DAS,
Petitioner,
v.
UDAI NARAIN MONDAL,
Opposite Party.

Bengal Tenancy Act (VIII of 1885), sec. 174—Rent sale—Application to set aside sale by deposit—Deposit made by judgment-debtor at the instance of prior purchaser and with money found by him—Subsequent withdrawal of application if to be allowed—Refund of money deposited and withdrawn, order for—Enforcement, as decree for money.

Where some of the judgment-debtors applied under sec. 174 of the Bengal Tenancy Act to set aside a sale for arrears of rent and also deposited the requisite amount in Court,

Held—*That the application was in order as in fact made by the judgment-debtors though it was stated in a note appended thereto that the tenants had long before the sale transferred the holding to a stranger and that the money had been furnished by the purchaser.*

When, therefore, after the deposit, the judgment-debtors withdrew the application to set aside the sale with the consent of the decree-holder:

Held—*On the application of the purchaser, that the Court should have set aside the sale.*

The money deposited having been withdrawn by the judgment-debtors they were ordered to refund it in Court within 7 days, and if they failed to do so, the lower Court was directed to execute the order as a decree and thus realise the money.

This was a Rule granted on the 7th of February 1913 against an order of Babu Deba Brata Mukerji, Munsif of Contai, dated the 14th of May 1912.

The facts of the case will sufficiently appear from the judgment.

Babu Upendra Nath Chatterjee for the Petitioner.

Jyotish Chandra Hazra for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

We are invited in this Rule to set aside an order by which the Court below has refused to cancel a sale held in execution of a decree for arrears of rent on the 19th July 1911. On the 28th July 1911, two of the judgment-debtors applied under sec. 174 of the Bengal Tenancy Act for reversal of the sale, and the requisite amount was brought into Court on the 29th July. Although the application was made by two of the judgment-debtors, a note was appended thereto, to the effect that on the 17th May 1902 the tenants had transferred the holding to the present Petitioner and that the money deposited had been furnished by the purchaser. On the 1st August 1911, the applicants presented a fresh petition, in which they asked for permission to withdraw their previous application as also the sum deposited. This application was taken up for disposal three days later, and by consent of the decree-holder and the judgment-debtors, the application under sec. 174 was allowed to be withdrawn, with the result that the sale stood confirmed. The purchaser under the prior conveyance, when apprised of this circumstance appeared in Court on the 16th August 1911 and prayed that the sale might be set aside on the ground that as soon as the requisite amount was deposited by the judgment-debtors on the 29th July 1911, it became the duty of the Court to record an order for reversal of the sale. He further stated that there had been collusion between the judgment-debtors and the auction-purchaser and that they had, by contrivance, got the sale confirmed, with

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the consequence that the judgment-debtors had withdrawn the money borrowed from him and had also become entitled to appropriate the sale proceeds which stood to their credit in Court. The Court refused to entertain this application of the prior purchaser." We are now invited to set aside this order. A bare statement of the facts makes it manifest that the order of the Court below cannot be supported.

Sub sec. 2 of sec. 174 of the Bengal Tenancy Act provides that if the deposit mentioned in sub-sec. (1) is made within 30 days by the judgment-debtor, the Court shall pass an order setting aside the sale. It cannot be disputed that the application in this case was made by the judgment-debtors; nor is there any contorversy that the requisite amount was deposited. The mere circumstance that the judgment-debtors stated in their application that they had obtained the money from a person to whom they had previously transferred the holding is, in our opinion, immaterial. The case before us does not belong to the class of cases of which *Ranajit Kumar* v. *Jogendra Nath* (1) may be taken as the type, and in which it has been held that when an application under sec. 174 is made by a stranger to the proceedings, on behalf of the judgment-debtor, he is bound to establish his authority to make the application. In the present case, the application was made by the judgment-debtors. We hold accordingly that the order of the 4th August 1911 cannot be supported. The result is that this Rule is made absolute, and the execution sale set aside under sec. 174 of the Bengal Tenancy Act.

It has been represented to us that the money deposited on the 29th July 1911 has been withdrawn by the judgment-debtors. If this turns out to be true, the judgment-debtors will be called upon to bring the money back into Court within seven days from this date. If they fail to do so, the Court below will forthwith proceed to realise the money from them by execution of the order of this Court, as if it were a decree for money against them. There will be no order for the costs of this Rule.

Rule made absolute.

(1) 16 C. L. J. 546 (1912).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1138 OF 1913.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 26 and 27, August. Judgment, 27, August.	ISRAIL and ors., Plaintiffs, Petitioners, *v.* SAMSER RAHMAN and others, Defendants, Opposite Party.

Temporary injunction—Co-owner building on joint land in his exclusive possession—Other co-owners if may apply for injunction—Question to be considered on such interlocutory application—Defendant building after notice of suit—Court's power to order demolition—Revision by High Court—Charter Act (24 & 25 Vict., c. 104), sec. 15.

Where in a suit by certain co-owners to restrain the remaining co owners from building on land of which the latter only were in occupation with the consent of their co-owners, the Court upon an application for a temporary injunction found that the Plaintiffs had come before the Court in proper time and that the Defendants had raised the greater portion of the building since the institution of the suit and with full knowledge of the proceedings:

Held—*That it was not only a proper case for granting an* ad interim *injunction restraining the Defendants from proceeding further with the building, but the Court might, if so desired, order the removal of the building already erected.*

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DANIEL v. FERGUSON (8), VON JAOL v. HORNBY (9), AYNSLEY v. GLOVER (5), CURRIERS' COMPANY v. CORBETT (6), NEWSON v. PENDER (7) *referred to.*

The real point, upon such an interlocutory application, is not how the question ought to be decided at the hearing of the cause but whether there is a substantial question to be investigated and whether matters should not be preserved in statu quo *until that question can be finally disposed of.*

JONES v. PACAYA (4), WALKER v. JONES (3), MORAN v. R. S. N. Co. (2) *referred to.*

The mere circumstance that one co-sharer has taken possession of a portion of a joint property does not necessarily constitute ouster of the other co-owners. But at the same time it does not follow that because one co owner is in sole occupation of a portion of the joint property with the tacit or express consent of his co-sharers, that he is entitled to change the nature of that possession or to use the property in a mode different from that in which it had been previously used.

The High Court in exercise of its power under sec. 15 of the Charter Act set aside the order of the lower Appellate Court discharging a temporary injunction granted by the first Court.

This was a Rule against an order of Babu Jogendra Nath Bose, Subordinate Judge, Khulna, dated the 5th of August 1913, reversing an order of Babu S. C. Mitter, Munsif of that place, dated the 26th of June 1913.

The material facts will appear from the judgment.

Babus Nil Madhub Bose and *Haripada Chatterjee* for the Petitioners.

Babus Ram Chundra Majumdar, Narendra Nath Sen, Bhudar Haldar and *M. A. K. Fazlul Huq* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioners are Plaintiffs in a suit for declaration of title to immoveable property and for an injunction to restrain the Defendants from building on the land. The Plaintiffs and the Defendants are joint owners in respect of this property, but the Defendants alone have been in actual occupation of the land with the consent of their co-owners. On the 11th May 1913, the Defendants began to dig for the foundation of a substantial building which they intended to erect on the land. On the 24th May the Plaintiffs commenced this action and applied for a temporary injunction. Notice of this application was served on the Defendants on the 7th June, and on the 26th June the Court granted an injunction by which the Defendants were restrained from proceeding with the erection of the building during the pendency of the suit. The Court found that the Plaintiffs had come before the Court in proper time, and that it was impossible to deny that the greater portion of the building had been raised since the institution of the suit, apparently with full knowledge of the proceedings. The matter was then taken by the Defendants on appeal to the Subordinate Judge, who on the 3rd August modified the order of the primary Court. His order is ambiguous and its precise

(2) 14 B. L. R. 352 (1875).
(3) L. R. 1 P. C 50 (1865).
(4) [1911] 1 K. B. 455 (1910).
(5) L. R. 18 Eq. 544 (1874).
(6) 4 D. J. and S. 764 ; 2 Dr. and Sm. 355 (1865).
(7) L R. 27 Ch. D. 43 (1884).
(8) [1891] 2 Ch. 27.
(9) [1895] h. 774.

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effect has been the subject of discussion before us. The Subordinate Judge has held that the Defendants would not be entitled to make any new construction, save the construction of a staircase to the north of the small projection of the building, for reaching the projection; that no equity will arise in favour of the Defendants for completing the building, over and above what, if any, they may be entitled to claim by reason of the construction already made; and that the Defendants would be entitled to improve the condition of the existing huts, to make them fit for kitchen and for use by servants, but they would not be entitled to construct any new hut. The formal order, as embodied in the decree which was drawn up in the case, however, does not embody these conditions; it records merely that the appeal is allowed. The Plaintiffs have now applied to this Court, and on their behalf it has been contended that the order made by the Subordinate Judge is manifestly erroneous and should be discharged.

The Subordinate Judge has held that inasmuch as the Respondents were in sole occupation of the land with the consent of their co-sharers, they were entitled to erect buildings thereon and that the Plaintiffs were in no way prejudiced by the erection of such a building, because in the event of a partition of the entire joint property of the parties, the Plaintiffs might be awarded some other piece of land. In our opinion, the view taken by the Subordinate Judge is opposed to the well-established rule applicable to cases of this description. As was pointed out by this Court in the case of *Dwijendra Narain Roy* v. *Purnendu Narain Roy* (1), the mere circumstance that one co sharer has taken possession of a portion of joint property does not entitle the other co-sharers to claim joint possession: in other words, sole occupation by one co-sharer does not necessarily constitute ouster of the other co-owners. At the same time it does not follow that because a co-owner is, with the tacit or express consent of his co-sharer, in sole occupation of a portion of joint property, he is entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used. It is not necessary for our present purposes, indeed it is not right, that we should further examine this point with reference to the special facts before us and thus anticipate the decision of the question in controversy between the parties, in the suit. What the Court has, at this stage, to determine is, whether there is a *bonâ fide* contention between the parties, or, as was said by Mr. Justice Markby in *Moran* v. *R. S. N. Co.* (2), whether there is a fair and substantial question to be decided as to what the rights of the parties are. To the same effect is the decision of their Lordships of the Judicial Committee in the case of *Walker* v. *Jones* (3), where Turner, L. J, observed as follows:—"The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions is such that it was proper that the injunction should be granted until the time for deciding them should arrive." It is quite sufficient if the Court find a case which shows that there is a substantial question to be investigated and that matters should be preserved in *statu quo* until that question can be finally disposed

(1) 11 C. L. J. 189 (1910).

(2) 14 B. L. R. 352 (1875).

(3) L. R. 1 P. C. 50 (1865).

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of [*Jones* v. *Pacaya* (4)]. Now upon the facts stated in the present case, there is no room for controversy that the Court has to decide a fair and substantial question as to what were the relations subsisting between the parties, and what were the rights and obligations flowing from those relations. Under circumstances like these, the matter for consideration at this stage is, where does the balance of convenience lie: is it desirable that the *status quo* should be maintained or is it right that the Defendants should be allowed to continue to alter the character of the land. It is well settled that the Court will not refuse an injunction in a case of this description so as to give the Defendants an undue advantage over the Plaintiffs. If the Defendants in the case before us were allowed to proceed to the completion of the building which has been erected by them on the land, it is indisputable that they will be placed in a position of undue advantage over the Plaintiffs. In this connection reference may be made to the judgment of Sir George Jessel in the case of *Aynsley* v. *Glover* (5), where that learned Judge observed as follows:—"At all events, this being an interlocutory application, let me continue my building, and I will undertake to pull down if the Court shall so think fit. That is a very specious argument to address to the Court, but one must have regard to the effect of allowing such a proceeding. Supposing a Defendant erects a building at great cost, when he comes to the hearing he will say to the Court: 'compare the injury to me, in pulling down the building with the injury to the Plaintiff in allowing the building to remain.' Ought or ought not the Court to give weight to such a representation? I think upon this point the observations of Vice-Chancellor Kindersley in the case of the *Curriers' Company* v. *Corbett* (6) are very important. The Vice-Chancellor says: 'If the Defendant's buildings had not been completed, there would have been ground for interference by injunction; but as they have been completed, the question is, whether the Court ought to or would order the pulling down of the buildings, or give compensation in damages. The Defendant's new buildings are of considerable magnitude and importance, while the two houses of the Plaintiffs are comparatively of small value and importance: and it has been decided that in such a case the Court will not as a matter of course order the Defendant to pull down his new buildings but will give to the party injured by the erection of those buildings compensation in damages. It appears to me that this is precisely one of such cases.' Consequently the learned Vice-Chancellor considered that, the buildings being erected, the comparative values of the Defendant's buildings and the Plaintiff's were sufficient to induce him to refrain from granting an injunction in a case where, if the buildings had not been erected, he would have granted the injunction. If that is so, and if those considerations are to weigh with the Court upon the question of damages or injunction, I ought not to allow the Defendant to proceed with his building, which will put him in such an advantageous position as regards the Plaintiffs when the case comes to a hearing." To the same effect is the decision in *Newson* v. *Pender* (7). In the case before us, therefore, *prima-*

(4) [1911] 1 K. B 455 (1910).
(5) L. R, 18 Eq. 544 (1874).

(6) 4 D. J. and S. 764; 2 Dr. and Sm. 355, 360 (1865).
(7) L. R. 27 Ch. D. 43 (1884).

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facie, the Defendants should not be allowed to proceed to complete the building which they have erected. But the case for the Plaintiffs is materially strengthened when we bear in mind the conduct of the Defendants. The Court of first instance found that there was good reason to hold that a substantial portion of the building had been erected after the Defendants had become aware of the institution of this suit and of the application for temporary injunction. In a case of this description, the Court would, if necessary, proceed not only to grant a temporary injunction restraining the further erection of the building, but also to direct that the building already erected be taken down. In *Daniel* v. *Ferguson* (8), the Plaintiff filed a suit for an injunction restraining the Defendant from building so as to obstruct his ancient light and gave notice of motion for an *interim* injunction. The Defendant, thereupon, working day and night, ran up the wall to a height of 40 ft. Mr. Justice Stirling granted an injunction restraining future building and ordering the removal of the wall, and this order was confirmed on appeal. Similarly, in the case of *Von Jaol* v. *Hornby* (9), when the Defendant had evaded notice of the writ in the action and continued to build until substituted service was effected, a temporary injunction was granted ordering the Defendant to pull down all that had been built since the Plaintiff had warned him of his intention to bring an action. In the case before us, the Plaintiffs did not invite the Court to direct the Defendant to take down so much of the building as had been erected after the 6th June 1913: they simply ask that the Defendants should be restrained from proceeding with the building any further. In our opinion, upon the merits of the case, there is no room for controversy that the order made by the Subordinate Judge cannot possibly be supported. The only question for consideration is whether this Court is competent to interfere in the exercise of its revisional jurisdiction. We do not feel pressed by the objection suggested, because obviously it is competent to this Court to interfere under sec. 15 of the Charter Act: and in view of the conduct of the Defendants which, in substance, amounts to a defiance of the authority of the Court, we are of opinion that this is a case in which ample ground has been made out to justify our interference.

(8) [1891] 2 Ch. 27.
(9) [1895] 2 Ch. 774.

The result is that this Rule is made absolute, the order of the Subordinate Judge discharged and that of the Court of first instance restored. The Petitioners are entitled to the costs of these proceedings in all the Courts. We assess the hearing-fee in this Court at three gold mohurs.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL No. 561 OF 1913.

CHITTY, J.
TEUNON, J.

1913,
Heard,
1, August.
Judgment,
4, August.

OFEL MOLLAH,
Appellant,
v.
THE KING-EMPEROR.

Trial by Jury—Misdirection in charge to Jury—Questions of fact, Judge's expression of opinion in dogmatic and unqualified terms—Material evidence, omission to refer to—Conditions precedent to using certain evidence and drawing adverse inference against accused, omission to point out—Absconding not incompatible with innocence, omission to point out—Retrial by a new Judge.

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Where the accused was convicted under secs. 304, 328, I. P. C., for having administered arsenic mixed with sugar to two boys and thereby caused the death of one and hurt to the other, and the Sessions Judge in his charge to the Jury expressed his own opinion on the evidence in terms too dogmatic and unqualified, although he informed them that on questions of fact they were not bound by any opinion of his, and omitted to refer to some statements of one of the two boys before the Committing Magistrate and before the Sessions Judge and did not warn the Jury that before drawing inferences against the accused they must first be satisfied that he knew of the presence of arsenic in the sugar and that the evidence negatived the possibility of accident or mistake and that before using the chemical examiner's report they must be satisfied on the evidence that the substances examined were in fact what they were said to be, and in discussing the question of accused's absence from his village did not warn the Jury that even if they believed that he absconded, absconding is not necessarily or invariably incompatible with innocence :

Held—*That the charge to the Jury was vitiated by misdirection.*

The High Court set aside the conviction and sentence and ordered a retrial by a new Judge on the ground that the trying Judge had formed a strong opinion on the case.

This was an Appeal against the order of H. C. Liddel, Esq., Sessions Judge of Jessore, dated the 30th of April 1913, convicting the Appellant under secs. 304 and 328, I. P. C., in agreement with the verdict of the majority of the jury and sentencing him to ten years' transportation under each section, the sentences to run concurrently, being awarded under sec. 59, I. P. C., instead of rigorous imprisonment for a like period under each section.

The Session Judge's charge to the Jury was as follows :—

"The accused before you is charged under secs. 302 and 328. The case is briefly this that he gave two boys, Kasem and Hakim, sugar in which arsenic had been mixed, that the boys ate it or part of it with the result that one of them died the same day while the other recovered after a serious illness.

The points which you will have to decide are not involved : they are really only these :—

(i) Did Ofel administer poison to the boys ?

(ii) Did he thereby cause the death of Kasem ?

(iii) What offence did he commit ?

The charge against the accused is a serious one. On the other hand, the poisoning of two boys and the death of one by poisoning is a heinous crime. You have therefore the responsible duty of deciding whether the heinous crime was committed and, if so, it was committed by the accused now before you.

The accused denies the charge : he gives no explanation as to how he has been accused : he gives no evidence to prove that he is innocent. The prosecution however must stand by its own strength : and you have to decide whether you have been satisfied by the evidence for the prosecution that the accused is guilty.

The case has been fully discussed before you on both sides : I shall now put the case before you as briefly as I can deal with the more important facts. There is considerable evidence in the case to show enmity between the parties. This however gives us little help : it might supply a motive for the crime, *viz.*, to take revenge,

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it might also supply a motive for accusing Ofel as the person who had given the poison. It becomes necessary therefore to examine the oral evidence carefully wherever it implicates Ofel. The evidence falls into various groups (i) there is the evidence of Hakim an eye-witness and the only person who makes a definite charge that Ofel gave the sugar, (ii) there is the evidence of relatives of Hakim and Kasem as to the vomitting and purging and as to what the boys said when asked the reason: The evidence is likely to vary for many reasons, *e.g.*, the boys may not have said the same thing each time—they would be asked many times in different ways, sometimes they would be feeling worse than at others, different witnesses heard the answers given at different times, they may have heard more than one answer and may combine them in their evidence; there is also a possibility that the boys may have grown more definite in their story from hearing the comments of their relatives.

This evidence therefore has to be taken carefully.

(iii) There is the evidence of witnesses who saw the boys near Ofel's house—*e.g.*, being called by Ofel or vomitting near Ofel's house.

(iv) There is the medical and chemical evidence which shows from what the boys suffered, particularly Kasem, the presence of symptom of poisoning and the detection of arsenic in the vomit and stools of both and in the body of Kasem.

(v) There is the evidence of the finding of the paper with arsenic on the ash heap.

(vi) There is the evidence as to the conduct of the accused how he left the village at that time and did not return.

(vii) There is the evidence as to the interview between the accused and Juran Kapali."

Babu Monmatha Nath Mukherjee for the Appellant.

Babu Brajendra Nath Chatterjee for the Crown.

The JUDGMENT OF THE COURT was as follows:—

In this case on a trial by Jury before the Sessions Judge of Jessore the Appellant, Ofel Mollah, has been convicted of an offence punishable under sec. 328 and sec. 304, I. P. C., and sentenced to transportation for ten years.

The case against him was that on the 8th of December last he had administered arsenic mixed with sugar to two boys Kasem and Hakim and had thereby caused the death of Kasem and hurt to Hakim.

In appeal it is urged that the learned Sessions Judge's charge to the Jury is vitiated by misdirection and that a retrial should be ordered.

We have gone through the whole of the record, and, after carefully considering the charge, are constrained to the conclusion that it is open to the objections taken.

No doubt the learned Sessions Judge did inform the Jury that it was for them to weigh the evidence with care and caution and that on questions of fact they were not bound by any opinion of his. But it is doubtful whether the isolated passages in which these warnings were given were sufficient to outweigh the fact that throughout the charge, for instance, in his observations on the criticisms levelled against the first information, on the evidence of Abadulla re the addition or admixture of cocoanut, on the question of the reliability of Monaulla's evidence, on the Kabiraj witness's treatment of the

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boy Hakim for cholera and on the evidence regarding the Appellant's absence or disappearance from the village, he has expressed his own opinion in terms too dogmatic and unqualified.

We next find that so far as appears, when discussing the boy Hakim's evidence and the statement of the Kabiraj regarding the name mentioned to him, the learned Sessions Judge made no reference to Hakim's evidence before the Committing Magistrate and no reference to the opening statements in the boy's depositions in the Sessions Court. Further, though when discussing the questions of the accused's absence from his village, the Sessions Judge does say "would he (the accused) behave like that if the poisoning were accidental;" it nowhere else appears that he placed before the Jury this aspect of the case and warned the Jury that before drawing inferences against the accused they must first be satisfied that he knew of the presence of arsenic in the sugar, and that the evidence negatived the possibility of accident or mistake.

Similarly it does not appear that he warned the Jury that before using the Chemical Examiner's report they must be satisfied on the evidence that the substances examined were in fact what they were said to be.

Lastly, while discussing the question of the accused's absence or disappearance from his village, not only does the Sessions Judge, as we have already said, express his own opinion on the evidence in too unqualified terms but he has further failed to warn the Jury that even if they believed he did abscond, absconding is not necessarily or invariably incompatible with innocence.

On the whole we are not satisfied that the case was fairly and fully placed before the Jury.

We therefore set aside the conviction and sentence and direct that the Appellant be retried. As the learned Sessions Judge appears to have formed a strong opinion on this case, we further direct that the retrial be held before the Sessions Court of Khulna.

Appeal allowed:
Retrial by a new Judge ordered.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 337 OF 1913.

IMAM, J. CHAPMAN, J. 1913, Heard, 25, June. Judgment, 2, July.	MUSAI SINGH, Petitioner, v. THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1908), secs 233, 234, 535 (1), 537 (a)—Three separate complaints of offences of the same kind—Framing of a single charge setting out one offence in respect of three complaints—Irregularity if vitiates trial.

Where three different tenants laid three separate complaints of cheating against the Petitioner who was an officer of the Bettiah Raj entrusted with the work of collecting rents from the Raj tenants, and the Magistrate tried the three complaints at one trial and framed only one charge setting out only one offence of cheating in respect of all the three complaints and the Petitioner made no objection at the time of the trial:

Held—*That the trial was not bad merely on the ground of the omission to draw up separate charges for each offence.*

This was a Rule against an order of the Joint-Magistrate of Bettiah, dated the 13th of December 1912, convicting the Petitioner under sec. 420, I. P. C., and

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sentencing him to suffer rigorous imprisonment for 2 years and to pay a fine of Rs. 100 or in default to suffer rigorous imprisonment for six months an appeal from which order was dismissed by R. Sheepshanks, Esq., Sessions Judge of Mozufferpore, on the 6th of January 1913.

The Petitioner was a Sazawal of the Bettiah Raj. He was accused of cheating three tenants of the Raj of Rs. 6, Rs. 10, and Rs. 11-2 respectively. The three tenants separately complained against the Petitioner under sec. 420, I. P. C. The Magistrate framed one charge under sec. 420, I. P. C, against the Petitioner in respect of the three complaints and under sec. 234, Cr. P. C., tried the three complaints together and convicted and sentenced the accused as stated above.

Mr. M. Zaker Ali with *Babu Biswa Nath Bose* for the Petitioner.

Dr. Dwarka Nath Mitter for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

At the time of the alleged offences the Petitioner was a Sazawal of the Bettiah Raj and was entrusted with the work of collecting rents from the tenants of the Raj. Three tenants are said to have been cheated by him while he was so engaged in the collection of rents. They laid three separate complaints against him before the Magistrate who purporting to act under sec. 234, Cr. P. C, tried the Petitioner for the three offences at one trial and framed only one charge setting out only one offence of cheating in respect of all the three complaints.

If the Magistrate had treated the three complaints as complaints of distinct offences and had drawn up three separate charges, the procedure would have been without defect. There was no obstacle to the disposal of all three cases at one trial. There was no misjoinder and no contravention of any law limiting the joinder of offences in one indictment [*Subramania Ayyar* v. *King-Emperor* (1)].

The defect was one of "duplicity," not of misjoinder, (Archbold's Pleading, Edn. 1910, page 76). It was not the mode of trial that was wrong, it was merely the form of the charge. The law on the subject in the words of the Code of Criminal Procedure is as follows :—"for every distinct offence . . . there shall be a separate charge, but no finding or sentence . . . shall be deemed invalid merely on the ground that no charge was framed or shall be reversed or altered on account of any error, omission or irregularity in the charge unless a failure of justice has been occasioned." It seems clear therefore that it is not open to us to hold that the trial was bad merely upon the ground of the omission to draw up separate charges for each offence.

We are of opinion that the Petitioner clearly understood what he was being tried for and was not in any way prejudiced. Moreover, he made no objection at the time of the trial (see Explanation to sec. 537).

The result is that we see no reason to interfere with the conviction. The sentence was, however, too severe. It is reduced to nine months' rigorous imprisonment. The sentence of fine and imprisonment in default will stand.

Rule discharged.

(1, 5 C. W. N. 866 : s. c. I. L. R. 25 Mad. 61 (1901).

THE

Calcutta Weekly Notes.

Vol. XVIII.] MONDAY, JANUARY 5, 1914. [Nos. 7 & 8.

Contents.

NOTES.

New Year honours to Mr. Garth and Mr. Ali Imam.

We note with pleasure that a knighthood has been conferred on Mr. William Garth of the Calcutta Bar and a K. C. S. I., on Mr. Ali Imam, the present Law Member of the Viceroy's Executive Council. The honours conferred are fully deserved by the position that these gentlemen occupy in their respective spheres. Sir William Garth has been a leader of remarkable ability at the Calcutta Bar for some time past. Latterly, owing to reasons of health, he has visited India and attended to professional engagements only during the cold weather. We understand that he at present proposes to practise chiefly before the Judicial Committee of the Privy Council. In recent years he was briefed by the Government in all the important political cases which have been tried in Bengal and we need hardly say that he conducted them with his usual ability. Few could place their cases and particularly the facts more forcibly than he. Although he did not pay much attention to legal technicalities his grasp of principles was always remarkably sound and his exposition of it equally lucid. He was often a terror to witnesses who are disposed to prevaricate or anxious to conceal facts. The honour conferred on him is fully deserved and our only regret is that it was not conferred on him in the zenith of his career at the Bar. The honour conferred on Mr. Ali Imam is both timely and opportune and he fully deserves it as a wise councillor of His Excellency the Viceroy.

Obituary—Mr. Justice Sundara Iyer.

We deeply regret to record the untimely death of Mr. Justice Sundara Iyer of the Madras High Court. A lawyer of proved ability and repute, his interests, like those of the late lamented Mr. Justice Krishnasawmy Iyer, were by no means confined within the limits of the profession, and his elevation to the bench was as popular as it was well-merited. His judgments were invariably well considered and sound. It is a great pity that a life of promise has been cut off in its prime. His death is a great loss to the Bench and to the Indian Community.

Judgment read by successor of trial Judge.

Is the judgment in a case and the decree founded thereon bad because the judgment was written by the Judge after he had ceased to be the Judge of the particular Court in which the case was heard? In *Basanta Behari Ghosal* v. *The Secretary of State for India*, I. L. R. 35 All. 368, the appeal preferred to the High Court was against the judgment and decree of Mr. Tute, Officiating District Judge of Allahabad, in a suit under the Land Acquisition Act. It appeared that the judgment in the case was written by Mr. Tute when he was no longer the District Judge of Allahabad and it was delivered by his successor in office and it was contended on behalf of the Appellant that the judgment and decree were bad on this account. Their Lordships Richard, C. J, and Banerji, J., overruled the contention and held that this ground alone was not sufficient to vitiate the judgment inasmuch as it was provided under Or. XX, r. 2 of the Civil Procedure Code of 1908 that a Judge may pronounce a judgment written but not pronounced by his predecessor. In taking this view reference is made to *Satyendranath Roychowdury* v. *Kastura Kumari Ghatwalin*, I. L. R. 35 Cal. 756 : s. c. 12 C. W. N. 682, in which a Full Bench of the Calcutta High Court held that a judgment written ten months after the Judge had ceased to have jurisdiction in the particular division was good and fulfilled the conditions of the corresponding section of the Code of Civil Procedure of 1882.

Onus of proof in suit for malicious prosecution.

In *Vydinadier* v. *Krishnaswami Iyer*, I. L. R. 36 Mad. 375, their Lordships have clearly laid

down that in a suit for malicious prosecution the onus is on the Plaintiff to prove the absence of reasonable and probable cause. The Defendant charged the Plaintiff with abetment of assault committed by certain other persons. The complaint was dismissed and the Plaintiff brought a suit for malicious prosecution. The allegation in the criminal case was that the Plaintiff used certain words which showed that he was guilty of abetment. The lower Court without coming to any finding as to whether the language alleged was used, proceeded to argue that even assuming that the Plaintiff used the words charged there was no reasonable and probable cause for the charge of abetment against him. In coming to this conclusion the lower Court threw the onus on the Defendant and their Lordships point out that it was clearly wrong. Their Lordships further point out that all that the Defendant had to be satisfied about was that there was reasonable and probable cause for the charge and reasonable grounds for believing that the Plaintiff was guilty of abetment and not reasonable grounds for coming to the conclusion that the Court would convict him of it.

Policy of insurance on deceased's life for wife's benefit if saleable in execution of decree against deceased.

Shankar v. *Umabai*, I. L. R. 37 Bom. 471, is of importance to insurance policy holders. It is an authority for the proposition that a policy of insurance executed upon one's own life but expressed to be for the benefit of another is attachable under sec. 60, C. P. C., as a security for money or other saleable property belonging to the assured. The Plaintiff's husband executed a policy of insurance on his own life but the policy was expressed to be for the benefit of his wife. Under the policy the Insurance Company promised on proof of the death of the assured to pay the policy monies to the trustee or trustees who might be appointed by the assured by separate writing and in default of trustees to the beneficiary (*i.e.*, the widow of the assured) and, if the beneficiary was dead, to the assured's heirs, executors, administrators or assigns. After the death of Plaintiff's husband, in execution of a decree obtained against him the judgment-creditors attached the policy and the Plaintiff applied to raise the attachment but was unsuccessful. She then filed a suit for declaration that the policy could not be attached in execution of the decree obtained against her deceased husband. The Plaintiff's contention which was overruled by the Court was that the Insurance Company and the assured entered into an agreement which was clearly a trust in favour of the wife and the husband could not change this contract, the result being that he had practically divested himself of his beneficial interest under the policy.

Their Lordships held that unless and until trustees were appointed on behalf of the wife it was in the power of the assured at any time to put an end to the contract by ceasing to pay the premia or otherwise to defeat the expectation of his wife by assigning the policy to a creditor. The assured could divest himself of his beneficial interest under the policy only by assignment in writing as provided by sec. 130 of the Transfer of Property Act or by signed declaration of trust as provided by sec. 5 of the Trusts Act and neither course having been adopted by him the policy on his death formed part of his estate, the right of action against the company being in his executors or other representatives untrammelled by any trust in favour of his wife. That being so, the policy fell within the description contained in sec. 60, C. P. C, as a "security for money or other saleable property belonging to the judgment-debtor over which he had a disposing power which he might exercise for his own benefit."

Inam land acquired by Government if may be assessed like ordinary Government land.

Does land, subject only to quit-rent, change its character when it passes into the hands of a private owner after acquisition by Government under the Land Acquisition Act? This was the question which came up for decision in *Hanumanthu Pantulu* v. *The Secretary of State for India*, I. L R. 26 Mad. 373 The Plaintiff sued for a declaration that the Government was not entitled to ground rent for certain land in his occupation and for the recovery of the amount collected from him by Government as ground-rent. The land which was originally *inam* land was acquired by Government for a certain Municipality under the Land Acquisition Act. The Plaintiff subsequently came to be in occupation of it and his contention was that Government was entitled to levy from him only quit-rent in respect of the land as from the Inamdar. The learned Judges held that it was the Government that acquired the land and the title of the Municipality was diverted from the Government. The effect of the Land Acquisition proceedings was that the land became vested in Government and it became ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier and unless the Plaintiff could prove a special grant by Government he could not claim exemption from payment of such assessment as the Government might fix.

CURRENT INDIAN CASES.

(CRIMINAL.)

Indian Penal Code, sec. 408—Criminal misappropriation.

EMPEROR *v.* BIMALA CHARAN ROY, I. L. R. 35 All. 361.

The Petitioner was a water-works inspector in the employ of the Cawnpur Municipality. He was the owner of a house which was let out to tenants and he had the main water pipe tapped by plumbers who were his subordinates and connected it by means of an old pipe to the house occupied by the tenants and to his garden. No report of the new connection was made to the Municipality. The Petitioner represented to the tenants that the Municipal tax for the two pipes in the house and the garden came up to Rs. 9 and he and the tenants should pay the tax in equal shares. The tenants agreed to the proposal and paid him Rs. 9 for two years. It was subsequently discovered that water had been laid on to the house and the garden without giving any information to the Municipality.

Held—That the Petitioner deliberately misappropriated water for his own use and for the use of his tenants for which he paid no tax and about which he gave no information to his employers nor obtained permission for tapping the main. In doing this he committed the offence described in sec. 408, I. P. C.

Criminal Procedure Code, secs. 517, 520—Powers of an Appellate Court.

EMPEROR *v.* AZMAT SHAH KHAN, I. L. R. 35 All. 374.

Sec. 520, Cr. P. C., gives full power to an Appellate Court to pass an order under sec. 517, Cr. P. C.

(CIVIL.)

Compensation, apportionment of, between landlord and occupancy raiyat.

SRI RAJAH BAMMADEVARA *v.* A. SUBBARAYUDU, I. L. R. 36 Mad. 395.

Where compensation has to be apportioned between a zemindar and raiyats with a permanent right of occupancy, certain factors are to be taken into consideration and apportionment made after a consideration of those factors. In *Appasami v. Ringappa*, I. L R. 4 Mad. 367, the Court considered among others the expenses of cultivation and the fact that the cultivator has a home and a sphere for labour for himself and his family. In that case however it was not intended to lay down a general rule applicable to all cases.

Provincial Insolvency Act (III of 1907), sec. 14 (3)—Matters to be considered before adjudication.

BAVA JUR CHETTI *v.* BAVA RANGASAMI CHETTI, I. L. R. 36 Mad. 1902.

On an application by the debtor himself for being adjudicated an insolvent, the debts exceeding Rs. 500, the Court is not bound before making the order of adjudication to decide whether the debts were real or fictitious and whether the Petitioner was really unable to pay his debts as stated by him in his petition. *Uday Chand Maiti* v. *Ram Kumar Khara*, 15 C. W. N. 213, followed.

Decree against Defendant in representative capacity.

SAHIB *v.* HAMID, I. L. R. 36 Mad. 414.

The general rule of law is that in a suit where one person is allowed to represent others as Defendant in a representative capacity, any decree passed binds those others only with respect to the property of those others which he can in law represent and no personal decree can be passed against them although the parties on record may be made personally liable.

Dispute regarding church—Onus—Facts of public history—Canon law.

AMBALAM *v.* RIGHT REV. I. M. BAITTE, I. L. R. 36 Mad. 418.

When in a suit for declaration that a certain church and its properties were dedicated to and impressed with trusts for worship according to the doctrines of the Roman Catholic Church, the Defendants being at present members of the Syro-Chaldean Church, it was found that for more than sixty years before the Defendants' secession, Catholic form of worship prevailed in the Church.

Held—That the onus was on the Defendants to establish by satisfactory evidence that the Church was Syro-chaldean at the inception.

The Court can dispense with evidence only of what may be regarded as notorious facts of public history.

The canon law can be invoked as a guide in deciding questions respecting temporal rights in Roman Catholic churches.

Review.

THE INDIAN DECISIONS (New Series), Allahabad, Vol. IX. *Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. Law Printing House, Madras. 1913.*

The publishers are to be congratulated on their being able to present the profession with the concluding volume of the Allahabad Series of these useful reprints within such a short time. The present volume brings the reprints of the Indian Law Reports, Allahabad Series, down to the end of 1900. The references to all other law reports and journals in which the same case is reported as also to all subsequent cases in which a particular decision has been judicially noticed considerably enhance the value of these reprints.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Miss Marjorie Bebb* v. *The Law Society.* Before the MASTER OF THE ROLLS AND LORDS JUSTICES SWINFEN EADY AND PHILLIMORE. 10th December 1913.

A solicitor's profession is the monopoly of man under the Common Law and the statute.

This was an appeal from a decision of 2nd July 1913 shortly reported in 17 C. W. N. ccliv. The

down that in a suit ... person" onus is on the ... s and was reasonable ... y the Law charged ... ainst her. It com ... ndent that the ... ction and that ... have been under ... offices for several ... smissed the appeal. ... aid :—

... a *mandamus* or an order ... *mandamus* requiring the Law Society ... to the preliminary examination. Th... Society was a modern creation of statute ... d the right which the Plaintiff claimed against the Society depended on the Solicitors Act, 1843. The argument which had been adduced was that reading the Act from beginning to end it would be found that certain obligations were imposed on the Law Society requiring them to admit any person who came before the Society and complied with certain conditions; and the Plaintiff said that, if sec. 48 were examined, it would appear that "every word importing the masculine gender only shall extend and be applied to a female as well as a male . . . unless . . . it be otherwise specially provided, or there be something in the subject or context repugnant to such construction." It was not really contended by counsel for the Appellant that there was anything in the Act of 1843 which destroyed or removed any existing disability, and his Lordship said that, in his opinion, all that the Court had to consider was whether at the date of the Act women were under a disability to become attorneys or solicitors.

Three grounds were alleged as proving disability. First, it was said that Lord Coke had laid it down 300 years ago that a woman was not allowed to be an attorney. (Co. Lit., p. 128a) It might be that the *Mirror of Justice* was not a work of the highest authority, but the reference to it did not in the least take away from the value of Lord Coke's opinion. An opinion of his as to what was the Common Law required no sanction from anybody else. That alone, therefore, was evidence of what the Common Law was, and at Common Law women were under a disability which prevented their being attorneys. Apart from this opinion of Lord Coke there was the fact that no woman had ever been an attorney. There had been a long, uniform, and uninterrupted usage. Such usage was the foundation of the greater part of the Common Law and the Court ought to be very loth to depart from anything supported by long usage. He decided this case on the fact that at the time of the passing of the Act of 1843 there was an existing disability which prevented women from being attorneys and which had not been destroyed by that Act. The Court had been asked to hold that in education, intelligence, and capacity there were women, including the present Appellant, who were at least equal and often superior to the candidates who were admitted as solicitors. That was really not a matter for the Court to consider. Its duty was to consider and ascertain the law, and he disclaimed any right to legislate on matters of this kind.

Lord R. Cecil, K. C., and *Mr. Wright* for the Appellant.

Sir R. Finlay, K. C., Mr. Hughes, K. C., and *Tomlin, K. C.*, for the Respondent.

B. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. LALIT MOHAN SINGHA ROY, Complainant, Petitioner *v.* KUNJA BEHARI GHOSH AND ANOTHER, Accused, Opposite Party. 27th November 1913.

Criminal Procedure Code, sec. 250—Compensation order if to form part of judgment of acquittal—Imprisonment in default of payment of fine.

On the complaint of the Petitioner the Opposite Party was placed upon their trial before the Deputy Magistrate of Baraset on a charge under sec. 379, I. P. C. The Magistrate after trial discharged the accused under sec 253, Cr. P. C, and passed an order to the following effect in the judgment: "I therefore declare the case to be vexatious and direct under sec. 250, Cr. P. C.. that subject to any cause to be shown by him the complainant do pay Rs. 50 to the accused as compensation."

The day after, the Magistrate passed the following order—"No cause shewn by complainant who was present yesterday. Above order made absolute, complainant to suffer simple imprisonment for 30 days in default of payment of the compensation." The complainant moved the Sessions Judge of 24-Pergunnahs who under sec 438, Cr. P. C, made a reference to the High Court recommending that the order should be set aside on the ground among others that the order awarding compensation must be contained in the order of discharge or acquittal and not passed after the accused has been discharged.

Babu Harendra Nath Mukherji in showing cause against the Reference.

No one in support of the Reference.

Their Lordships discharged the Reference.

Reference discharged.

[CIVIL APPELLATE JURISDICTION.]

EXTR. SUIT NO. 5 OF 1910.
APPEAL NO. 61 OF 1911.

WOODROFFE, J.
COXE, J.
D. CHATTERJEE, J.
1912,
17, August.

DONALD WESTON and two others, Defendants, Appellants,
v.
PEARY MOHAN DASS, Plaintiff, Respondent.

Indian Explosives Act (VI of 1908), secs. 5, 6—Bomb found in portion of house open to access to all members—Liability of owner to arrest—Possession in law—Arrest by Police primâ facie *legal*—Bonâ fides, *presumption of—Malicious motive, proof of, if makes arrest actionable—Fraud and crime, charge of, in civil action—Pleading—Proof—Charges how far should be definite—Onus of proof—Presumption of innocence—Case of fraud set up in pleading, if should be allowed to be changed—Court if may give relief on other grounds of fraud than that alleged—Counsel's privilege—Counsel, if may appear as witness—Professional etiquette—Duty of Counsel not to accept retainer when likely to be called as witness—Counsel if may cross-examine from personal knowledge—Witness, cross-examination of, charges by counsel during, against witness and third parties—Court if may ask to see instructions—Evidence Act (I of 1872), secs. 3, 118, 125, 149-150—Privilege of witness—Document withheld on ground of privilege—Withholding if ground for adverse inference—Joint tort if actionable as conspiracy—Conspiracy, apart from tort, if actionable—Illegal arrest, malicious prosecution and imprisonment charged as result of concert—Suit for damages—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 19, 23, 36, 120—Judge, if may rely on expert treatises not referred to at trial—Judgment, if may be revised after delivery—Acquittal, judgment of, how far conclusive in proceeding between private persons.*

WOODROFFE and COXE, JJ.—*Where an officer causes the arrest of a person under the authority of law and in the* bonâ fide *belief in his right to do so, the fact that he might also be shown to have been actuated by other motives, e.g., to induce his son to make a confession, would not make such act actionable.*

CHATTERJEE, J.—*It is a sound principle of law that in the absence of proof to the contrary credit should be given to public officers who have acted* primâ facie *within the limits of their authority for having so done with honesty and discretion.*

WOODROFFE and COXE, JJ.—*Where the charge against a District Magistrate and police-officers under him was that they had caused the arrest of the Plaintiff fraudulently and in abuse of powers conferred on them by law, it was not enough to show that the officers did not in all they did act with all wisdom and discretion or that they acted too rigorously or mistakenly or with legal irregularity.*

The karta *or the managing member of a family has* primâ facie *possession and control of any article found in a part of the house equally open to access to all members of the family.*

QUEEN EMPRESS v. SANGAM LALL (2) *referred to.*

Held—*That the Plaintiff was in law in possession of a bomb which according to the reports upon which the Police acted was brought into the Plaintiff's house and placed in his* baitakhana *by his son, and was liable to arrest under sec. 5 of the Explosives Act, and his arrest by the Defendants was therefore authorised by law.*

That it was immaterial whether the Plaintiff was arrested under sec. 5 or sec. 6, inasmuch as it was open to the Defendant to call in aid any provision of the Statute which justified his action quite irrespective of whether it was present or not to his mind when he made the search.

(2) I. L. R. 15 All. 185 (1893)

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CLARKE *v.* BROJENDRO KISHORE ROY CHOWDHURY (3) *referred to.*

Fraud which by its very nature is secret in its movements is in a large number of cases not capable of establishment by positive and express proof and although circumstances of mere suspicion are no proof of fraud, its establishment must depend in a large measure on theories and inferences from facts proved. But the Plaintiff who alleges fraud should at least know and formulate precisely what the fraud is which he alleges and against whom he charges it and he should be able also to definitely formulate in an intelligible way what his theory and scheme is and how it fits in with the facts.

A charge which cannot be reasonably formulated or supported on the evidence should be withdrawn.

It is a well known and fundamental rule not of technicality but of substance that when fraud is charged the plaint must set forth the particulars. The evidence must be confined to the allegations. The charge must be substantially proved as laid and when one kind of fraud is charged another kind cannot on failure of proof be substituted for it.

If a case as framed does not commend itself to the Court's judgment, it should dismiss it and not decide it on some other ground because it thinks that that ground is more credible than the Plaintiff's allegations and because it thinks that the Plaintiff might have made a case in another way and on which, if he had, he would have been entitled to succeed.

Where the Defendants were charged in the plaint with having conspired to commit malicious search and trespass and malicious arrest, imprisonment and prosecution of the Plaintiff, and they were so charged as joint tortfeasors, the Court was not justified in extending the scope of the suit by treating the case set up as one of a general conspiracy to cause damage to the Plaintiff of which the tortious transactions alleged were merely the overt acts.

There is but one rule of evidence which in India applies to both civil and criminal trials and that is contained in the definition of the terms "proved" and "disproved" in sec. 3 of the Evidence Act, which in conformity with the general tendency of the day adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof. The test in each case is, would a prudent man after considering the matters before it (which vary with each case) deem the fact in issue to be proved or disproved? In a matter of this kind the conscience of the Court can never be bound by any rule but that which coming from itself dictates a conscientious and prudent exercise of its judgment.

Where, whatever be the form of the proceeding, charges of a fraudulent or criminal character are made against a party thereto, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is the greater of necessity is the force of the evidence required to overcome such presumption.

The English rule in such matters (whatever it be, for authorities are not at one) does not as such apply to India.

IN THE GOODS OF GOPESSUR DUTT: JARAT KUMARI *v.* BISSESSUR (1) *referred to.*

(3) 13 C. W. N. 458: s. c. I. L. R. Cal. 433 (1909).

(1) I. L. R. 39 Cal. 244, 255; 16 C. W. N. 265 (1911).

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When the production of a document is resisted on the ground of privilege the Court must first determine whether there is privilege or not. But after the Court has once held that a document or subject-matter of enquiry is privileged with the result that the other party cannot compel production or answer, it is not open to the Court to draw adverse inferences from its non-disclosure. Still less is it permissible to draw adverse inferences when the privilege is claimed and allowed in favour of a third party.

Although sec. 125 of the Evidence Act does not in express terms prohibit a Police witness, if he is willing, from saying whence he got his information, the protection should not be made to depend upon a claim of privilege put forward, but it is a duty of the Judge apart from objection taken to exclude the evidence.

When Counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept a retainer therein.

There is nothing necessarily unprofessional in Counsel giving evidence in a case in which he appears as such. Though it may be undesirable, there is no absolute bar to Counsel being examined as witness even in respect of matters with which he was acquainted before he was retained.

SETHNA *v.* MIRZA MAHOMED SHIRAZI (5) *doubted.*

The true rule is that though engaged in the case Counsel is in law competent to testify whether the facts in respect of which he gives his evidence occurred before or after his retainer. The Court has no authority to exclude such evidence if tendered. At the same time it is recognised by both the Court and the profession that as a general practice it is undesirable, when the matter to which Counsel deposes is other than formal, that he should testify either for or against the party whose case he is conducting. In judging the matter from the point of view of what is desirable as opposed to what is legal much must depend on the circumstances of each case.

Where from the circumstances it appears that Counsel, because he was a material and necessary witness, ought not to have accepted the retainer, his client's opponent is entitled to ask the Judge to draw adverse inferences from the fact that he was not called as a witness. His client cannot plead his own act which made it undesirable for Counsel to come forward as witness against such comment.

CHATTERJEE, J.—*Counsel is not debarred by any rule of professional ethics from appearing as a witness in a case in which he has accepted a retainer, and he ought to offer himself for examination if his evidence is found necessary.*

WOODROFFE and COXE, JJ.—*It is unprofessional on the part of Counsel to cross-examine a witness as to facts within his personal knowledge.*

When Counsel in the course of cross-examination makes a charge against a witness or third parties, the Court is entitled to ask whether he made the charge on instructions and if so on whose. Instructions to Counsel are privileged only in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court.

[SEMBLE :—*The Court's disciplinary power over advocates in relation to questions put in cross-examination is not confined to questions reflecting on the witness personally, but extends to questions reflecting on third parties as well.*]

It is not sufficient for Counsel in such cases even to plead instructions, they have a responsibility in the matter and are not

(5) 9 Bom. L. R. 1044 (1907).

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justified in making charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

Held—*That the reference by the Judge to some medical works after the trial was over was open to the objection that whatever a Judge relies on should be made known at the trial to the parties so that they may have an opportunity of adducing evidence or argument on the point.*

A conspiracy for an unlawful purpose in respect of an act which if done by an individual would not be either a crime or a tort would be actionable in this country, by reason of special damage having been caused thereby, and the limitation applicable to such an action would be that provided in Art. 36 or Art. 120 of the Limitation Act.

But facts which give rise to a cause of action for a definite tort would necessarily exclude a cause of action for a conspiracy.

A suit brought against several persons as joint tortfeasors for damages in respect of certain acts alleged to have constituted malicious arrest, imprisonment and prosecution of the Plaintiff is governed by Arts. 19 and 23 of Sch. I of the Limitation Act.

A judgment of acquittal only decides that the accused had not been proved to be guilty by the Crown of the offences with which he had been charged. To this extent only and no more is it to be taken as correct and conclusive in a subsequent civil proceeding between private parties, the opinions and conclusions expressed in the judgment being otherwise irrelevant and inadmissible in such proceeding.

CHATTERJEE, J.—Quære :—*Whether in this country conspiracy alone apart from and independently of specific acts of tort furnishes a distinct cause of action even when special damage is proved.*

There is no authority for holding that a tort when committed by several persons acting in concert is different from the same tort committed by a single individual.

WOODROFFE and COXE, JJ.—*A Judge sitting on the Original Side may revise his judgment after delivery thereof, and in so doing may add to it.*

This was an Appeal preferred by the Defendants against the judgment of Fletcher, J., passed on the 7th of August 1911 (*see* 16 C. W. N. 145).

The material allegations of the parties and the findings of the Court thereon so far as they are material to this report will appear from the portions of the judgment set out below.

Messrs. W. Garth, A M. Dunne, Eardley Norton, W. Gregory and *S. Sharfuddin* for the Appellants.

Messrs. K. B. Dutt and *H. D. Bose* for the Respondent.

The JUDGMENT OF THE COURT so far as is material to this report was as follows :—

WOODROFFE, J.—If one confines one's attention to the relevant and material facts in this lengthy case, the issue may be very shortly stated. The Plaintiff alleges that the Defendants, who were the District Magistrate, Deputy Superintendent and Inspector of Police, respectively of Midnapore, in pursuance of their object, which is now (though not in the plaint) stated to be a wicked and concerted plan falsely to implicate in an imaginary "Bomb Conspiracy" "the respectable and wealthy inhabitants of Midnapore and other parts of India," placed and connived at the placing of a bomb in his house. They then, he says, pretended to search it and "discovered" the bomb which they themselves had placed or knew

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to have been placed there. Falsely alleging that the Plaintiff's son Santosh Das was responsible for the presence of the bomb, they arrested and imprisoned him. Then subsequently they arrested the Plaintiff as well, not in the belief that they were entitled to do so as the owner of the house in which the bomb was found or otherwise, but in order to extort a false confession from his son that the latter had put the bomb in the house which they knew had been placed there in pursuance of a conspiracy amongst themselves. The Plaintiff was after his arrest kept in detention for some time—for more in fact than a month—after the confession had been secured, to obtain which he is alleged to have been arrested, and then discharged for want of evidence. His son Santosh and another accused were at first convicted by the Sessions Judge, but were subsequently acquitted on appeal by this Court. The Plaintiff now sues in respect of the alleged pretended search and trespass in his house, his alleged false arrest, imprisonment, and malicious prosecution.

The first and main issue therefore is whether the bomb was placed in the Plaintiff's house by and with the connivance of the Defendants as alleged. If it were so placed, then there was a pretended search, trespass, malicious arrest, imprisonment of the Plaintiff, and assuming that what was done constituted a prosecution in fact, it was a malicious one. The existence of all these charges follows on proof of the first, just as on disproof of the first all subsequent charges are negatived, if we confine ourselves to the case made in the pleadings.

Mr. Justice Fletcher, before whom the suit was tried, was of opinion that the Plaintiff had failed to establish his charge that the bomb was placed in his house as he alleged, but for some reason unexplained (unless it be that in his view of the suit as one on a general conspiracy to cause special damages, which, in my opinion, it was not, proof of one overt act was considered sufficient) omitted to come to any conclusion whether there was either a pretended search or trespass. Whatever may have been the learned Judge's reason or whether it was due to an oversight, we must, I think, assume that as he omitted to find on these charges in favour of the Plaintiff, it was because in his opinion the Plaintiff had not established them. Nor did he determine whether there had been a malicious prosecution, unless it can be said that such determination is involved in his finding on the next two issues, to which I now refer.

The learned Judge has, however, found that there was a malicious arrest and imprisonment, and has given the Plaintiff a thousand rupees damages therefor.

If, however, as the learned Judge has found, the bomb was not placed in the house by the Defendants or with their knowledge, then it was truly discovered by them there. If they then honestly believed that the Plaintiff as owner of the house or otherwise was so implicated by such discovery as to entitle them to proceed against him under the provisions of the Indian Explosives Act (VI of 1908), then the only question which remains for determination was (apart from limitation) whether the act in fact justified his arrest.

The discovery of the bomb was in itself *primâ facie* justification (though liable to be rebutted) for that belief, as also for the arrest, if the warrant was issued under a provision of the Act which authorised it. On this issue Mr. Justice Fletcher,

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holding that the District Magistrate Mr. Weston had not spoken the truth, and that the Plaintiff had, found that the Defendants had no such *bonâ fide* belief in their right to arrest the Plaintiff, nor had they authority therefor. The issue then on the judgment (given according to the previous finding, the presence of the bomb) was whether the Defendants had such belief and authority: or to put the matter from the point of view of the Plaintiff, did the Defendants maliciously arrest him for the purpose and with the object of extorting a false confession from his son. I have said "on the judgment" because I here reserve the question whether the judgment has not travelled beyond the proper issues in this suit: and because Mr. K. B. Dutta who appears on behalf of the Respondent has challenged all the findings in the judgment which are against him, and therefore we have as regards Mr. Dutt's client also to ascertain whether the bomb was placed in his house as he alleges but Mr. Justice Fletcher has negatived.

The Defendants deny all these charges. Their defence, shortly stated, is this: The District of Midnapore at the time of the events in question was and had been for some time past in a very disturbed state, and Midnapore town was one of the chief centres of sedition. The Defendants received reports of a "Bomb Conspiracy," as it is called, which they thought credible and acted upon. Learning from such reports that the Plaintiff's son Santosh had taken to and kept a bomb in his father's house, they searched it. They found the bomb which they did not place there, but which on the faith of their informer's report they believed had been placed there by Santosh. The finding of this bomb, they contend, justified both the report received and the action taken on it, including both the search of the house, the arrest of the Plaintiff's son, and the arrest of the Plaintiff himself, who as owner of the house was called upon to explain its presence there. They deny that the Plaintiff was arrested as a means of extorting a false confession from his son. And they say that when after enquiries, including the confessions of his son and another co-accused, it was found that there were not sufficient grounds to further proceed against him, he was, some five or six weeks after his arrest, released on the 31st August 1908.

The gravity of the relevant charges made doubtless justified a full enquiry. The trial, however, exceeded all ordinary limits and lasted some eleven months The enquiry went with lengthy cross-examinations (that of the Deputy Superintendent of Police Maulvi Mazarul Huq, referred to shortly as "the Maulvi," alone taking over one month and extending to between 800 and 900 pages) into various matters, which in my opinion are irrelevant, and at length presented itself last April before us in the form of twelve quarto volumes of some 10,000 printed pages. The appellate hearing has taken some three months, fourteen months in all having thus been occupied in the discussion of what is supposed to be the Plaintiff's case.

The latter, I should have mentioned, is an old man, formerly in Government service as a Sub-Registrar of Deeds. In the year 1884 he was dismissed from Government service in connection with his action in having returned, to a party presenting the same, a forged deed. Whether any moral blame attached to him in the matter, or whether it was merely

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a breach of departmental rules, does not appear. It may be, and I assume it was, only the latter. Years ago he was an Honorary Magistrate in virtue of his office as Sub-Registrar, but he ceased to be that on his dismissal from the post of Sub-Registrar. His position at any rate in Midnapore was a comparatively humble one, and his means appear to be modest. His son Santosh was employed as a probationer in the Police, and his other son Ashutosh in the Post Office.

The evidence given in this suit covers a period extending from the Partition of of Bengal in 1905 to the decision of this Court in what is called the Midnapore Bomb Conspiracy Case in June .1909. Generally speaking, the evidence and judgment relating to this period discusses the political condition of Midnapore, the action of Government, the conduct of the district officials as regards not only the Plaintiff but third parties, the conduct of other officials who appear at different stages of the history, the decisions of this and other Courts in other Midnapore cases, the provisions of the Criminal and Jail Codes, and other matters with an exhaustive particularity which covers practically all administrative and judicial acts, which on the widest principles of admissibility can be said to precede, concern, or follow the alleged "Bomb Conspiracy" and connected matters between 1905 and 1909.

It is therefore not without reason that this case, which in the ordinary course would be entitled after the names of the actual litigants, has been known as "The Midnapore Case." But it is not only the extensive nature of the enquiry which justifies such an appellation. For I have no doubt that this suit is not the Plaintiff's suit only (if it is his suit at all), but that he is the mouthpiece of others whose implication, and possibly in some cases false implication, in the alleged "Bomb Conspiracy" or other personal reasons have caused them to prompt or support this suit with its extraordinary and as I find malicious charges. Mr. Weston seems not to have been a popular man at Midnapore with the Nationalist Party, whether of the right wing or "soft" (*naram*) or Moderate Party, of which Mr. K. B. Dutt was a leader, or the left or "hot" (*garam*), or as it is called Extremist Party. It is idle to suppose that a man of somewhat humble position and modest means, and who is so chary of expending them as to be described by his witness Bonomali as a miser, should, for the sake of the Rs. 1,000 which Mr. Justice Fletcher has given him, prosecute and carry on a suit for over fourteen months at the necessarily enormous cost involved. His real interest, if he had any, would in fact have been injured, as his real case has been embarrassed, by the introduction of charges which are not necessary to it, however they may have served the purposes of others. It would have been feasible for the Plaintiff to have framed a suit for illegal arrest (which is the Plaintiff's real cause of action, if (he has any), along in fact the lines of the alternative case put before us by Mr. Dutt, without resorting to the mass of charges of fraud which have encumbered this suit and have helped by their failure to discredit it. It is these charges also which have helped so largely to contribute to the great volume of this suit, which is probably as Mr. Dunne put it, one not merely (if at all) to right the supposed wrongs of a somewhat obscure resident of Midnapore, but of those other more wealthy or influential inhabitants

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of that town who conceived themselves to be aggrieved by the action of the Defendants taken by them during their administration of the District. The Defendants have in fact been called upon to justify their informer's reports not only as regards the Plaintiff's son, who took the bomb to his father's house, but also as against as many of the other persons implicated rightly or wrongly by those reports as the Plaintiff chose to call. As I pointed out at the hearing, there was no reason but the relative moderation of the Plaintiff, or the limitation of his purse, or those of his supporters, which on the principle on which evidence has been admitted in this suit, stood in the way of his calling every one of the 154 persons implicated by the reports and supporting the statements of each of such persons by such further corroborative testimony as he thought fit.

Mr. Justice Fletcher at one time seems to have been sensible of the dangers ahead, for he is recorded as having remarked to Mr. Dutt that he must be careful not to introduce other cases into this. Learned Counsel, however, was able to persuade the learned Judge that all that he introduced was part of a conspiracy. The question was not that, but whether it was part of the particular conspiracy mentioned in the pleadings. A suit possibly might have been brought by one of the persons claiming to be falsely implicated by the reports, in which, if such a conspiracy as has been here tried was alleged, evidence of the character now adduced might have been admissible. But this is not such a suit, and the conspiracy alleged in the plaint is different both from that which has been tried and that which has been found by the learned Judge.

A considerable portion, which is said to be one-sixth of the record, is concerned with the alleged ill-treatment in jail not only of the Plaintiff but of his son Santosh and a third party, Surendro Mukerji, unconnected with either save as co-accused of the latter. All this evidence has had eventually to be ruled out, as it was not shown that the Defendants were in any way connected with it even if it were true, which is denied. This evidence, in my opinion, should not have been admitted at all. Assuming it was all relevant, which I am not disposed to think, it should not in any case have been admitted until it was shown that the Defendants were connected with the ill-treatment alleged. Several witnesses have been called merely to prove the fact that this Surendro Mukerji was kicked by one of the Police Defendants, and other evidence has been given which is of equally little assistance in the determination of this case. There is also a considerable body of charges against officials other than the Defendants and also against the Police, which I deal with separately at the conclusion of the judgment, and which sometimes directly, and in other cases only remotely, if at all, affect the the issues which were allowed to be raised. The Defendants have also introduced some evidence of doubtful necessity and gone into it with some unnecessary prolixity, but of them it may be said that they were driven to do so either to meet evidence which was permitted to be given for the Plaintiff or to prove facts which the learned Judge has found to exist, though the Plaintiff's Counsel unreasonably refused to admit them.

Were I to deal with only what is absolutely necessary, it would be sufficient to say that the Respondent has not been

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able to disturb Mr. Justice Fletcher's finding that he had not proved his main charge on which his whole suit turns—the alleged introduction of the bomb. I should then point out that both Appellants and Respondent admit that other findings of the learned Judge are inconsistent and cannot stand; that his finding that the reports (upon which the search for the bomb was made) were wholly false was inconsistent with the previous finding that a bomb was in fact discovered, which therefore corroborated the reports. For the same reason, I should point out that the learned Judge's finding that the Police Defendants knew the reports to be all false could not stand when the discovery of the bomb (and I may add also of another) showed that the reports were not all false and were at least not false in that very particular which is the material one in this case. The same grounds which lead to the conclusion that the Defendants had, by reason of the discovery of the bomb, ground to believe in the reports which spoke of its possession by Santosh would also show that they had ground for believing in his confession which admitted possession of such bomb. These and other considerations would further show that whatever may have been the object of the Defendants in arresting the Plaintiff, it was not to procure a confession from Santosh which they knew to be false. But this was what the Plaintiff alleged, and according to the judgment of the learned Judge, has failed to prove. His suit should therefore have been dismissed as the Appellants contend. I should have then pointed out that the learned Judge has only avoided the natural conclusion to which his previous and other findings in the case should have led him by adjudicating on a new case for the Plaintiff, not that in the plaint and which was inconsistent with it. It would only have then remained to show that even if it were open to the Plaintiff, as it was not, to make such a new case, he had not established it in fact, and then to have proceeded finally to enquire whether the suit was not barred.

Our judgment has, however, been invited on all the facts by reason of the charges of crime and fraud involved and I have therefore thought it my duty towards the parties, and in particular towards the Defendants, who are affected by these charges, to express my opinion thereon. As the case has been allowed to proceed beyond its proper limits, it must necessarily be the case that my judgment which must follow it is a more lengthy one than would have been otherwise necessary. Whilst therefore I propose to examine all the evidence I do not assent to its being all relevant. Indeed, the bulk of it on a proper construction of the pleading is in my opinion not relevant. At the same time my own opinion as to such relevancy does not in any way affect the conclusions at which I have arrived, as I have taken into consideration all the evidence laid before us and other evidence I have myself read except the opinions of Judges, the alleged admissions of Counsel and evidence in other cases on which the learned Judge has in some instances relied, but which it is conceded before us are inadmissible.

The charges made are of the gravest possible character and such that if they be established, then not one of the Defendants is fit for further public employment. The peculiarity of this case is that they are not, as is usual, directed against the Police only (who in this case happen to

be officers of long service and good record, the Maulvi also as Deputy Superintendent occupying an exceptionally high position) but also against the District Magistrate Mr. Weston. It is alleged that he, who as such Magistrate was at the head of, and responsible for, the proper and just administration of the district, was himself a party to a very malignant criminal conspiracy (the other members of which were his subordinates, the two police-officers) to falsely implicate persons whom he knew to be innocent, and that for the purpose of such conspiracy he and they stooped to such base acts as the introduction of bombs into other people's houses, concocted false informer's reports, or acted on reports they knew to be false, arrested and imprisoned and ill-treated pe sons they knew full well to be innocent, suborned false evidence and were themselves guilty of forgery and perjury. In the course of this suit in which the gravest charges have been launched broadcast with a ligh. hand the Plaintiff or his witnesses have further charged a number of other gentlemen not parties to it with misconduct in connection with this case.

Mr. Macpherson, Commisioner of Burdwan, Captain Weinman, I. M. S, Mr. Brett, Assistant Superintendent of Police, Mr. Nelson, Joint-Magistrate, Colonel Buchanan, Inspector-General of Prisons, Babu Surendra Nath Chakravarti, Deputy Magistrate, Mr. P. K. Bose, Counsel of the English Bar practising at Midnapore, Mr. Hadrill, formerly a member of the English Bar and now a Solicitor instruc - ing the defence, have all been charged with varying degrees of misconduct, some of the grossest character, not merely dishonest but criminal. As these gentlemen are not alleged to be conspirators against the peace of the loyal and law-abiding inhabitants of Midnapore, we are asked to hold that they have all of them deserted in different ways and degrees the character to which they presumably owe their respective positions in order to unjustly and maliciously pursue the Plaintiff and his son Santosh Das with whom they have no personal concern.

Having regard to the extraordinary character of all these charges, the responsible position and *primâ facie* respectable character of the persons against whom they were made, and the unsatisfactory manner in which they had been put forward, I was at pains to endeavour to elicit from Mr. Dutt what his case (shift as it did throughout the trial) precisely was, how he supported it and met the numerous objections which the Appellants on a careful analysis of the judgment and survey of the facts had made against it. Were the Court in the hearing of suits to consult merely its own personal comfort in disregard of public time and money and at the risk of doing injustice through failure to understand a litigant's case, it might let advocates argue at large and then dismiss their case if that argument dib not seem to be sensible. But as the Court has a duty in this matter to examine, understand, and test the case, particularly where charges of fraud and the honesty of the litigants are in issue, so advocates for the party preferring such charges have a duty both to the Court which is asked to adjudge on them and to the Defendants against whom they are made. And here Mr. Dunne has anticipated some remarks I had intended myself to make. It has been said before now that fraud which by its very nature is secret in its movements is in a large number of cases not capable of establishment by positive and express proof. Whilst circum-

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stances of mere suspicion are no proof of fraud, resort must probably in the generality of cases be had to circumstantial evidence and the inferences derivable therefrom. No one therefore would complain of a Plaintiff having to depend on theory in regard to a case of fraud, for in a large measure its establishment must depend on theories and inferences from the facts proved. But what is required of a Plaintiff is that he should at least know and formulate precisely what the fraud is which he alleges and against whom he charges it, and he should be able also to definitely formulate in an intelligible way what his theory and scheme is and how it fits in with the facts. This Mr. Dutt was unable and as it appeared to me unwilling to do. At length when questioned he stated that he preferred to take his case in his own way. I pointed out that there was the risk in so doing that learned Counsel and the Court, particularly in a case of this magnitude, might overlook the particular point. Mr. Dutt, however, appears to have been willing to accept this risk, for though he on occasions returned to his subject, he did not return to the point. This is not the way a case should be presented to the Court. I need not say, however, any more on this aspect of it beyond this, that the failure to meet and indeed the evasion of the objections taken by the Appellants have convinced me as much as the arguments of the latter that in respect of the graver charges and the main issues of the suit the Plaintiff has no answer to them. I only here wish to add that the remarks I have made do not apply to the junior Counsel Mr. Bose, who, though obviously oppressed at times by the difficulties of his case, was always studious to afford in a straightforward manner such explanation of them as he could.

The other aspect is, however, to my mind a more serious one. Duty to the opponent in a case of this kind means the possession of a sense of ordinary fairness. Charges should be formulated and not merely hinted at. A charge may be met, but not a suspicion. The charge, if there is anything in it, should be put forth in a precise form and then pressed in that form, and not in some changed form, by all honest means. But if Counsel thinks that he cannot reasonably formulate or support it on the evidence it should be withdrawn. I observe, however, from the record that Mr. Dutt claimed (unless specially directed by the Court) the right either to state or not state his case to the Defendants as he chose, just as he claimed to regulate the civility which he should extend to their witnesses. I need hardly say that charges of fraud cannot be kept up the sleeve and then sprung on the opponent when it is thought that he is least likely to be able to meet them. Further, the charges have not only lacked definition, so that it is not possible even now to exactly say on some points what the Plaintiff's case is, but they have shifted throughout the whole length of the trial and appeal. The case was in fact on one or another material particular differently presented to the Court in the plaint, in the opening of Counsel, at the trial, and in the appeal. And the learned Judge in conclusion has in my opinion found a different case from that made in the pleadings and in some respects from that suggested in the opening of Counsel or at the trial.

It is a well known and fundamental rule not of technicality but of substance that when fraud is charged the plaint

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must set forth the particulars. Then evidence must be confined to the allegations. The charge must be substantially proved as laid, and when one kind of fraud is charged another kind cannot on failure of proof be substituted for it. The necessity of these rules is obvious, being founded not on any technicality of law but on grounds of essential fairness. If you make a charge you must tell your opponent fully what it is, so that he may be able to meet it. You cannot shift it during the trial for the same reason. And what the party cannot do the Judge cannot. The Court must decide according to the allegations which the party is permitted to make. It decides a case and does not make one. If the case as framed does not commend itself to its judgment it should dismiss it. It cannot decide it on some other ground because it thinks that that ground is more credible than the Plaintiff's allegations, or because it thinks that the Plaintiff might have made a case in another way and on which if he had, he would have been entitled to succeed. What Mr. Justice Fletcher has in effect done is this: he has either rejected or held not proven the grosser charges which the Plaintiff has made and on the proof of which in fact depends his whole case as made in the plaint. The principal charge, the alleged introduction of the bomb on which all the rest depend, the learned Judge has, however, treated as though it were an almost negligible incident in the case instead of being, as it is in fact, its keystone. He has then substituted for the case as made in the plaint another which stands independent of the proof of the charges (which he has found to have failed) and which is of a different character from that stated in the plaint and which the Defendants were not summoned to meet.

I will now proceed to examine this matter in detail so as to discover what the issues are which have been tried or should have been tried. I cannot, however, without unduly lengthening this judgment on a preliminary point, deal with all the shifts and changes in the Plaintiff's case. I take only such of the chief items as are sufficient to justify the observations I have made.

I start with the notice of suit given on the 31st August 1909, not because such notice was in fact necessary but because it indicates the root of the developments which followed it. That notice charged that all three Defendants acting in concert maliciously arrested the Plaintiff with the object of extorting a false confession from his son Santosh. Nothing is said of malicious trespass, search or prosecution.

This was followed by the plaint filed on the 15th November 1909. The suit is there described as one for wrongful confinement and malicious prosecution for which damages are claimed. It implicates all the Defendants in equal degree as joint tortfeasors.

The torts which they are alleged to have conspired to commit are,—firstly, malicious search and trespass: and, secondly, malicious arrest, imprisonment and prosecution of the Plaintiff; their object in so doing is alleged to be a desire to injure him personally in his good name, fame, reputation and loyalty as also to extort a false confession from his son. The meaning of these two sets of charges are as subsequently explained in the opening of Counsel and the evidence as follows:—the meaning of the charges of malicious search and trespass is that the

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Defendants are said to have searched the Plaintiff's house on the strength of the reports of a real informer, one Rakhal Chunder Laha. The reports were false. One of such reports falsely stated that the Plaintiff's son Santosh had carried a bomb into his father's house. The Defendants knew this and the other reports to be false. Nevertheless what they did was this. Dr. Bankim Chunder Ghose, now in charge of the Victoria Hospital, Hatwa, prepared an experimental bomb for the Maulvi who is said to be his friend. For this service the Doctor was, on the recommendation of the Defendants (as stated originally) or the Maulvi (as now stated), honoured by Government with a title. Then apparently the necessary knowledge having been gained, the Defendants conspired to put a bomb in the Plaintiff's house in accordance with the false report on which they intended to act, in order to implicate the Plaintiff's son. Before doing so and in order to facilitate their designs they had his brother Ashutosh Das suddenly transferred from Midnapore. The Maulvi had previously through the agency of a constable, called Kartick Singh, interviewed a boy, called Bonomali, who was an inmate of the Plaintiff's house. He promised to take the boy into his service and told him to come again. The boy did so on 7th July, and the Maulvi then gave him a bomb with instructions to put it in the Plaintiff's house, in pursuance of the conspiracy in which all the Defendants were concerned and of the acts done in the course of which conspiracy they presumably had knowledge, as they also had liability therefor. This the boy did on the 7th July. Immediately after the bomb had been so placed a search-warrant was taken out. On the following day a pretended search took place at which of course the bomb was discovered which the Defendants had conspired to put there. Santosh Das was then arrested on a false charge and taken to prison.

The meaning of the next set of charges as so explained is as follows:—The Defendants then attempted, by persuasion and threats to get a false confession from Santosh that he had placed the bomb in the house which the Defendants knew had come there through their own criminal conspiracy. They, however, failed. In order then to put further pressure on him to falsely confess they arrested his father, the owner of the house, who they necessarily knew to be wholly guiltless in the matter, for they themselves had put the bomb there. Even this had no effect until it was represented to Santosh that if he confessed his father would be released. The arrest of the Plaintiff was of course under such circumstances necessarily not merely illegal but criminal.

Before I pass to the opening of learned Counsel for the Plaintiff, I here pause to point out the exact intendment of the plaint. It is a well constructed pleading and hangs together in all its parts. The base of all its allegations is the charge that the Defendants in pursuance of a conspiracy between themselves put the bomb in the Plaintiff's house. Let us assume that fact. What follows? In the first place there was a malicious search and trespass, for the Defendants were not entitled to go into the Plaintiff's house on the pretence of search for a bomb they had put there themselves. Nextly, there was for the same reason a false arrest of the Plaintiff's son Santosh. For the same reason there was a false arrest, imprisonment, and prosecution of his father, the Plaintiff. They also arrested him to extort

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a confession which they knew to be false. They knew this fact directly for the same reason, *viz.*, that they had put the bomb there. Every charge therefore follows on proof of the first which is the basis of the Plaintiff's case. So vital is it that notwithstanding Bonomali's story has not been accepted by three Courts before it was put to us yet the Respondent insisted, and from his point of view rightly, in again pressing the story for our acceptance notwithstanding these adverse decisions.

Now let us assume that that basis is not proved or disproved which in legal result is the same. Then the Defendants did not put the bomb in the house. As the discovery of the bomb corroborated the report on which the search took place, there was ground on the facts proved for belief that both the Plaintiff as owner of the house, in a public room of which the bomb was found, and his son Santosh as the person reported against, were accountable. Both were liable to arrest. The plaint alleged that the Plaintiff had been arrested, though the Defendant knew him to be innocent. They were charged to be aware of his innocence in a particular manner, *viz.*, because they had themselves put the bomb in the house. With disproof of the latter fact follows disproof of the former allegation. Again they were charged with having arrested the Plaintiff (who on the ground stated they knew to be innocent) with an object. That object was to extort a confession from Santosh which was, and which they knew to be, false. But how did they know it to be false? Again because they had themselves put the bomb in the house, the responsibility for which they were pressing him to admit. If they did not put the bomb in the house they could not know his confession to be false in the manner as alleged in the plaint. In short, the whole scheme of the plaint is an introduction by the Defendants of the bomb and illegal action taken thereon and thereafter with a direct (and not inferential) knowledge that neither Plaintiff nor his son were responsible in respect of the bomb—a case in fact of direct and positive fraud. With therefore the failure to prove the basal fact on which the rest of the allegations of the plaint rests the other allegations also are not proved. I have analysed this matter in close detail because it is necessary that this point should be fully grasped in order to understand how much the case shifted and how far removed is the case found by the learned Judge from that which is made in the plaint.

I now pass to the opening of Mr. Dutt on the 17th August 1910. Here the first step is made towards the enlargement of the conspiracy, the principal object of which was then alleged to be not to injure the Plaintiff and not even primarily to implicate his son but to implicate in an alleged "Bomb conspiracy" "the respectable and wealthy men of Midnapore and other parts of India" from whom to continue to use Mr. Dutt's words, "the investigating officers" hoped to levy blackmail. The Defendants' object was not merely to implicate Santosh but as many of such other persons as possible through the instrumentality of false witnesses, fabricated evidence, and false confessions not only of Santosh but of others.

I pass to the issues. There is nothing about a general conspiracy to cause damage in the plaint, which as I have said describes the suit as one for malicious imprisonment and prosecution. The learned Judge, however, notwithstanding objection, considered that the Plaintiff

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was not bound by the description which he had himself given of his own pleading and framed two issues which extended the suit which was one against joint tort-feasors in respect of certain specified torts to one on a general conspiracy to cause damage to the Plaintiff of which the tortious transactions alleged as, and which were, his real cause of action were made merely the overt acts.

Evidence was then gone into. After the conclusion of the examination of the boy Bonomali on the 26th of August it must have become apparent to the Plaintiff's Counsel that reliance could not be expected for this evidence alone. The story had gone unless something else could be brought in to show that it was a probable incident in a wider scheme. Therefore in the months of September to November 1910 (the earliest objections that I note are at pages 2694 and 2873 of the paper-book), a case of still more extended conspiracy was put forth. It was then suggested not merely that the Defendants had conspired to implicate "the wealthy and respectable inhabitants of Midnapore and other parts of India" in an alleged "Bomb conspiracy," but that in a district free, or practically free, of sedition, the Defendants has conspired together to invent the "Bomb conspiracy" itself in which these wealthy and other persons were to be implicated. The conspiracy itself in short was the outcome of their own very wicked imagination. The charge then assumed a colossal form. There was first what Mr. Dutt calls a primary conspiracy. That which was alleged in the plaint became only a secondary conspiracy. The former was alleged to be the motive and cause, the latter the actual cause of action. The primary conspiracy by the Defendants was to invent another imaginary bomb conspiracy at Midnapore and then to implicate the wealthy and other persons there and elsewhere in it. The secondary conspiracy was merely instrumental to the first. The plaint alleged a conspiracy to injure the Plaintiff. But it was then said he was not really aimed at. It was not the predominant intention of the Defendants to injure the Plaintiff whatever in fact the results of the Defendants' act might in fact be. Indeed, there was no grudge, personal spite, or other personal motive against him at all. Nor except as a means to an end was his son Santosh aimed at. What the Defendants were, it was said, really aiming at was to injure the wealthy and other inhabitants of Midnapore and other parts of India and to "net" as many as they could in a spurious and invented conspiracy. The Plaintiff and the rest of his family, persons of somewhat humble condition and modest means, were to be the mere instruments of this wider purpose. They were to be such instruments in this way that through their extorted and false confessions the wealthy and respectable citizens might be falsely implicated. This extension of the general conspiracy involved also extensions of other charges. On the previous case only the report of the 7th July and those directly connected with it could be said to be relevant because they alone implicated Santosh. Now the Defendants were called upon to defend themselves in respect of all the reports and all the charges made against all other persons in those reports, the Raja of Narajole, Jamini Mullick, and numerous others of whom some thirty have been called as witnesses. The previous case as to the reports was that they were the work, though false, of a true

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informer. Though this was kept up through the trial, an alternative and inconsistent suggestion was also then put forward, *viz.*, that the reports were the inventions of the Defendants or some one or other of them. These theories again involved three different cases as to the Defendants' alleged knowledge of the falsity of the reports and the Plaintiff and his son's innocence. From the resulting entanglement the Defendants were invited by the Plaintiff to extricate themselves as best they could. First there was the original case that the Defendants directly knew that the Plaintiff was innocent and that the report concerning Santosh was false because they had put themselves or caused to be put the bomb in the Plaintiff's house in respect of which they accused the Plaintiff and his son. Then there was the case that the Defendants knew that all the reports were false not only as regards the Plaintiff and his son but every one else implicated by them for they had invented these reports themselves. Thirdly, there was the case on which Mr. Dutt says the learned Judge also went that though it might not be proved that the Defendants put the bomb in the house and therefore had direct knowledge of the falsity of their case against the Plaintiff and his son, and though the reports might not be of the Defendants' making, yet they were so false and so incredible on their face that the Defendants as honest and intelligent men should not have believed them as regards any of the persons implicated thereby, and if they did they were liable. We then get another extraordinary variation. The case opened was that Bonomali put the bomb in the Plaintiff's house before the search. A second case was then made, destructive of the first, that not Bonomali but a constable called Asadullah put the bomb in the house, and that he did this not on the day before the search but during the course of it having come into the building without having been previously searched himself. This novel suggestion, which has not been without its effect on the judgment, was made as late as the 2nd June 1911, after the close of the Plaintiff's case and after 42 witnesses had been examined for the Defendants to no one of which was the point put. Then to the case that Santosh was arrested to extort a confession of his own guilt was added the suggestion that the primary object was to get him to implicate wealthy and other third parties. To the case that the Plaintiff was kept in prison in order to extort a false confession from his son was added the charge that he was also kept there to extort another false confession from his other son Ashutosh and from a stranger Surendro Mukherjee. Then it was argued that even if it were not proved that the Defendants had conspired to put, and had put, the bomb in the house, and that the Defendants had arrested the Plaintiff to extort a false confession as alleged, still the Plaintiff was entitled without proof of these fraudulent acts to a decree. Finally, as Mr. Dutt admits, when the Defendants' case and argument was closed and Mr. Dutt was in his reply, he argued that the arrest having been as he contended under sec. 6 of the Explosives Act, the Defendants were not in any event authorised to arrest the Plaintiff as they claimed to have done as owner of the house under sec. 5. The previous assumption on which the trial had proceeded and in which Mr. Dutt had expressly concurred was that the arrest was effected under sec. 5, and that the

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statement in the plaint that it was under sec. 6 was incorrect, as it in fact was, for we have the warrant itself which shows that secs. 4 and 5 were the sections actually invoked. If, said Mr. Dutt at the opening of the case, Mr. Weston had arrested the Plaintiff on the 8th July, then no question could have been raised. At the conclusion of the case the argument of Mr. Dutt was that Mr. Weston could not have arrested the Plaintiff on the 8th July or at any other time.

Finally in appeal, the previous case having apparently been (to use the words of Santosh Das, who in this represents the tenor of the evidence of the rest of his family), that there was a conspiracy in which Mr. Weston was implicated "from start to finish," we were told that neither Mr. Weston nor Babu Lal Mohun Guha, though fully in the conspiracy at the end of May had any knowledge of the introduction of the bomb on the 7th July, but that they came to know it afterwards (when is not clear, nor how; or through whom is not stated) for, Counsel added, these conspirators must at least have had reason to believe (the grounds not being stated) that the Maulvi had in pursuance of the common conspiracy put it there. Then as regards the reports we were first told that Counsel's case was that the Defendants or some one or other of them concocted these reports. Later we were told that they were not concocted but the genuine though false reports of Rakhal Laha. And then upon my brother Coxe asking whether this answer applied to the report of the 7th July, Mr. Dutt said he would except that particular report which he alleged to be concocted, though no such exception had ever been taken nor suggestion made before, all the reports having been dealt with in previous stages of the case on the same footing.

I find at pages 8167-68 of the paper-book that Mr. Dutt put a question to Mr. Weston, upon which the Court observed "you are putting your case very high," and then stated what it understood the Plaintiff's case to be. Mr. Dutt then assented "yes, that is my case." Learned Counsel then put another question to the witness, on which the Court again interposed stating a case to which learned Counsel said "that is certainly a part of my case." Learned Counsel then put another question. The Court again interposed with an observation as to what its understanding of the case was, and then Mr. Justice Fletcher, who was naturally puzzled by these acceptances and departures from his statements of what he understood the case to be, was at length constrained to observe "that the case has moved a little." The case has in fact moved throughout its entire length as regards all its items, including the conspiracy alleged, the reports, the alleged knowledge and belief of the Defendants, the alleged introduction of the bomb and the Plaintiff's arrest. These constant shifts which have been gravely prejudicial to the Defendants also indicate that in respect of the matters so shifted the Plaintiff has no definite case founded on fact. It has been variously stated from time to time not because of any reason founded on fact but either in the hope that the charge in some form or other might be got home or because the exigencies of a defeated argument demanded it.

Mr. Dutt's only explanation of his departure from the rules which govern a case based on fraud is the surprising one that the Defendants have not been

prejudiced and that their case at any rate has been found to be false by the learned Judge. The Defendants have in fact been gravely prejudiced and have been defeated precisely because of the breach of the rules to which I have referred, and because of the learned Judge's views on the facts put forward as the result of such breach. I need not enlarge on what is so obvious, the difficulty in meeting undefined and shifting charges, the cost and trouble to which the Defendants have been put in having to sit out a trial of eleventh months whilst they have been made, and the prejudicial effect they are likely to have both on the mind of the Court and the possibility, which in this case has ripened into fact, that in this volume of irrelevant matter the real issues might be lost sight of. As to the first matter I observe that the learned Judge discredits a statement of the Defendants' witness Asadullah made with reference to the search for the bomb because Mr. Wilson, a witness who preceded him, had not been questioned as to its subject-matter. The learned Judge, however, overlooked the fact that Mr. Wilson could not have been asked about the matter, as when he was examined the Plaintiff's novel charge that it was Asadullah who had put the bomb in the Plaintiff's house had not then been raised. The Defendants could not be expected to foresee in this case of shifts and surprises when and in what direction the next step was going to be. This incident illustrates the dangers of the latitude allowed the Plaintiff. It is also not the least disadvantageous result of this excessively lengthy and unduly complicated case that the learned Judge has not in this and other important matters to which I later refer been able to correctly recall the evidence given and the facts which occurred at the trial.

I will now refer to the judgment. In doing so it will be convenient to distinguish between its state as it was originally delivered and as it now is after the addition which was subsequently made and which appears at p. 9128. I may here say that no one does or can question the propriety of this addition. It was open to the learned Judge to revise and add to his judgment as is commonly done. And in this case he was the more entitled so to do as copies of his judgment were only granted during his absence subject to his revision. What is, however, contended for is that the addition made does not represent and is inconsistent with the considered judgment which was delivered in Court.

I will consider therefore this latter judgment first. Neither in this nor in the revised judgment does the learned Judge come to any finding as to whether there was, or was not, any malicious search and trespass or prosecution. There is also an absence of findings on matters incidental to these and the other issues. I may mention some of the more important, *viz*, as to whether there was such a primary and secondary conspiracy as alleged and whether the reports were those of a real informer or not. There are passages which seem to imply the affirmative. Elsewhere, however, the learned Judge speaks of the "alleged" reports and expresses the opinion that it is not probable that a drunkard, such as Laha is said to be, evolved the reports, and states that in the absence of the latter it is impossible to say who wrote the reports on which so much is made to turn in this case by learned Counsel for the Plaintiff. Nor does the learned Judge

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find whether Santosh's confession that he put the bomb in the house, is true or false. It would certainly have been more satisfactory if the learned Judge had given his judgment on these issues and important points. But as he has not, it must be assumed that according to his judgment and having regard to what he does find (to which I next come) there was no malicious search or trespass, no such primary or secondary conspiracy as alleged and real reports. As to the latter if, as is the case, the learned Judge was unable to determine who was the author of the reports, we must assume that they were the work of Laha which they purport, and which the Defendants' evidence discloses them to be. If it is alleged by the Plaintiff that the reports were invented by some one else, the Plaintiff has to prove it. Similarly, as regards the confession, as the learned Judge according to his original judgment did not find it to be false, we must assume that this was because he found himself unable to do so.

What the learned Judge does find is this. He finds, *firstly*, that the Plaintiff has not proved that which is the basis of his suit, *viz.*, his allegation that the Defendants were responsible for the presence of the bomb in his house. He next finds that the reports are false and that there is no truth in the evidence of the Defendants' witnesses which corroborate certain incidents in them. He then makes a distinction between Mr. Weston and the Police. The former he says, misled by the Police, believed these false reports grossly improbable as he finds them to be. Mr. Weston is also found to have believed that Santosh's confession was true. It is found that the Police, though it is not suggested that they had other information which Mr. Weston had not, did not believe either. The reasons which the learned Judge assigns for this distinction are, as regards Mr. Weston, that he had his house guarded by armed constables. The learned Judge does not say in connection with this passage whether Mr. Weston did so under a reasonable apprehension of danger. During, however, the course of the case, he made the following remark to which our attention has been called: "Two policemen played upon Mr Weston's fears and Mr. Weston fell into the trap." From this observation it would appear that the precautions which Mr. Weston took for his own safety were due to lack of courage, and that there was no real ground for them. As, however, the remark was made during the progress of the suit and before the Defendants' case was concluded, we cannot treat it as having been intended by the learned Judge to be a finding in the case. In fact his subsequent judgment when he had considered the evidence does not seem to support this reflexion on Mr. Weston's courage. The observation suggests that there was no conspiracy except what was got up by the Police and Mr. Weston was put into groundless fright by the trap they set for him. The judgment does not find any such concoction of a conspiracy by the Police, but on the contrary that there was a real criminal conspiracy at Midnapore which was in a highly seditious state, and which conspiracy as the learned Judge finds included Satyendra and Khudiram, both of whom were subsequently hanged. The evidence further proves that Mr. Weston's life was threatened. In my opinion there is no ground for the conclusions involved in the learned Judge's observation, if it was

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not, as I think it may have been, merely a passing remark recalled in effect though not in words by the judgment. The proved state of the district and the actual attempts made on the life of officials in other parts of India, such as that upon the life of Mr. Kingsford at Mozufferpur, resulting in the deplorable death of two unfortunate ladies and Mr. Allen at Goalundo and other similar attempts, fully justified Mr. Weston in taking the precautions which he did. The learned Judge also finds that Mr. Weston did take some steps to satisfy himself that the reports were true. Mr. Justice Fletcher next finds that the Police did not believe the reports. This he infers from what he finds to be "the procuring and attempting to procure false evidence, the tutoring of confessing prisoners and others by these two Defendants." He then proceeds to deal with the issue of false arrest and finds that there was a conspiracy to arrest the Plaintiff by all the Defendants who did not believe that the Plaintiff was accountable in respect of the discovery of the bomb, but did so to put pressure on the Plaintiff's son to confess and not to extort a false confession as alleged in the plaint. It is clear on the judgment that the learned Judge thought that Mr. Weston's object was to obtain a confession of facts which he believed to be true. Though the learned Judge finds that the Police did not believe the reports he apparently excludes that portion of the reports which refers to Santosh. For he finds that they also conspired to put pressure to obtain not a false confession but a confession: and if they had disbelieved the reports which implicated Santosh, then their object must have been to extort a false confession which is not found. On this ground of malicious arrest the learned Judge decided the suit.

To this judgment the learned Judge subsequently added the sentence after his conclusion that the Plaintiff had not proved that the Defendants were responsible for the presence of the bomb in the house: "I am unable to say who placed the bomb in the house, but in my opinion Santosh did not." As I have pointed out in the original judgment the learned Judge omitted to find whether Santosh's confession was true or false. If it was true, there was an end at once of the charge against the Defendants in respect of the alleged placing of the bomb. The learned Judge did discuss this confession; but from the point of view of certain alleged irregularities in the taking of it, which were immaterial if the confession was itself false. It is argued, and I think with reason, that the general tenor of the original judgment shows that when it was delivered the learned Judge was unable to come to the conclusion that Santosh did not put the bomb in the house and therefore abstained from a finding on the question of the truth of his confession though a finding one way or another was necessary. We must, however, take it that even though there is now no formal finding on the point the added remark necessarily implies that the confession was false. But for this added conclusion no reasons are given.

These findings have been attacked by both Appellants and Respondent on three grounds. Both parties agree on the first two grounds. The Appellants alone take the third ground.

In the first place both parties claim that they were entitled to a decision on all the issues raised and on the points incidental to those issues. As I have said in the absence of any finding on a particular point we must assume that on such points

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the learned Judge was not satisfied that the Plaintiff, on whom the general onus lay, had made out his case.

In the second place both parties take exception to the judgment on the ground that its findings are, as is I think the case, inconsistent. Mr. Dunne on the one hand has pointed out, and Mr. Dutt on the other admits, that if the allegation that the Defendants put the bomb in the house be negatived, as Mr. Justice Fletcher has done, then the search was not as alleged a pretended search, but the bomb was truly discovered as a result of it. And if it was so discovered, then such discovery (and I may here add of the other bomb subsequently found in the house of the Dutt's) *pro tanto* went to prove the truth of the reports and (of Santosh's confession) which cannot be wholly false, unless possibly we adopt (as we are not entitled to do) a third case which is not that of either party, *viz.*, that it was not Santosh who put it there as the Defendants suggest, or the Defendants who put it there, as the Plaintiff suggests, but some third unknown party. A case, however, cannot be decided on an hypothesis which is not that of the parties but inconsistent with it. In other words the learned Judge's findings that the bomb was not placed in the house by the Defendants and the finding that the reports in consequence of which it was found were wholly false cannot stand together. Nor again can the first finding stand with the third that the Police did not believe in the reports or, in other words, knew them to be false. For they could not know that to be false which, for the reasons I have stated, was not false but shown to be true by the discovery of the bomb. And it is not, and could not be alleged, that the Police knew that some third party had introduced the bomb. The Plaintiff's case is that they put the bomb there themselves and on that case the suit must be decided. Mr. Dutt again has a grievance on the same ground of inconsistency, looking at the matter from another point of view. He points out, *firstly*, that the learned Judge finds that the reports, including that of the 7th July on which the search proceeded, are wholly false, and that there is no truth in the evidence of the Defendants' witnesses who speak to them What then is the result? Santosh did not put the bomb in the house; the story of the existence of the bomb, of the meeting at which it was shown, of the way it was obtained, of the manner in which it came into Santosh's confession are a pure myth. But Mr. Dutt further points out that not only does the learned Judge find that to be so, but he finds that the Police who made the search knew the reports to be false and knew that the story about Santosh and the bomb and so forth was a myth. If that be so there could not have been a *bonâ fide* search in consequence of reports which were false and known to be so. And Mr. Dutt contends that the conclusion should have been that there had been a malicious trespass and search against these men who are found in effect to have invaded his house under colour of supposed information, which, if they did not actually invent, was wholly false and known by them to be false? But the answer in my opinion to Mr. Dutt's argument is this. We are not losing ourselves in words but we are dealing with facts. And the palpable fact is that in the early hours of the 8th July 1908, an article described to be like a hockey ball weighing 5 chittaks and subsequently analysed to contain explosive

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powder and shot was found in the Plaintiff's house. That is an admitted fact and not a myth. Had of course the Court found that the Defendants put it there, then the allegation that Santosh did so would have been found to be such a myth and the Plaintiff would have succeeded along the whole line of his case without further discussion. But the Court has not so found but has negatived that case. A bomb was therefore truly discovered; such discovery was a fact which showed that the reports were not wholly false and the Defendants could not know that to be false which such discovery showed to be true. In other words the findings are not consistent. There are others to which the same criticism applies, but I need not deal further with the matter here beyond observing that whatever be the decision which should be arrived at in this suit, it cannot in my opinion rest on the grounds on which the learned Judge has put it.

The third objection is taken by the Appellants only and is also sound. They contend that the learned Judge should, after he had negatived the main issue, have dismissed the suit, but that on the contrary he has decided it against them on a ground not raised in the pleadings which must be taken to formulate the only case they are called upon to meet. This criticism that the learned Judge's decision is not in conformity with the case of the party applies to a number of other matters besides the main issue with which I now deal, such as the general distinction he makes between Mr. Weston and the Police, his finding as regards the recording of Santosh's confession, and as regards the alleged attempt to suppress his petition of retractation on the 31st August. On this main issue to which I return I have already pointed out what the case of the plaint was, how all was made to turn on its allegation as to the introduction of the bomb by the Defendants, how the alleged belief of the Defendants in the Plaintiff's innocence depended on it, as did the motive of the alleged malicious arrest, *viz.*, the extortion of a false confession; and I therefore do not desire to repeat myself here. I will only now point out how the Appellants' criticism is justified.

Now it is a well known rule of law that an act which is not in itself actionable does not become so because the motive is malicious or bad. A man may prosecute another for reasons of personal spite, but if he, in fact, had reasonable and probable cause for so doing, there is as regards the prosecution no ground to proceed against him. Similarly, though I do not say it was the case here, if for the sake of argument we assume that Mr. Weston did arrest the Plaintiff in order to induce his son Santosh to make a confession, that would have no legal consequence provided that Mr. Weston in arresting the Plaintiff had a *bonâ fide* belief in his right to do so and was in fact justified in law in doing so. Therefore it is not the motive in itself which is of importance but the belief with which the act was done. If on the other hand, as the learned Judge finds, the Defendants when arresting the Plaintiff had in law no authority to do so and did not believe in the existence of such authority, or that the Plaintiff was accountable in respect of the bomb found in his house either as owner or otherwise, then of course the arrest of the Plaintiff merely to procure a confession, whether true or false, from his son would be a fraud on-

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the statute under which it purported to take place, for it was an act not done in furtherance of the ends of that statute but for another and indirect purpose.

The point then is, were the Defendants acting in the honest belief that they were entitled to arrest the Plaintiff, for I will deal in its own place with the question whether the statute in fact authorised the arrest. Now the original case made by the plaint was that the Defendants had no such honest belief. And why had they no such belief? Because they directly knew the Plaintiff to be innocent. And how again did they know this? Because they had themselves placed the bomb in the house in respect of which they were charging him. And what was their motive? To extort a false confession from his son Santosh, a confession which they knew to be false for the same reason that they knew the Plaintiff to be innocent. The learned Judge has found all these allegations which were those the Plaintiff made in his plaint to be not proved. He has, however, in effect said this: "It is true that you have not proved the ground of your suit, or the allegations which are based thereon in the way alleged in the plaint, but I hold it has been proved in another way."

I state the finding as it has been presented to us in argument. Now the plaint not only alleged that in arresting the Plaintiff the Defendants did not believe in his guilt but it also told us why they did not. And that is because the Defendants had put the bomb in the house themselves. But when this fact is negatived, the alleged ground of the Defendants' disbelief has gone. The judgment substitutes no other ground for it, and does not explain how it was that the District Magistrate believed that the Plaintiff was innocent. The discovery of the bomb was a fact which *primâ facie* justified the Magistrate's belief in the Plaintiff's guilt as also the Plaintiff's arrest. But what the learned Judge does say in effect is this: "Notwithstanding such *primâ facie* right to arrest, and that the alleged ground for the Defendants' disbelief has gone, I find as a fact that the Defendants did not believe in this right to arrest." Then the learned Judge makes a distinction between Mr. Weston and the Police which is the case of neither party. Mr. Dutt claims, and if his case were founded in fact rightly so, that all the Defendants in respect of the main issue stand on the same footing. The Appellants say the same and that Mr. Weston does not shirk any liability by casting it on subordinates who worked under his orders. But the learned Judge does draw such a distinction. And the reasons why he says Mr. Weston did not believe in his right to arrest the Plaintiff are these. In the first place it is said that the informer's reports did not inculpate him. That is admitted and the fact only shows this and nothing more that the Defendants cannot (as they do not claim to do) directly rely on the reports as their ground for arresting the Plaintiff. But the learned Judge goes further. He says in effect that the reports exculpated the Plaintiff. This is however not so. The reports deal with the state of things before the bomb got in the Plaintiff's house—a state with which the Plaintiff was admittedly not concerned. They do not and could not speak as to the state of things after the bomb was in the house whether the Plaintiff knew of its existence there or connived at its keeping and so forth. Secondly, it is alleged that Mr. Weston

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knew of the search before it took place, and if it was his case and belief that 'the Plaintiff was as the owner of the house liable to arrest, then it is said he would have arrested him then and there. But as the Plaintiff was admittedly not then arrested, Mr. Weston had, it is concluded, no such belief.' Mr. Weston's answer is that he did not know of the search before it was made, and that had he known of it he would have arrested the Plaintiff on the 8th July; that when he found that the Police had not done so, he blamed them; that on their asking whether they should go back and arrest the Plaintiff, he said that as they had not arrested the Plaintiff at first they had better wait until it had been ascertained whether the article found (which was alleged to be a play-ball by Santosh Das) was really a bomb, and, if so, whether it was of a dangerous character; and that he in fact waited till the receipt of the Chemical Examiner's report which showed that it was a dangerous bomb, and then arrested the Plaintiff on the first day of hearing of the case following the receipt of such report. The learned Judge has, however, found that Mr. Weston's explanation is untrue, and that in support of one particular the Maulvi has committed a forgery. Thirdly, though, as I have said, the finding of the bomb was *primâ facie* ground for the arrest, and though the learned Judge finds that Mr. Weston believed in the existence of a bomb conspiracy, in Santosh's guilt and the truth of his confession, he did not, he finds, on the other hand believe in the complicity of his father, for he is found to have expressly told the latter on many occasions that he was well aware of his innocence, that he need not be nervous, and to have expressly told him that the reason why he would arrest him was the eventuality of his not getting a confession from his son, which the Plaintiff alleges Mr. Weston, who made this alleged threat, knew to be false. This story that Mr. Weston admitted to the Plaintiff his guilty intentions as regards him sees the light of day for the first time in the evidence in this suit. If it were true it would have been put forward before and made the basis of his pleading in which case all the other allegations of fraud were wholly supererogatory. If you can believe the proof offered there is no better evidence of a man's state of mind than what he himself states it to be; and it was not necessary if Mr. Weston in fact made such an admission to allege that he put a bomb in the house or did any other of the criminal acts alleged. As I am now only outlining the facts, I do not here give the reasons for my finding that this story also has been proved to be false.

It will be observed from what I have said that the effect of the judgment is to substitute for the case of direct knowledge by the Defendants of the Plaintiff's innocence due to their direct knowledge of the truth of the facts owing to their having placed the bomb in the house themselves, a case of knowledge based on grounds of inference from alleged acts, circumstances and conversations, including direct admissions. What Mr. Dutt relied on in his opening was not such an admission, but the alleged fact that Bonomali had put the bomb in the house. Mr. Dutt must probably have had in the proofs of the Plaintiff, his first witness, some such statement of the conversations he is said to have had with Mr. Weston, as he (the Plaintiff) has deposed to in Court. It is a noteworthy fact, however

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that in the opening (I quote from the transcript he has given us) he does not beyond a vague allusion to "threats" mention these admissions. It is possible he did so, and has not been reported. But if so, this can only have been because the reference was of a cursory character. Mr. Dutt, to whom these conversations are alleged to have been reported, possibly was able to estimate this evidence at its true value and therefore rested his case in conformity with the pleading on the story of the introduction of the bomb in the house. If this were not so, one would have expected him to put these alleged admissions prominently forward. His argument would have been "there is no doubt about Mr. Weston's belief in the innocence of my client for he repeatedly told him so. There is no doubt what his motive was in effecting my client's arrest, for he expressly told him that the cause of the arrest which followed his threat was his failure to get his son to confess." If this story were true, one would expect it to be put in the forefront of the case, especially if Mr. Dutt had, as the Plaintiff alleges, been told about all these conversations immediately after they are said to have occurred. That Mr. Dutt did not so put it shows two things: that he considered his real case to rest on the story which his witness Bonomali was going to tell about the introduction of the bomb, and he estimated, as I have said, the story about the alleged admissions of Mr. Weston at their true value by saying nothing about them. It was only after Bonomali's story failed that an attempt which has proved successful was made to rest the case on them.

To pass to the case of the Police. The learned Judge has found as I have stated that the Police did not believe the reports and therefore presumably did not believe the conspiracy. Presumably also on this finding they should not have believed in Santosh's guilt or the truth of his confession. I cannot say, however, that the learned Judge has found this, for he has found that they arrested the Plaintiff not to extort a false confession from him, but to put pressure on him to make a confession. The grounds for their alleged disbelief in the reports as alleged in the plaint have been negatived, but it is found as a fact that they did not believe in them because they tutored witnesses, and so forth. As I have already pointed out, it cannot, on the learned Judge's previous finding as to the bomb, be held that they disbelieved reports which spoke of a bomb and were verified by its discovery. So the only remaining ground for their liability is their alleged conspiracy with Mr. Weston, for whose acts done in pursuance of the common object of it they are charged to be liable. But the uncontradicted evidence, and the learned Judge has not said that he disbelieves it, is that the Maulvi acted only under the orders of Mr. Weston, who alone was responsible for the arrest both as initiating and directing it; and Lal Mohun Guha was a subordinate acting under both. And it is conceded that if that be so, though Mr. Weston's orders, if not authorised by law, would not exempt them from liability for the arrest, there would on such state of facts be no evidence of any conspiracy in this regard. Finally as regards the motive of the arrest, the learned Judge substitutes in lieu of the case in the plaint that it was to extort a false confession, the case that it was done to put pressure on the Plaintiff to obtain a confession from his son which was believed to be true.

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It is clear that the case thus found which is made to stand independent of the causal fraud alleged in the plaint has no resemblance to the case there made, and if it were necessary to do so, I would have, after affirming the finding that that fraud had not been proved, held that the suit should be dismissed on these grounds. It is, however, not necessary to rest my judgment on such grounds as an examination of the evidence, irrelevant as it was, has led me clearly to the same conclusion.

Though Mr. Dutt has himself taken exception to the findings of the learned Judge, he has urged nevertheless that we should at any rate consider ourselves bound by his appreciation of the witnesses he saw, an advantage which we as an Appellate Court have not had. I have during the course of this judgment given fully my reasons for appreciating the evidence differently from the manner in which the learned Judge has done. In answer, however, to learned Counsel's submission it is incumbent on me to make some further observations of a more general character on this matter. In the first place what I have said of the issues and the mode in which they have been determined touches this question of appreciation of evidence. We cannot be affected by the learned Judge's appreciation of evidence on matters on which he does not decide. Nextly, the weight of such appreciation where there is a decision is diminished by the following facts. In some cases witnesses have been discredited on matters of which there is no evidence; in others the learned Judge has relied on matters which are inadmissible. Next he has discredited evidence given on behalf of the Defendants owing to an erroneous reading, or misrecollection, of what that and other evidence was. I deal with these matters in their places in the judgment, but in illustration only of my remarks I may here point to the discrediting of Rahman's story as to the circulation of the "Message to the Punjabis" on the ground that the document produced is a proof of which there is no evidence and which is not the fact. There is in respect of the witness Kartic Singh the reliance on the deposition in the Sessions Court of Kishoripati Roy, who has not, however, given any evidence in this case. There is the reliance which the learned Judge places on Upendra Nath Maity, whom he regards as one of the principal and most reliable of the Plaintiff's witnesses, and to which conclusion he is influenced by the opinions of the learned Judges in the criminal case which he cites but which are not evidence. On the other hand, Lal Mohun is suspected because of the learned Judge's findings on the Narainghur case. On the other hand, also, we have the discrediting of the evidence as to the search at the Dutt's house on a supposed admission of Mr. Gregory in the criminal case which is denied, and is in any case no evidence. On the same matter the learned Judge is under the erroneous impression that Mr. Cornish said that he suspected such search which he did not. I have referred to the case of Asadullah and Mr. Wilson. The latter is also discredited because the learned Judge thinks that the story he tells about the guarding of the Plaintiff's house was a new story, whereas in fact the record shows that it was put forward at the first opportunity. Mr. Weston's statement on the important questions whether he knew of the search before it was made is discredited on an erroneous reading of the Maulvi's evidence, on an omission to recollect what the learned

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Judge had ruled about Mr. Weston's pleading, and on the mistaken supposition that Mr. Cornish made a particular statement when he in fact said the contrary. Other similar errors I deal with in their places. As regards these matters I may observe that it may doubtless not have been easy in the case of this enormously lengthy record to be always accurate as to what had been said or done, the more particularly that the learned Judge was not favoured as we have been with printed books, proper indices and the abstracts which have been supplied us. But that circumstance, while it may help to explain these and other mistakes, does not dispense, much less prevent us, from examining for ourselves evidence, the appreciation of which has been affected by them, particularly having regard to the gravity of the charges in support, or defence, of which it has been given. Further, the earned Judge has criticised the evidence for the Defendants. But beyond the statement that some of the Plaintiff's witnesses are not loyal and law-abiding, the learned Judge has omitted to deal with the question whether their evidence was open to criticism by reason of their having said that which was untrue. In so dealing with the case the learned Judge has overlooked the fact that the general onus was on the Plaintiff. Though, the learned Judge holds that Bonomali's story is not established, he omits to observe that his evidence is (as it undoubtedly has been proved to be) false. As I shall have occasion to point out in this judgment there is no doubt whatever on the depositions of the Plaintiff and some of the most important of his witnesses, it clearly appears that they have given false, and in some cases admittedly false, testimony. To arrive at this conclusion it is not necessary to have seen these witnesses. It is patent on the depositions themselves. As regards the appreciation of the Defendants' witnesses it is not only affected by the mistakes to which I have referred and others, but in some cases adverse criticism is passed upon them for which in my opinion no sufficient grounds are given. As regards the Maulvi's evidence, I will deal in detail later. Further in the appreciation of testimony, it is necessary to observe whether it has been met by other available evidence. But though the learned Judge has adverted to the non-calling of evidence by the Defendants, he has omitted to observe that the Plaintiff's evidence is gravely open to attack on that very ground. In fact the only reference which he makes to this matter is that relating to the objection that inferences adverse to the Plaintiff should be drawn from the absence from the witness-box of Mr. K. B. Dutt, who is said to have knowledge, either personal or reported, on every one of the main incidents in the case, and against whom, in connection with it, personal charges have been made. I deal at the conclusion of this judgment with the question whether Mr. Dutt was as Counsel precluded from giving evidence, and whether even were that so, the fact of the Plaintiff having briefed him deprives the Defendants of the comment that he should not have been briefed but should have been called. It is sufficient for me to say here that the fact that he was not called is in my opinion one of the invalidating arguments against the truth of the Plaintiff's case.

Before proceeding to deal with the facts, I wish here to clear the ground of other matter dealt with in the judgment though according to its terms, they are

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not material. The learned Judge has discussed in detail various provisions of the Criminal Procedure Code, secs. 172, 364, 344, 167 (read with the Bengal Police Code), 352, 154, dealing with case diaries, recording of confessions, remands, provisions as to open Court, and first information; matters which no doubt would not have been out of place were we dealing, as we are not, with an appeal from a conviction of the accused in the criminal case. It is true that on the case which Mr. Dutt asks us to accept some of these matters might not be without relevancy. For that case is that every act which Mr. Weston and Mr. Nelson, the Joint-Magistrate, who is alleged to be his "tool," did from the beginning to the end of these proceedings was fraudulent. As Mr. Dutt puts it, these matters discussed are not merely irregularities. They were deliberate and perverse breaches of the law committed for the purposes of the conspiracy alleged. But that is not what the learned Judge finds. He discusses them merely as irregularities, and no ground has been shown us why they were more than that. I must not be understood to assent to all the legal propositions which the learned Judge lays down, and in particular I do not assent to the observations made relative to the first information and the argument which underlies it that it should have been laid by the Police spy. Let it, however, be assumed for argument that the Defendants, Mr. Nelson, Mr. Plowden and others, may have been in error in construing these provisions or may not rightly have followed them. That is not material. The question in this case is not whether Mr. Weston or the Police acted in all matters with all wisdom and discretion, or whether they [illegible] rigorously or mistakenly or with legal irregularity. That is not the issue, nor could it be. The question is whether in whatever they may have done they acted in honesty and good faith or fraudulently, and whether the Defendants maliciously as alleged abused the powers with which the law vested them to commit the dishonest and grossly criminal acts with which the Plaintiff and his witnesses have charged them. The issue in short is one of fraud and nothing else. In some matters such as the interpretation of the provisions of the Code relating to the first information the observations made would appear to have no bearing even on the assumption of a case such as Mr. Dutt seeks to make. It is true that before Mr. Justice Fletcher it was charged that the first information which had been drawn up by Messrs. Morshead, Denham, Plowden and several others, including Mr. Withall, the attorney, was, to use learned Counsel's words, "a clumsy forgery;" but in this Court learned Counsel appeared to be rather embarrassed by the absurdity of the suggestion, and whilst Mr. Dutt explained that his words, which on their face covered the whole typed document, were really directed to some obvious additions by pen and ink of some further names by the Maulvi, Mr. Bose, his junior, told us that the suggestion though made in the Original Court (apparently in that light and haphazard way in which the gravest charges have been launched in this case), was afterwards there withdrawn. After this incident we heard nothing further as to a charge which is without a pretence of substance. I wish to add one word to the criticism which the learned Judge has passed on the Police for their not having, for a part of the period, kept case diaries. These no doubt should have been commenced

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to be kept earlier and before the 3rd August. The circumstances, however, were peculiar. There were a large number of cases which were later apparently amalgamated. Besides the case of the 7th July, No. 3750, there was the case against Surendro Mukerjee, No. 4224 of the 30th July, the Dutt's case, No. 3751 of the same date, and on the 26th August there was case No. 4225 against some other 20 accused. Owing to the complexity of the case and number of charges involved the first information was not filed till September. Mr. Dutt, however, sees in this omission a deliberate attempt to forward the alleged conspiracy. It is difficult to understand how this could be. For if we assume, as we are asked to do, that a false case has been made as to events during the period from the 8th July to the 3rd August, when the diaries were started, are we also to assume that the sense of truth of persons dishonest and fraudulent as the Police Defendants are alleged to be was so great that they would have stated in these diaries such a real statement of fact as would have discovered their alleged fraud. The learned Judge has not found that the omission to keep the case diaries spelt this case of fraud. But there is another and conclusive answer in a circumstance to which the learned Judge omitted to refer; and that is that Mr. Cornish, the Superintendent of Police, takes upon himself all blame in the matter and responsibility for this omission, and Mr. Cornish is one of the extremely few persons amongst the defence witnesses whose desire to tell the truth is not impugned. If, therefore, there were any such fraudulent object as Mr. Dutt alleges, Mr. Cornish must have been in the alleged conspiracy which, however, is a case he does not make.

As regards the provisions of the Jail Code, the learned Judge, notwithstanding that he held that the alleged breach of them was irrelevant, has observed that the treatment of many of the prisoners was not according to its provisions. The matter was of doubtful relevancy or value even as regards the Plaintiff and his son, and we are not concerned in this suit with what may, or may not, have been done as regards third parties. Even as regards the Plaintiff and his son and Surendro Mukerjee it has been found that the evidence does not connect any of the Defendants with such alleged ill-treatment, if it existed, which is denied. It seems to have been erroneously supposed that Mr. Weston was responsible for the jail, and it was found necessary to prove that the Inspector-General of Jails is in control of them. Some of the charges in respect of this matter have been of a trivial character, such as the Plaintiff's alleged difficulty in getting a light for the cigars which the jail supplied him; others are in respect of annoyances commonly suffered in this country such as the presence of ants and mosquitos; others refer to the discomforts incidental to jail life; and there are some which have the appearance of greater substance but which are denied. The complaints, as a reference to the *Medini Bandhab* newspaper to which Santosh Das contributed his "Prison story" shows, are very indefinite and resolve themselves mainly into a charge that each undertrial was kept in a cell by himself. It is in evidence, however, that the general undertrial ward, where ordinary undertrial prisoners were confined, was extremely overcrowded, the number of undertrials being always 70 and often more, while the capacity of the ward was 35 or 45. It would have been impossible therefore

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to meet the wishes of the persons accused to be confined in the general ward with the ordinary class of low and common criminals, had such a desire been ever expressed. Mr. Dutt suggests as a grievance that his client was deprived of such criminal company. I have but little doubt myself that had his client instead of being given a separate cell been herded with criminals of a low and common type this in itself would have been made the subject of grievance. No complaints were made at the time either to the Superintendent of the Jail or to the Commissioner, Mr. Maddox, when he visited the jail, and the charges, which in my opinion are unsubstantial, have been introduced to give a colour of hardship and prejudice to the proceedings taken against the Plaintiff. In my opinion the Plaintiff's real hardship, if he had one, was not that he was given a separate cell, but that he was kept in prison at all. Though something may be said from the point of view of the condition of affairs at the time, I think an old man such as he was and a resident of Midnapore, who was not likely to, and could not have, run away, might well have been released on bail. This is not, however, a matter which touches the issue. As regards the actual conduct of the jail by Captain Weinman (whose experience of central jail management began only a week before Santosh's arrest), the opinion of the Inspector-General of Jails, based as it is on years of practical experience and on actual knowledge of what courses were open to the Superintendent as regards the disposal of the prisoners, must necessarily be far more valuable than any which the Court is in a position to frame. And his opinion was a very favourable one as to the manner in which the Superintendent, Captain Weinman, conducted what the Inspector-General considered to be his difficult duty at the time. It was also alleged that Captain Weinman kicked Ashutosh Das when in jail, and evidence was gone into a matter which, as the learned Judge observes, was even, if true, "a long way off from Mr. Weston" as is indeed other evidence in this case. Ashutosh Das is not, as I shall have later to show, a reliable or truthful witness, and Captain Weinman denies this incident, explaining that what he in fact did was to push the witness along when he found him to be apparently deliberately loitering behind the file. With the alleged ill-treatment of the witness Surendro Mukerjee I deal later.

Before passing to the evidence I will deal with the question of the standard of proof required of the Plaintiff in a case such as this to which both the judgment and the argument have referred. The learned Judge has cited in support of his views in this matter a case [*In the goods of Gopessur Dutt: Jarat Kumari* v. *Bissessur* (1)] which was heard by the Chief Justice and myself. I wish to point out that the observations to which Mr. Justice Fletcher refers are to be found in the judgment of the Chief Justice, and that the separate judgment which I then delivered contains the grounds on which I disposed of that appeal.

In my opinion there is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of the terms "Proved" and "Disproved" in sec. 3 of the Evidence Act. This Act, to use the language of the Chief Justice in the case cited, "in conformity with the general tendency of the day, adopted the require-

(1) I. L. R. 39 Cal. 245, 255: s. c. 16 C. W. N. 265 (1911).

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ments of the prudent man as an appropriate concrete standard by which to measure proof." The test in each case is, would a prudent man after considering the matters before it (which vary with each case) deem the fact in issue to be proved or disproved? In a matter of this kind the conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment. And speaking for myself where, whatever be the form of the proceeding, charges of a fraudulent or criminal character are made against a party thereto, it is right to insist that such charges be proved clearly and beyond reasonable doubt though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is the greater of necessity is the force of the evidence required to overcome such presumption. I cannot myself imagine a Court saying to a party, who as in this case may be a person holding high and responsible position with a previous unblemished record, "It is true that I have reasonable doubts whether you did the grossly criminal acts with which you are charged, but I find that you did so all the same." And this exclusion of reasonable doubt is all that the so-called "criminal proof" requires. What I understand the Chief Justice to have held, and with this part of his judgment I agree, is that the English rule in these matters (whatever it be, for authorities are not at one) does not as such apply to India. He proceeded, however, to say that presumption against misconduct is not (as have also said) without its due weight, though (he adds) the standard of proof to the exclusion of all reasonable doubt required in a criminal case *may* not be applicable. That is not that it is not applicable, but it possibly may not be. For this two English cases are cited: Apart from the fact that the English authorities are not uniform on the subject, in my opinion the reasons which exclude the application of the English rule (whatever it may be) in this country also exclude as authorities the cases which are said to embody and interpret it. Whatever however be the standard of proof applicable, and assuming it to be as the learned Judge puts it the Plaintiff has in my opinion, for the reasons which I give in my review of the facts to which I now proceed, failed to satisfy it.

I will, in dealing with these facts, first take up the subject of the political condition of Midnapore before, and at the time of, the events the subject of this suit, giving also a short history of those events up to the institution of this suit (pages 72-104). A short account of the Plaintiff's case as to the Defendants' alleged conspiracy follows (pages 105-113). I will then deal with the reports of the informers who were appointed by the authorities in their endeavour to cope with the seditious state of the district at the time. This subject will include the questions whether there were real informers, whether their reports were true or false, or partly both and the question which the learned Judge discusses, namely, whether the Defendants believed in them (pages 114-192). This will bring us to the action as regards the Plaintiff and his son Santosh taken on those reports; the first of such proceedings being the search of the Plaintiff's house on the 8th July when a bomb was admittedly discovered (pages 193-210).

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Now, as I have said, the Plaintiff alleges that the Defendants conspired to put it there. Before, however, he gets to the proof of that fact he has to deal with another, *viz.*, that his son Santosh confessed that he had put the bomb there himself. If he did so, of course the Defendants did not. I will therefore deal with the question whether Santosh Das' confession was true or not—a very lengthy matter as it embraces all the events which took place between the 8th July, when he was arrested, and the 7th September, when he retracted that confession (pages 211-403). Now if the Plaintiff cannot explain away the fact of this confession, he cannot gain credit for his witness Santosh Das when he says he had nothing to do with the bomb. But assuming for the sake of argument that he does succeed on this issue, he has got to go a step further. For while it is true that if Santosh put the bomb in that house the Police did not, it is obvious that the converse does not follow that if Santosh did not put the bomb in the house the Defendants did. The Plaintiff therefore has to, and does in fact, lead evidence to show that the Defendants conspired to have the bomb placed in the house and did in fact put it there on the 7th July, the day before the search, through the agency of the boy Bonomali. This introduces us to his story and the defence case with reference thereto (pages 404-437). As I have already said, if this issue is not established, as the learned Judge has found it is not, the case on the pleadings ought to end there. But as I have also pointed out the learned Judge has in my opinion allowed the case to go beyond the pleadings, and the Plaintiff on such permission contends that even if he has failed on that issue, he is entitled to show on other grounds than those alleged in the plaint and which I have already mentioned that he was maliciously arrested on the 23rd July. In the order of events, this matter has also been noted under that part of the judgment which deals with the events leading up to the confession; but as it constitutes an issue and one of the most important in the case, it is dealt with after the story of the introduction of the bomb (pages 438-511). It must also logically take that place because we must know before we deal with the question of the alleged illegal arrest whether the Defendants are responsible for the presence of the bomb there. If they were, then there was such an illegal arrest and there is nothing further to be said. If there was not, then though I do not consider that it was open to the Plaintiff to make the alternative case he did, I shall proceed to examine the facts in detail to see whether it is in any event established.

I will then deal with the various miscellaneous charges which have been made against the Defendants, and in particular the allegations against the Police of tutoring of witnesses, subornation of evidence, bribery and so forth (pages 512-570). These are conveniently dealt with separately as they otherwise disturb the orderly statement of the case with which they are but indirectly connected, the story for instance on which so much evidence and argument has been expended as to whether on the 11th August the witness Surendro Mukerjee received a kick or rather three kicks from the Defendant Lal Mohun.

Following this I deal with the question which I have already reserved whether Mr. K. B. Dutt, the learned Counsel for the Plaintiff in this case, should have been called as a witness, whether his position

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as Counsel prevented him, as the learned Judge has held, from giving evidence, and whether, assuming that to be so, the Defendants are deprived by that circumstance of the comment that Mr. Dutt should not have accepted a retainer but should have been called as a witness, and that the fact that he has not been called raises the usual presumption that his evidence would not have supported the Plaintiff. I have already, in order to explain the views I express throughout the judgment, given my opinion that the Defendants are entitled to make such adverse comment, and in this portion of my judgment I will give my reasons (pages 571-590). I will then sum up the case on the facts and give my decision on the issues of fact (pages 591-617), and finally proceed to discuss the questions of law raised, the most important of which is whether this suit is not barred by limitation, and should, on the cause of action on which it has been decreed, have been dismissed (pages 618-623).

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[In summing up the case on facts towards the end of his judgment, his Lordship observed as follows :]

There is no doubt, and it has been so found by the learned Judge that in and prior to 1908 Midnapore was in a very seditious state. There was also, as he finds, a conspiracy in which I think Satyendro, Hemchandra, Khudiram, Jogjiban and others, chiefly younger men of the Extremist party, were engaged. Rahman's reports and deposition and other evidence in the case establish this. The conspiracy was fomented by older heads whose writings and outside support induced and upheld it. Amongst many of the educated and wealthier class there was a sympathy with extreme doctrine, and possibly in some cases an outside and covert encouragement by support of those who were prepared to carry it into action. The latter were chiefly younger or irresponsible men of the type of Satyendro, who is alleged to have been for some time the Secretary of the Zamindars' Samiti, of which the Raja of Narajole, Jamini Mullick, Abinash Mitter, Upendra Maity and others were members. With Satyendro and Khudiram, Nirmal, Sarat and other younger men, the Plaintiff's sons, Santosh and Ashutosh associated. There can be no question that, whatever the two latter actually did, their sympathies were with the extreme party. Their father had in fact to warn them in this matter as he thought that by such association their own future was imperilled. Rahman's reports largely dealt with men of this class. Then Laha became the informer. Socially and intellectually he appears to have been the superior of Rahman and to have mixed in a society which the latter, who was merely an instructor of *lathi* and sword-play, could not. What Rahman chiefly learnt was from his pupils. Laha had access to the older and more influential men with some of whom apparently he used to drink. Laha is alleged to have been in straitened circumstances, a ne'er do-weel and drunkard, and the events which attended his resiling from the information which he had previously given show that he was a worthless character. There is no doubt whatever that some of these persons of whom his reports speak, such as Deb Das Karan and Jamini Mullick, the Raja of Narajole and others, were not loyal or law-abiding. There were also some who may not have gone as far as they did or even disagreed with their views, but who yet associated with them. Laha reported the doings of the younger men Santosh, Ashutosh, Jogjiban, Surendro, Satyendro and others

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who were carrying on, and possibly sometimes playing with, the same sedition which Rahman had noted against them. But in addition to this he brought into his reports persons from three other classes, namely,—men who, like the Raja of Narajole, Jamini Mullick and Deb Das Karan, were without a doubt fomenters of the agitation which produced the overt sedition; and others like Peary Lal Ghose, a relative of Satyendro who was (as amongst other things his letter to the *Medini Bandhab* shows and as the learned Judge holds) deeply implicated in the swadeshi boycott and kindred movements; an implication which in his case I have no doubt was coloured by the disloyal views he held, even though he may not perhaps openly have gone the same length that the others I have mentioned did, and, lastly, there were others like Mr. Dutt and Upendra Maity who, though belonging to the Moderate party, possibly associated with some at least of the men who were its opponents. Laha, from the doings of the younger men, the conversations he had with the older men of the first class and bazar gossip, his own inventions possibly due to drink, malice or the simple desire to earn informer's pay, made up a series of reports which, I think, probably contain false matter, but which were not on the evidence wholly false. On the evidence I hold that whilst the Plaintiff has not established that the reports are wholly false and the Defendants have not shown as against any other than Santosh, Baroda Dutt and Surendro Mukerji that they are, or are likely to be true, the Defendants have shown that they were true or that, in any case, there is ground for supposing that they were not (?) true as regards both (?) Santosh Dass, Surendro Mukerji and Baroda Dutt and his family by reason (1) firstly, of the evidence which shows that Santosh was in association with persons who were undoubtedly seditious and members of a conspiracy found by the learned Judge to exist, (2) his confession which the Plaintiff has failed to show was false, and (3) of the evidence, which the Plaintiff has not displaced, that a bomb spoken of in Rakhal's reports as having been taken by Santosh to the Plaintiff's house was actually found there; the evidence that another bomb was found in the house of Baroda Dutt's and his family; and Surendro's confession which his unreliable evidence does not displace.

On these reports which were not incredible and which, whether true or not, the Defendants believed, a search of the Plaintiff's house took place, of which Mr. Weston was not aware until after it had been made. A bomb was found. The Plaintiff's attempt to explain its presence by the allegation that the Defendants put it there as part of the alleged conspiracy has been found to be false. The bomb having been discovered in the Plaintiff's house, the Defendants were, on the reports that they received of Santosh's implication in the matter, entitled to search his father's house and arrest him as they did. Though they did not then arrest the Plaintiff as the owner of the house, they were, as Mr. Weston pointed out when the search was reported to him, entitled to do so and might have properly done so. As, however, the Police had not at first arrested the Plaintiff, Mr. Weston determined to wait before taking further steps until a chemical examination had shown whether the bomb, which was a country-made one, was of a dangerous character. After Santosh's arrest the Police doubtless put before him the information they had, questioned him and probably pressed him to make a disclosure. That in so doing they made use of the Plaintiff and his family

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as alleged and resorted to the various tricks, devices, persuasions and threats alleged, I am unable to hold. For the evidence by which this is sought to be established is (for the reasons I have fully given) itself of a most unreliable character. Santosh refused, however, to confess up to the date of his father's arrest. The latter was arrested on the 23rd July after and in consequence of the Chemical Examiner's report which revealed the dangerous character of the bomb, for the ascertainment of which the arrest of the Plaintiff had been deferred. It is not in my opinion true that he was then arrested either to extort a false or to obtain a true confession from his son. The arrest of the Plaintiff was the sole act of Mr. Weston in which the Police, except as subordinates carrying out his orders, were not concerned. It was in my opinion ordered by Mr. Weston in the honest belief that he was entitled in law and fact to do so (as in my opinion he was), and not for the indirect motive alleged. The arrest, however, of his father probably did influence Santosh to confess and possibly with a view to exculpate his father and obtain the latter's release he confessed his own guilt a week or so later. That his confession was false and induced by promises or tutored has not been proved, for, as I have said, I cannot accept Santosh's evidence or that brought to corroborate it. On the contrary the story told by Santosh of the manner in which his confession was recorded by Mr. Nelson and the charges which he makes against the latter and Mr. Weston are manifestly and on their face so mendacious, that Counsel for the Plaintiff has not been able to ask us to accept them. This confession of Santosh implicated not only himself but a large number of others including wealthy and influential persons, such as the Raja of Narajole and Jamini Mullick. Maity was also mentioned in connection with swadeshi. Surendro Nath Mukerjee, the companion of Santosh, was also implicated. After this confession and until the 15th August Santosh made no sign that he wished to retract, notwithstanding that according to his allegations the confession was made on a promise that his father should be released and the alleged promise was not kept. If there is a case in which retraction might be expected, it would be in such an one as this where the confessing party alleges that he had been trapped by false promises into confessing that which was not true. Meanwhile other events had been taking place. On the 31st July a bomb had been discovered in the house of the Dutt's, and several persons were arrested. Surendro Mukerjee who had been arrested also confessed on the 15th August. He also makes charges against the Deputy Magistrate, Babu S. N. Chakravarti, which are so false that they have not been attempted to be supported before us here. His story as to Police tutoring, threats, kicks and so forth I have held, for the reasons given, to be not proved. The man who makes these charges has himself admittedly given false evidence. Surendro's confession also implicated a large number of people at Midnapore, including the persons I have named, Saroda and Baroda Dutt, Deb Das Karan and others. He also implicated Santosh, but says it was himself who actually carried the bomb to the latter's house. As I have said up to the 15th August, Santosh had made no sign that he wished to retract. His confessions had not been publicly known. It had not been put on the record. On the 15th August an application being made for bail

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on behalf of the persons arrested, both Santosh's confession and that of Surendro became for the first time publicly known. The matter then created a great stir. Up to this time Ashutosh Das, the other son of the Plaintiff, and who was probably as much, if not more, implicated than his brother had, he says, been working with the Police under the Maulvi whom he regarded, he says, as his patron. On the 15th August, however, his help was secured by the pleader applying for bail through Nilkanto Bose, Ashutosh's brother-in-law. The latter took him off to the Midnapore Library, at which time he says "the spell of the Police was broken." He told the pleaders there assembled what he professed to know and, according to the evidence for the Plaintiff, made allegations of misconduct against the Police. These revelations would necessarily perturb three classes of persons, *viz.*, those who may be falsely implicated by the reports and the confessions which corroborated them; those who may not have said and done that which the informer's reports represent them as saying and doing, but who holding in fact seditious views, or having given effect to them, feared a disclosure of what they had said or done; and, lastly, those who may have been rightly implicated. It is not improbable that Jamini Mullick and others with whom Laha associated may have said and done things which they desired should not be known. All these persons would, however, be at one in the determination to take steps against a proceeding which threatened them with a common, if in some cases undeserved, ruin. Accordingly Mr. Bradley-Birt was immediately approached, and then on a requisition which included the names of several persons implicated, a telegram was on the 16th August despatched to Government complaining of the action of the Police. Instead of sending details at once as the Government requested, time was taken up to the 27th August in preparing some statements by Ashutosh Das, his nephew Jotindra and the brother of Surendro Mukerjee who had confessed. The complete spontaneity of these statements is doubtful. Note-books were also started at the instance of Mr. Dutt for the making of memoranda of complaints against the Police. The next step was to see whether Santosh and Surendro would adhere to their confessions. We find then that Santosh who, until his confession with its implication of others had become known, had not retracted, did so after that event. The circumstances attending such retractation are suspicious. A petition was prepared for Santosh and Surendro Mukerjee. They were produced in Court on the 31st August. Though the petition is by a man who is represented as craving for the opportunity to retract, though it asks for such an opportunity, and though such opportunity in fact then presented itself, it was not availed of. It is obvious that it must have been a matter of indifference to Santosh himself when or where he made his retractation. If his confession were untrue and he wished to withdraw it, he might do so at any moment without preparation by telling the simple truth. The telling of such truth does not require legal manœuvres or aid. The matter would not, however, present itself in the same way to those others who were interested on their own behalf in obtaining such retractation. It was never intended by them that this opportunity should be availed of. But why not, unless it be that it was contrived that the retrac-

tation when made should be suitable and effective for the purposes desired and not in conflict with the case already made in the documents previously sent to Government. Accordingly the retractation was delayed. I have no doubt that the persuasion of these others was an inducing cause of the retractation of the confessions of both Santosh Dass and Surendro Mukerjee subsequently made on the 7th September. The next step was to make the informer innocuous and the circumstances indicate to me beyond all doubt that this was achieved by getting him to have written and subsequently to produce for the defence Ex. G as the record of the information he had given to the Police. We know from the evidence that an attempt was also made to dissuade the other informer Rahman from giving his testimony. The evidence also fully establishes that persuasion, threat and boycott were employed to dissuade or punish any person who might or did give evidence for the Crown. If it be the fact as it possibly is that the prosecution might in any case have failed against some by reason of the falsity of the accusations against them, it is also none the less the case that if there were others who were truly implicated, the manœuvres employed to prevent the production of evidence raise an inference which both supports the truth of such implication and that such means contributed to the failure to establish it against them. In the end proceedings had to be abandoned against all the accused except three; the two who had confessed, Santosh and Surendro and Jogjibon, against whom there was the evidence also of Abdur Rahman, the other informer who did not fail the prosecution. Then shortly before these proceedings the boy Bonomali was set up to tell a false story against the Maulvi about the introduction of the bomb. An attempt is made to persuade the constable Kartic who is supposed to have taken the boy to the Maulvi to tell such story for the benefit of 'the country' by the pleader Kishoripati Roy who has not been put into the box to deny this charge. Santosh probably dissatisfied with the result of a retractation which had then not personally benefited him, for the proceedings continued, asked Mr. Brett whether he would better himself if he went back on it. This is proved of a man who is alleged to have been entirely innocent and to have been all along desirous to declare it. The three accused were at first convicted and then acquitted by this Court. The notoriety of a departmental enquiry and a press campaign preceded the institution of this suit with its serious initial charges which have been added to and shifted throughout the hearing.

It is of course natural to assume that there must be some basis for an action in which, as appears from the record, so much feeling has been displayed. It is well at the same time to remember that everywhere in all countries, but particularly in this, the smoke is always disproportionate to the fire. On this matter we can only look to the record. It may be, though I do not desire to express a positive opinion on the point, that Mr. Weston, as an executive officer perhaps, possessed in excess the qualities which are supposed to be requisite for such a service. He acted conscientiously, with great vigour and perhaps rigour in his general dealings with the disaffection in his district. These remarks are not made as a criticism, for it must be remembered that as the learned Judge points out, Mr. Weston's position was a peculiarly diffi-

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cult one. As a result, however, of his uncompromising attitude Mr. Weston got himself very much disliked by those whose views and actions he opposed; and that, as also the disaffected state of many minds, produced many a threat against his life which, I believe, not to have been idle but prevented from execution by the measures for his safety which Mr. Weston rightly took. In the matter also of the particular conspiracy dealt with in these proceedings there has been in one case excessive rigour and in some others irregularity; I think in particular that the Plaintiff, an old man of about 70, was treated with unnecessary harshness in being kept in jail pending the investigation of the charge against him. He might, and I think should, have been let out on bail and thereby much ill-feeling spared. I think also that Mr. Weston acted with indiscretion in seeing or communicating with the Plaintiff at all during the pendency of the proceedings against the latter's son, even though, as I find, such interviews were brought about at the instance of the Plaintiff and not of himself. The circumstance was one likely to afford a handle to the charge actually made and may have in others' minds given rise to suspicion. Though I am fully satisfied with the explanation he has given, his action in arresting the Plaintiff when he did was also open to misconstruction. I refer to the Plaintiff's exemption from arrest when the bomb was found and his subsequent arrest about a fortnight later. It cannot necessarily be imputed to the Plaintiff that he knew what was the cause of this. Probably he did not, seeing that he doubtless believed himself innocent of the offence and was subsequently discharged in respect of it. He and others may have connected the arrest with an intention to secure that confession from his son which in fact followed his arrest and was, I think, probably induced by it. This is indeed the only matter against Mr. Weston which has, *primâ facie* and in the absence of explanation, a show of substance. I refer to the matter, the subject of Mr. Justice Fletcher's finding and not that the subject of the plaint. To it have been added in the interest, I believe, of others than the Plaintiff a number of wholly unfounded and false charges.

As regards the Police (I am now speaking generally and not of the Defendants) one must always admit and consider the possibility of misconduct, for experience unfortunately demands this; and looking at the case from the point of view of such mere possibility and independent of the evidence, it may be that the Police Defendants did more than they admit to procure the confession and acted otherwise irregularly or wrongly. At the same time the matter is one of proof. As I point out later there are certain acts which I hold that they did not do, and there are other acts which I hold that it has not been proven that they did do. The evidence satisfies me of the necessity of peculiar caution in this case in seeing that the charges are made out. This is not the common case of an individual alleged to be oppressed by the Police. It is one in which there is an organised and powerful combination against these two Defendants. Whilst it is possible that such combination was brought about by what they did, it is also possible that it was in the nature of a reprisal against them for having made and failed to prove charges which under more favourable circumstances they might have established; for I am fully satisfied that this combination has been itself doing

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some of the things it charges against the Police; getting at their informer and witnesses or attempting to do so in the case of the latter and putting up false charges such as that of Bonomali against the Maulvi, Mohesh Rout against Inspector. Kedareswar, and other cases. It appears further that the charges against the Defendants were again most mendacioulу exaggerated in the 'Prison story' of the Plaintiff's son in Deb Das Karan's paper, the *Medini Bandhab.* This, I believe, was done to prejudice the Defendants' case before it was tried and indicates how readily admittedly false charges were preferred against the Police. The exaggeration which there describes the Police as fiends (*rakshasas*) showing their 'fierce rows of teeth,' lords of ghosts (*bhuta*) and so forth affects every incident with which they are there charged and others which, if Santosh is to be believed, are the pure invention of the Editor. But these very falsities, if they are proved embarrassing by their absurdity to the Plaintiff and his family in giving their evidence in this case, were probably on account of this very exaggeration and appeal to prejudice, the more suitable for the purpose for which they were put forth.

It was under such circumstances that this suit with its many charges was filed, and we have next so see what has become of them on Mr. Justice Fletcher's judgment.

I take first the case against Mr. Weston. The following are Mr. Justice Fletcher's conclusions, either directly expressed or to be implied, from his judgment. He has found that the story of the primary conspiracy to falsely implicate the people of Midnapore and other parts of India s untrue, as also is the alleged secondary conspiracy for the same purpose. He has said that he disbelieves altogether the suggestions of a corrupt motive which he finds were made against Mr. Weston. He holds on the contrary that his district was in a very seditious state and that there was in fact a conspiracy in it. He finds that on the information then in his possession he was bound to be very watchful over the district of which he had had charge. He holds that he did not concoct or have any hand in the concoction of false reports nor in the passing of reports known to be false. On the contrary he is of opinion that Mr. Weston honestly believed in the truth of the reports and that if he had not he would not have acted on them. He finds that he took steps to test the truth of the reports, and that if such testing was, as the learned Judge thinks, insufficient, it was due to no dishonesty on his part, as the Plaintiff alleges, but to the want of opportunity of which the administration of an excessively heavy district deprived him, and to his inexperience. Whilst the learned Judge is of opinion that the alleged introduction of the bomb in the Plaintiff's house and in the house of the Dutt's is not proved, he also finds that Mr. Weston who believed the truth of the reports in no case had any hand or part in such alleged crime.' He finds that there was no such malicious search or trespass as is alleged. He is of opinion that Mr. Weston believed that Santosh Dass was guilty and that he was entitled to arrest him as he did. As regards the proceedings which followed Santosh's arrest the learned Judge, touching Santosh's confession, says that he altogether disbelieves the suggestion that Mr. Weston and Mr. Nelson or either of of them put to Santosh questions which they knew to be untrue, and he does not find, and therefore pronounces against

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the other allegations of misconduct which Santosh Dass makes against these two officers. He holds also that the allegation that Mr. Nelson and Mr. Weston attempted to suppress the petitions of retractation of the 31st August is not true and that the incident arose out of a misunderstanding. Lastly he finds that Mr. Weston did not, as alleged, arrest the Plaintiff with the knowledge (as alleged in the plaint) that he was innocent or because he had conspired to put the bomb in his house and that his motive in arresting the Plaintiff was not (as also alleged in the plaint) to extort a false confession from his son. Every one of these charges goes by the board on Mr. Justice Fletcher's judgment. All of them are not only in my opinion false, but very malicious and wicked charges for which there is no foundation, of which fact the Plaintiff or others who are responsible for them must have been well aware. The motive for such charges is obvious. There was, as I have pointed out, an ill-feeling against Mr. Weston which matured into actual threats against his life. The reasons for this I have given. But it is not only by such acts of violence that injury either to an individual or a class may be done. Not the least dangerous or malicious to either is that which clothes itself in the legal form of a false accusation. The suit on these findings should have been dismissed outright. What, however, the learned Judge has done is this :—He has, as I have pointed out, put aside as false the charges on which the suit is based and pronounced against Mr. Weston on another and different charge, *viz.*, an illegal arrest of the Plaintiff without authority in fact or belief in his right to do so, and as a means of obtaining a true disclosure from his son Santosh of a conspiracy which, he, Mr. Weston, honestly believed to exist. As incidental to this finding his view must necessarily be that Mr. Weston has perjured himself. Had the plaint been framed on these grounds it might have, as already pointed out, been instituted without such malice as I find in the case of the other charges, though such a suit would, for the reasons I have given, have equally failed. I have found, however, that an explanation on this matter has been given which entirely satisfies me as to Mr. Weston's *bonâ fides*. Apart from the fact of the conflict of testimony not a single instance has been proved which convicts this Defendant of an untruth. Indeed had one single instance of deliberate untruth been established against him (his position being what it is) I should not have accepted any portion of his testimony without good and reliable corroboration. On the other hand the Plaintiff has put forward numerous charges against Mr. Weston, all of which have been found both by the learned Judge and myself to be untrue. It has been to me a matter of surprise that the learned Judge has not, either in the case of Mr. Weston or the Police, considered this circumstance in judging of the relative value of their testimony and that put forward on behalf of the Plaintiff. It is in my opinion impossible to hold that a man who has himself and through the witnesses he has put forward made so many clearly false and malicious charges is entitled to the same credit as if he had never made them. On the contrary they discredit his case. In my opinion further the evidence of the Plaintiff himself with its prevarications and untruths cannot be accepted. In particular his account of the alleged conversations which he had with Mr. Weston, when the latter

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is charged with persuading and threatening him and then owning to his (Mr. Weston's) alleged guilty intentions towards him, is, for the reasons I have given, been conclusively proved to be untrue. Though therefore the charge on which Mr. Weston has been convicted ought not in my opinion to have been tried in this suit, it has also in my opinion been shown to be, as the others against this Defendant have been found by Mr. Justice Fletcher and myself to be, untrue.

I pass now to the case against the Police. The learned Judge has not found against them either the alleged primary or secondary conspiracy or that they concocted their reports or that they put bombs in the house of the Plaintiff or of the Dutts. In my opinion all these charges have been shown to be untrue. He has found that they conspired with Mr. Weston to effect the illegal arrest above stated. In my opinion, Mr. Weston was alone responsible for that arrest and the Police Defendants acted only as his subordinates. Mr. Weston is not liable, nor are they. I further find that the unrebutted evidence supported by that of Mr. Cornish establishes that the third Defendant, Lal Mohun, acted merely as the subordinate of the Maulvi, who did not take him as such subordinate into his full confidence. It is not now alleged that Lal Mohun had directly anything to do with the alleged introduction of the bomb into the Plaintiff's house, and the evidence establishes that he did not at the time know who the informer actually was or what was the information on which the search was made. This disposes of the charges dealing with the main issues in the suit.

The learned Judge's other conclusions against these Defendants are upon a matter which only indirectly and sometimes remotely, if at all, affects the main issues which have been tried. He has found that the Police Defendants did not believe the reports of the informer; that is, they did not believe that there was a conspiracy as there alleged, and therefore did not believe in the guilt of Santosh or his father and misconducted themselves in a pretended investigation of a false case by procuring and attempting to procure false evidence, by tutoring confessing prisoners and witnesses and so forth. In short, it is charged that not believing in the truth of the case they were investigating but on the contrary knowing the charge to be false, they attempted to get false evidence to support it. I need not here again point out how the learned Judge's finding that they knew the case to be false is inconsistent with his other findings that they did not put the bomb in the houses of the Plaintiff and the Dutts as alleged. There are, however, further reasons why I cannot agree with the learned Judge's conclusions against these Defendants.

Whilst we must consider the possibility of misconduct to which I have referred, we must also be satisfied that such possibility is proved to be a fact by relevant and credible evidence. The law does not presume against a policeman as such, but deals with him as it would with any other against whom charges of fraud and crime are made. He is entitled to the benefit of the same procedure and to have his conduct judged by the same tests and in the same manner and free from considerations which proceed from other than relevant evidence in the suit as are others. If the considerations of the possibility to which I have referred be productive of suspicion this

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must yield in the face of the repeatedly unproven charges supported by false evidence, and the proven facts. Some of the learned Judge's suspicions have been removed during the conduct of the appeal. Thus, Laha's account of the alleged concoction of the reports by the Police, given as his excuse for resiling therefrom, is so false that learned Counsel for the Plaintiff will not adopt it. There is no evidence that the Police did concoct the reports, and the learned Judge finds that there is no such evidence. His judgment nevertheless expresses a suspicion. Before us, however, that suspicion has been removed by the practical withdrawal by learned Counsel of that charge for which in my opinion no grounds whatever exist. The learned Judge expresses his doubt whether the document produced as a copy of a statement which Ashutosh Dass made to the Police is in fact a genuine copy, and comments in this connection on the facts that other original documents are missing. Before us Mr. Dutt has admitted that the document is in fact a genuine copy; and not a single argument has been addressed to us to show that any document which is said to be missing was not in fact so but withheld. The learned Judge finds that Ex. 57 is a forgery, though as I have said, the brother-in law of the man who wrote it is called for the Plaintiff and does not deny the writing. Mr. Bose has expressed his willingness to argue that it is a genuine document but given for a purpose other than that which the witness Rahman alleges. In other cases the learned Judge's general suspicions of the Police testimony have outweighed the evidence Thus the learned Judge comes to the conclusion that the alleged bribery of the Police by the Raja of Narajole is not proved, and that there are grounds (and indeed as I have shown strong grounds) for supposing that the money was extorted by a trick of the Raja's own uncle. He is however not prepared to say that the story of the Raja that the Police asked for the money is not true. The evidence similarly offered to prove the alleged attempted extortion of a bribe from Jamini Mullick is such that the charge cannot be said to be at all made out. In my opinion the evidence does not sup port the learned Judge's inclination to think that it may be true. Though there is nothing which in my opinion warrants the suggestion that the Police put the bomb in the Dutt's house, all the evidence being one way and available rebutting evidence not being produced, the learned Judge has, whilst finding the charge not proved, held the circumstances attending the search to be suspicious. Similarly, though the story of Bonomali is shown to be false, the learned Judge holds that there are matters of suspicion on the evidence The Police Defendants have thus in the opinion of the learned Judge been unsuccessful in meeting the charges made against them

In my opinion, however, in determining whether these charges are true or not we must first eliminate all considerations derived from extraneous sources, the Narainghur, Alipore and Midnapore criminal cases, the statements alleged but denied of Counsel in other cases, even though, as the learned Judge in one instance says, such statements may have been made in the presence of the Maulvi. We must then correct the misapprehensions and errors, unfortunate for these Defendants, into which the learned Judge has fallen, and which in part doubtless account for the suspicions he has expressed. I refer, in connection with the charge relative to the introduction of the bomb in the Plaintiff's house, to the learned Judge's comments as regards Asadullah and Mr. Nelson and Kishoripati Roy; and, in

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connection with the charge that the Police put the bomb in the Dutt's house, the reference to Mr. Gregory's alleged but not admitted statements in the criminal appeal and the erroneous supposition of the learned Judge that he had the support of Mr. Cornish's evidence for his suspicions when he had not. The evidence of the Police Defendants has also in my opinion in several instances been wrongly construed to their discredit. Inferences have also been erroneously drawn against these Defendants in respect of matters which are the subject of privilege. We must also (I refer to ourselves) put aside the mass of rumour and hearsay which the depositions contain. Nor must our minds be affected by the fact that the charges are numerous unless they have been also proved. As the burden of proof rests on the Plaintiff, we must then see whether the witnesses by whom he seeks to prove these charges are credible or not. As regards one set of charges they depend on the Plaintiff and members of his family. In my opinion none of this evidence is reliable, and some of it, as that of others, is as mendacious as any in my experience. Then as regards the evidence of third parties that the Police attempted to suborn them or take bribes from them, I have on an examination of the evidence come to the conclusion, for the reasons I have fully given, that there is no one of these serious charges upon which one can lay one's finger and say that it is proved.

In conclusion I may say that if there be any truth in these numerous charges which have been preferred against the Police they have not been made out by credible evidence in this case.

I decide accordingly the first and second issues of fact in the negative The sixth issue of fact as to damages is dealt with later in the judgment upon the issues of law (Nos. 3, 4 and 5), to the consideration of which I next pass.

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[On the questions of law raised in the issues his Lordship's judgment was as follows :—]

It is not necessary to discuss the third issue as it is not contended that the Defendants were entitled to notice under sec. 80. It is therefore also unnecessary to say anything about the fourth issue. The fifth issue, however, raises the question of limitation. The Advocate-General contended, and in my opinion rightly, so far as regards the causes of action for malicious arrest and prosecution, that the suit was barred. Upon these causes of action the suit should have been dismissed *in limine*. The learned Judge, however, stated that he would subsequently hear the argument about limitation and would meanwhile hear the evidence. The plaint is not, as the learned Judge has stated, a "mofussil pleading," concerning which according to Privy Council rulings of about the middle of last century and later (when such pleadings were often very imperfect) should not be read too strictly. It was no doubt filed in a Mofussil Court, but is in the English form of pleading and I should say had been settled by Counsel as one would also naturally expect in a case of this importance. Now the suit is described in the plaint as "valued at Rs. 10,000 on account of damages for wrongful confinement and malicious prosecution." Though the plaint also alleges trespass, it seems that the suit was really based on the two other torts, as it is in respect of these that damage is alleged to be suffered and the cause of action is said to have arisen on the 31st August 1908 when the Plaintiff was set at liberty,

I will, however, assume that with malicious arrest and prosecution was included trespass. All these acts are well known torts, and the only peculiarity about the suit is that the Plaintiff alleges that these torts were committed by three men acting in conspiracy instead of by one. In one sense this allegation of conspiracy is immaterial to the action, for the acts alleged are such that if proved against any one Defendant, he is entitled as against that Defendant to a decree. The reason, however, why conspiracy is alleged is obvious. According to the Plaintiff it was the Maulvi who was directly responsible for the bomb; so in order to implicate Mr. Weston and the other Defendants in the charge it had to be alleged that there was a conspiracy between him and them to do this act. Similarly, it was Mr. Weston who ordered the arrest which is alleged to be done in conspiracy with the other Defendants to bring them into the charge. But the suit remains what it is—a suit against joint tortfeasors. If it was a suit against one person, it would be admittedly barred as regards the arrest and prosecution. I may leave out of account the alleged trespass if that was part of the cause of action, as the result of Mr. Justice Fletcher's judgment is that there was no trespass in fact and that also is what I have held. If the suit is barred as against one person, the period of limitation is not extended because it happens to be against three. This is admitted. But then it is said, and Mr. Justice Fletcher has held, that there is another cause of action which the Plaintiff has himself nowhere stated. It is said that besides the cause of action on the torts there is a cause of action to recover special damage by reason of a conspiracy to cause damage. The learned Judge accordingly framed an issue which does not arise on the pleadings alleging a general conspiracy to cause damage of which the trespass, arrest and malicious prosecution were merely the overt acts. I have asked learned Counsel to produce to the Court authority for the proposition on which the learned Judge has proceeded, *viz.*, that the same set of facts may constitute two causes of action, *viz.*, for a tort and for a conspiracy to cause damage. And none has been produced. The reason of this is that the two exclude one another. If a joint tort is committed there is no necessity to have recourse to any law of conspiracy. And on an action to recover damage resulting from a conspiracy as distinct from an action on a joint tort, the conspiracy is one to do an act which, if done by an individual, would not constitute a tort, but is actionable by reason of special damage having been caused thereby. The two in fact are mutually exclusive. There is a conspiracy to commit a crime; a conspiracy to commit a tort; and a conspiracy for an unlawful purpose in respect of an act which if done by an individual would neither be a crime nor a tort. All these may be the subject of criminal prosecution. In respect of the civil remedy where there is a joint tort the action is on the tort against the joint tortfeasors. In any other case where in carrying into effect the conspiracy the conspirators inflict damage on an individual he may sue for the particular damage he has thus separately suffered. In the former case the cause of action is on the tort, and in the latter on the special damage. There is a further difference in that in actions on tort general damage is, except in special cases, sufficient, whereas in such a conspiracy there must be special

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damage. The class of cases to which the learned Judge refers establishes that there are instances in which two or more persons can render themselves liable to civil proceedings by combining to injure the Plaintiff, although if one of them did the same act by himself and without any pre-concert with others he would escape liability both civil and criminal. I agree with the learned Judge in thinking that an action on such a conspiracy would lie in this country, but the point here is different, *viz*, what is the Plaintiff's cause of action, and what is the limitation applicable. It appears to me to be quite clear that the suit is on joint torts, and that the arrest, imprisonment and prosecution are governed by the one-year rule under Arts. 19 and 23 of the Limitation Act. Mr. Justice Fletcher is of opinion that though the suit is described as a suit for malicious prosecution, it is in fact not one. Whilst the learned Judge assigns no grounds for this view, it also appears to be inconsistent with a previous statement made by him that the Plaintiff had two causes of action—one for damage and one for malicious prosecution. As the learned Judge's finding as regards trespass and search was a dismissal on the facts, it is not necessary to enquire whether Art. 36 or 39 or both would apply so far as the suit alleges wrongful search and trespass. In my opinion, the suit is barred on the other causes of action, and should not have been entertained on that cause of action on which it has been decreed. On the sixth and last issue I am of opinion that if it was necessary, as according to the learned Judge's view of the case it was, to prove special damage, such damage has not been proved. Portion (but what is not stated) of the Rs. 1,000 which the learned Judge has given the Plaintiff was, it appears, spent to obtain the release of his son, which is not damage to the Plaintiff in this suit, and no evidence strictly so-called has been called to prove the expenditure of the residue. These findings dispose of all the issues, both of fact and law, before us.

I would accordingly decree this Appeal and dismiss the suit, the Plaintiff-Respondent paying all including reserved costs in both Courts.

[In the course of his judgment, when dealing with the issues of fact, his Lordship discussed several points of law and practice. Portions of the judgment bearing on these points are set out below :]

"I pause here to consider a matter which should have been excluded in the determination of this case At page 2345 of the paper-book it is noted that Mr. Norton tendered the judgments of the Sessions Court and of this Court in the criminal case to show that the present case had been modified to meet the points raised in the Appeal Court judgment. These judgments have been cited by the learned Judge in support of his conclusion. Now respect must be and is had for any other judgment which is passed by this Court, and for this reason amongst others I have not entered into a discussion of the Naraingarh criminal judgment. Nor have I dealt with the observations said to have been made in the Alipore Conspiracy Trial. The judgment rendered by this Court in the criminal case must be taken to be correct and conclusive, but it is so only for the limited purpose for which it was rendered. It decided that the accused had not been proved to be guilty by the Crown of the offences with which they have been charged and nothing more. Not only are such opinions and conclusions

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not binding on us, but they are, according to a well known rule, not admissible in evidence at all in this case, and the reason is that neither the parties, the issues, the burden of proof or the evidence are the same. In particular, as regards the evidence, the Court did not and could not, it being a criminal trial, have before it the evidence of the accused. It is still one of the advantages which doubtfully innocent persons possess in this country that they are not called upon and indeed are not permitted to give evidence; and whatever may be the truth which might be elicited by a procedure in which the party most concerned and most instructed in the true facts is called upon or permitted to give his explanation on oath and cross-examination, if the Crown on whom the onus lies fails to establish such facts beyond (as appearing to the Judges constituting the Court) reasonable doubt, the charge must be dismissed. Here the case is entirely different. It is for the Plaintiff, who puts forward criminal charges against the Defendants, to prove them. And it is he and not the defence who has to satisfy the Court before he can get the relief he claims that the confession which his son made (and the other confession of Surendro Mukerjee if also it stands in his way) was false. He undertakes to do this by evidence, the principal portion of which is the deposition of his son. And we have therefore ourselves to see independently of and uninfluenced by the opinions of any other Court and the alleged statements of Counsel to that other Court (on which the learned Judge has also relied) whether the Plaintiff's case, including the incidental issue to which I have referred, is proved."

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"After the decision of this Court in the criminal appeal the Government deputed the Commissioner of Burdwan, Mr. D. J. Macpherson, to inquire and report into the charges made against the Police in respect of the alleged conspiracy. This was done on the 10th June 1909 and following days. Mr. Macpherson, who has been called in this case, took the evidence of witnesses in the presence of Mr. K. B. Dutt, who was implicated by the informer's reports and who is said to have been the chief complainant and spokesman for the others. Some of the statements of the witnesses in that enquiry have been put in and used, and the witnesses for the Plaintiff have been considerably cross-examined as to important discrepancies between these two statements then and now made. Learned Counsel for the Respondent has rightly objected to the admission of any statement which is not relevant to evidence actually given at the trial. The depositions at the enquiry are only admissible either to corroborate or contradict evidence given here. Mr. Macpherson then made a report, and a question arose about its production. I cannot see myself how a finding on a departmental inquiry or Mr. Macpherson's opinion in the matter could under any circumstances be evidence before us. But in any case the Government claim, as it was entitled to do, privilege. We have been told that in the House of Commons the Secretary of State declared that it was not advisable that the report should be published during the pendency of these proceedings. A similar privilege was claimed for a confidential diary of the Maulvi. Mr. Justice Fletcher allowed both claims of privilege. A suggestion was, however, made in cross-examination on behalf of the Plaintiff that the Government claimed this privilege because it knew that the documents would, if produced, falsify the defence and that it did not, to use Counsel's word, "dare" therefore to produce

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them. The question in which this unfounded suggestion that Government was assisting a case known by it to be false was made was a scandalous one and was very rightly disallowed by Mr. Justice Fletcher. The supposition is not to be tolerated that the Government of this country, one of whose functions is to administer justice through the very Court in which this accusation was made, was itself party to a conspiracy to defeat the just claims of the Plaintiff by wrongfully withholding that which, if produced, would establish the falsity of a defence of its officers which they had further aided by public money. The suggestion serves, however, as a leading sample of the reckless and unfounded charges which have been made throughout this case.

"On this point of privilege another matter must be noted; when a document is in fact privileged no adverse inference can be drawn from its non-production, for to allow this would be in fact to destroy the privilege. This rule applies as regards the party claiming privilege. *A fortiori*, where, as here, privilege is claimed by a third person no adverse inference can be drawn against any party to the suit in consequence of such claim and allowance of privilege. The learned Judge, however, when dealing with the evidence, notes that the confidential diary was not produced with the apparent object of drawing an adverse inference therefrom. If further the suggestion was that the confidential diary had been kept back the Appellants have rightly contended that such an inference was prejudicial to them. The Defendants do not represent the Government, though being its officers the costs of their defence are, I understand, borne by it. They are sued personally, for their own alleged personal wrongs. Had they been the parties claiming and allowed privilege, no adverse inference could be drawn against them. But they are not. They in fact complain that the decision of the Government not to produce these documents has hampered them in their defence. In particular it is claimed that the production of the Maulvi's confidential diary would have helped to establish, as I think it might, the authenticity of the informer's reports which have been challenged. The learned Judge further allowed the claim of privilege for which the Evidence Act, sec. 125, provides, but has yet in several instances drawn inferences adverse to the Police Defendants by reason of the non-disclosure by them of the source of their information, the subject of the privilege. The learned Judge's comments were, in my opinion, not open to him. It must be of course first determined whether there is a privilege or not. But it is obvious that after the Court has once held that a document or subject-matter of enquiry is privileged, with the result that the other party cannot compel production or answer, the comment is not then open to the Court that the party to whom privilege has been allowed has not done or said that which the law and the Court have said he cannot be compelled to do or to say. I will only add as regards sec. 125 of the Evidence Act that though the section does not in express terms prohibit the witness if he be willing from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is a duty of the Judge apart from objection taken to exclude the evidence. *A fortiori* if objection is taken it cannot, since the law allows it, be made the ground of adverse inferences against the witness."

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"The first question which arises is whether Mr. Weston was in law justified in effecting that arrest. Sec. 5 of the Indian Explosives Act (VI of 1908) enacts that a person who knowingly has in his possession or control an explosive substance under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession or under his control for a lawful object is punishable unless he shows that he had it in his possession or control for a lawful object Therefore once it is established that a person has under such circumstances in his possession or under his control an explosive substance, the statute casts the onus on him of proving that he had it in his possession or control for an innocent purpose. Sec. 6 of the same Act deals with abettors. Any person who by money, provision of premises, supply of materials or in any other manner abets or is accessory to the commission of any offence under the Act is punishable in the same way as if he had committed the offence itself.

"The first question then is whether the bomb must be taken to have been in the Plaintiff's possession or control. The bomb was not found in any place in the separate and exclusive possession of any other person than the Plaintiff. It was found in the *boitakhana*, a common room in possession of the family, by whom it was used and to which they all had access. As pointed out in *Queen-Empress* v. *Sangam Lall* (2), where articles are found in a house in such a place or places as several persons living in the house may have access to, there is no presumption as to possession and control that those articles are in the possession or control of any other person than the *karta* or house master (in this case the Plaintiff). This case was followed in the criminal appeal of Santosh against his conviction to this Court There the Chief Justice said: "Had the bomb been found in Santosh's room when the search was made there, this might have been fair ground for imputing to him possession or control within the meaning of the Act But the discovery in the *boitakhana*, a place equally open to others, taken by itself, points no more to possession or control in Santosh than in the others who had equal access with him to this place" The judgment under appeal also holds that in such a case the *karta* or managing head of the family is *primâ facie* responsible. But in this case the learned Judge holds that he was not, and as the Appeal Court held that the discovery of the bomb in the *boitakhana* did not indicate an exclusive possession by Santosh, it follows according to the judgment that the bomb must be deemed to have been in the possession of nobody and nobody was liable to account for it. But if the bomb was there, it was obvious that someone was accountable for it. The grounds for this conclusion are that the Police having acted on information showing that the article was in the exclusive possession of Santosh, they were not entitled to arrest the Plaintiff merely on the ground that the bomb was in fact found in a public room in the house, of which he was the owner. The answer, however, in the first place is that this does not correctly represent the information which the Police had. The reports it is true do not mention the Plaintiff and show that it was Santosh who took the bomb to the house. The reports do not state that the Plaintiff had no responsibility nor do they nor could they state that after the bomb was taken by Santosh to the house it remained in his exclusive possession. They deal with the movement of the bomb only during the period antecedent to that act.

(2) I. L. R. 15 All 129 (1893).

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What they say is that the bomb was taken by Santosh to the *boitakhana*, a room which is a public room where it was found And for a finding in such room the owner of the house was responsible. It is quite possible that information may show that an explosive substance is taken to a house by a particular person, and that when it gets there another person may also become liable for its possession. The bomb having been found in what is by law the Plaintiff's possession, the latter was called upon to account for such possession though information showed that before it came into his possession it was in the possession of some-one else, namely, his son who was also the means by which it came there. It may well be that a person may take a bomb to the house of another and ask the latter to keep it for him and the latter may do so or permit it to be kept in a place which the law deems to be his custody. In short the finding of the bomb in the possession or control of another justifies his arrest.

"The learned Judge, however, nexts holds that the arrest was not justified, as the pleadings show that the Defendants did not arrest the Plaintiff as the owner of the house under sec. 5 but as an accessory under sec. 6. He is of opinion that a different defence has been set up to that raised in the pleadings. Had this been so, I should have been ill-disposed to shut the Defendants out on a merely technical plea seeing it in no way affected the evidence which the Plaintiff had given or might give and that the Plaintiff has shifted his own case from that stated in the plaint throughout the whole trial. In my opinion, however, the learned Judge's finding is not justified.

"In the first place it is in my opinion immaterial in this case under what section of the Act the arrest was made if in fact the circumstances were such that the Act justified arrest. If a person were arrested say on a charge of theft, but it turned out that he should have been arrested for criminal misappropriation, it seems to me, apart from any question of surprise and the necessity for calling any particular evidence, to be hardly possible nor sensible that he could bring a suit for malicious arrest claiming Rs. 10,000 or other damages saying "it is quite true you could have arrested me for criminal misappropriation, but as you did not and pursued me for theft I want my damages, because though liable in fact to arrest, the warrant was issued under the wrong section." Such a conclusion would, it appears to me, stultify the law I may cite in this connection the observations of Mr Justice Harington in *Clarke* v *Brojendro Kishore Roy Chowdhury* (3), the appeal in which has recently been decreed by the Privy Council. "In the course of the argument there was some discussion as to which of these Acts the Defendant purported to act under; that to my mind is of very little importance; the Defendant is entitled to call in aid any statute which justified his action quite irrespective of whether it was present or not to his mind when he made the search." The present case is not even one of different Acts, but of different sections under the same Act.

"It is, however, unnecessary to decide this question in the present suit, for the learned Judge is in error in supposing that the warrant was under sec. 6 and not under sec. 5. The case against Santosh appears to have been under secs. 4 and 6, but in the case of the Plaintiff the application dated 23rd July under the recommendation of Mr. Brett for the warrant was under secs. 4 and 5. This appears plainly on the face of the record (Ex. R in I, page

(3) 13 C. W. N. 458 : s. c. I. L R. 36 Cal. 433 (1909).

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764), and in Mr. Nelson's order-sheet it is stated 'The Police apply for a warrant against the father of Santosh, the owner of the house in which the bomb was found. Issue warrant without bail.' Again the warrant itself plainly states 'whereas complaint, etc.,' for offence under secs. 4 and 5 of Act VI of 1908, etc.,' (Ex. XCVII in I, page 4387). Again the remand order was under the same sections. Again the Plaintiff himself stated on the 7th August in a petition for bail that he was arrested under secs. 4 and 5, 'the Police stating me to be the proprietor of the house in which the Police allege that they found a bomb in connection with the case instituted against Santosh Dass' (Ex. Ia, page 3641). He was himself thus quite conscious of the grounds of his prosecution. Lastly, Mr. Dutt, his Counsel, was aware of the fact. The following questions were put by him to Mr. Weston (page 7947):—

Q.—You know the section under which Peary was arrested, sec. 5, which says 'any person who makes . . . . punishable.' Did you have any information on the 8th of July which gave rise to a reasonable suspicion that Peary knowingly either made the bomb or kept it in his possession for an unlawful object?

A.—I had the fact that the bomb was found in his house and my interpretation of the law is that I was justified in arresting him and the onus of explaining the presence of the bomb in his house lay upon him—whether my view of the law is correct or not, it is for His Lordship to decide.

Q.—And it is for that reason and that reason alone that you had Peary arrested on the 23rd? Is that your evidence?

A.—That is.

Q.—Why did you not order his arrest between the 8th and the 23rd?

A.—Because until about the 21st I had no knowledge that the bomb was a dangerous one.

Q.—You swear to that, that you had up to the 21st or 22nd no knowledge about the dangerous character of the bomb?

A.—I do.

Q.—I put it to you that you had Peary arrested with a view to extort a confession from his son?

A.—That is utterly and absolutely false.

"Mr. Dutt now explains that this question was put 'with another object' which he does not state. But whatever his object was, it is plain that during the trial he assumed that the arrest was under sec. 5, notwithstanding that the plaint incorrectly mentioned sec. 6. I say 'incorrectly' because not only is there no evidence that the proceedings were taken under sec. 6, but the evidence is directly the other way. Then he admits that at the very close of the case during his (Mr. Dutt's) reply, when the argument for the defence had been closed, he argued that the Defendants' pleading was under sec. 6 and that (notwithstanding the facts) they should not be allowed to rely on sec. 5. In other words though the warrant was in fact under secs. 4 and 5 they were not to be allowed to say so. Their mouth was thus to be shut whilst a charge of crime and fraud was sought to be fixed upon them. This is another but very marked case of the constant and unfair shifting of ground by the Plaintiff at the trial. The learned Judge, however, gave effect to this belated argument and has held that notwithstanding the application for arrest, warrant and proceedings were under secs. 4 and 5, that the Plaintiff himself stated and understood that he was being proceeded against under secs. 4 and 5, and that his Counsel at the trial proceeded on the same basis—the Defend-

ants were not entitled to say that they acted under secs. 4 and 5, because they are held to have pleaded (apparently in ignorance of the plain facts), that the Plaintiff was arrested as an accessory under sec 6. There is no mention of that section in the written statement, but the learned Judge reads the reference to accessory as implying action under the section. The word accessory is, however, there used not with reference to the warrant but to the information which the Police had received prior to the application for a warrant. It was thought that that information coupled with the circumstances of the case including the fact of the bomb being in the house of which the Plaintiff was owner, raised a reasonable suspicion against the Plaintiff that he was fully aware of what was being done. The application for the warrant was actually under secs. 4 and 5 and against the Plaintiff as owner of the house. If the proceeding had been under sec 6 presumably the written statement would have so said. It could not have done so, however, unless the gentleman who drew it have never seen the application, warrant and proceedings in the case including the Plaintiff's own petition. However this be, it is plain that an erroneous statement in the pleadings (assuming that for the sake of argument though not holding that there was one) cannot overcome the actual fact apparent on the face of the record and admitted by the Plaintiff himself and his Counsel. The latter should not (after having dealt with the case as one under sec. 5) have been permitted to shift his ground in the last stages of the case in reply. I hold that it is established beyond all doubt that action was taken under secs. 4 and 5 and not sec. 6 and that the Defendants are not precluded by anything in their pleadings from avowing that which is plainly the fact. If, as I have found, the Defendants were not responsible for the bomb, then sec. 5 justified the arrest of the Plaintiff on its discovery in his house. In fact Mr. Dutt is recorded as having said in the first Court that "if the Plaintiff had been arrested on the 8th July nothing could have been said;" and this for the reason that the Plaintiff was the owner of the house. His case then and until he shifted it in reply was, that his client should (if the Defendants' case be true) have been arrested on the 8th July, but the fact that he was not, but later on on the 23rd, showed that Mr. Weston had no *boná fide* belief in his right to proceed against him as the owner of the house."

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"Then Mr. Dutt put forward a charge of conspiracy to produce false evidence and to forge a document, Ex. 61, against both Mr. Weston and Mr. Hadrill, formerly a member of his own profession and now the solicitor instructing Counsel for the defence

"A witness of the name of Akshoy Kumar Pal says that he was asked not to give evidence for the Crown "against the country" by a man named Paramananda Shaha, who himself makes charges of bribery against the Police. The latter is alleged to have asked the witness to say that the Police had coerced and tutored him. He also showed a note which is said to be in Mr. Dutt's writing, stating that Mr. Dutt would arrange that Abinash Mitter and the Raja of Narajole would, between them, pay Rs. 6,000. The witness also swore that Paramananda took him to Mr. Dutt's house, where he saw Mr. Dutt. He asked the latter whether he had said what Paramananda had stated and whether he had sent the letter, to which Mr. Dutt said 'yes' and that the witness would get the money through Paramananda. He also said that

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Mr. Dutt 'bribed almost all the witnesses and got them over; tried to do the same thing with me; played the same trick; but could not succeed. Since the last two and a half years all sorts of oppressions are being perpetrated on me.' There has been some difficulty in reading the letter which my brother Chatterjee says contains some mistakes which are not likely to have been made by Mr. Dutt. On the other hand, the Appellants draw attention to certain words which they claim to be similar mistakes in a sample writing made by Mr. Dutt before Mr. Macpherson. The witness read the document as 'we are also prepared to give or pay, please make all arrangements for it.' The witness Akshoy swears that he knows Mr. Dutt's writing; that the note is in his writing, and that Mr. Dutt admitted that he had sent the letter. This letter is alleged to be a forgery. It is true that Mr. Dutt has not been called, but I am not prepared to say that the document has been proved. I am not, in the first place, satisfied with the evidence of Akshoy Pal. If he was in fact approached and was an honest man, he would have rejected Paramananda's offer then and there. Why did he, as he says, go to Mr. Dutt? If this evidence is true, it would tend to show that, instead of rejecting the offer, the witness was seeing what might come of it. He also admits that though he was a witness for the Crown, he did not say 'all, but what little I said I did so with great reserve.' Nextly, the witness in his evidence is not competent to depose to Mr. Dutt's writing, and as Mr. Justice Fletcher points out this and other documents were taken out of Court for expert examination, but no expert was called to speak to it. It is possible that the document is a forgery, and that Paramananda wrongly took Mr. Dutt's name, but if so, the evidence of the witness that Mr. Dutt admitted that he sent the letter must be untrue. However, the matter I now desire to discuss is not the charge against Mr. Dutt which this witness introduces, but Mr. Dutt's counter charge against Mr. Weston and Mr. Hadrill and the Maulvi in respect of it. Mr. Dutt who personally cross-examined the witness who was making charges against him, suggested to him that Mr. Weston, in concert and conspiracy with the Maulvi and Mr. Hadrill, put up this witness to tell a false story, and either forged or put forward this document knowing it to be forged, which suggestion the witness denied. This suggestion was supported by another that Mr. Hadrill and the Counsel then appearing for the Crown, were putting up with Mr. Weston and that the witness Akshoy Pal was there also. As in other cases, an attempt has been made before us to show that what was suggested was not that which the question put obviously meant, and that there was no charge against the Defendants of fabricating this document, or using it, knowing it to be fabricated. This explanation I do not accept.

"And the learned Judge in his judgment, while holding the document to be a forgery, added 'But while saying this I am satisfied on the evidence that there is not the slightest ground for suspecting that either Mr. Weston or Mr. Hadrill had anything to do with it nor did they in any way suspect that it was not a genuine document.' An application was made to Mr. J. C. Dutt, Attorney for the Plaintiff, to state the grounds on which this question was put, but Mr. J. C. Dutt replied that he was advised not to answer. An application to the Court by Mr. Hadrill for an enquiry was refused, the matter being *pendente lite.* Before us the matter has been put in this form, namely, that the document was put forward

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at the instance of Mr. Weston though Mr. Bose says whether Mr. Weston had knowledge that the document was forged he 'cannot say,' nor can he say that the document was made at the instance of Mr. Hadrill. In my opinion, this is not a creditable manner of dealing with the question. In the first place no attempt should have been made to deny that the charge made was that which appears on the face of the question; which was understood and stated without objection by Counsel for the defence; which was put to Mr. Weston without objection; which was repeated in express terms by Mr. Dutt in his reply; and which was so understood by the learned Judge who rejected it. Secondly, the learned Judge having found as the fact is that there was not the slightest grounds for the charge, learned Counsel should frankly have withdrawn it and then stated to the Court the grounds, if any really existed, on which Mr. Dutt considered himself justified in putting it.

"Such grounds as have been put forward by Mr. Bose (for Mr. Dutt has not himself attempted to justify his charge) are no grounds whatever for the charge, which should never have been made. Mr. Garth has, in consequence, asked us to refer Mr. Dutt's conduct in preferring this unfounded charge to the Court, for consideration whether action should be taken against Counsel in respect of it. I do not, however, propose to do so; notwithstanding the number and reckless character of other unfounded charges exceeding any in my experience, which have been made in this suit because I think that with this expression of opinion this case, which has already occupied enough of the public time, should in all its aspects now come to a close. I wish, however, to add some observations to what I have said. After this charge had been made the Advocate-General requested the Court to ask Mr. Dutt whether he made the charge on instructions, and, if so, on whose. Mr. Justice Fletcher appears to have considered that he was not entitled to do that. In my opinion the Court is so entitled and that were this not so, it would be powerless to prevent that abuse of cross-examination which the law directs. Instructions to Counsel further are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. If the latter calls for written instructions it cannot obviously use them as evidence in the cause which is tried, and for the purpose of such trial would have to treat them as confidential. They could, however, in my opinion, be called for then and there and be used after the trial on the determination of the question whether disciplinary action should be taken against Counsel by the Full Court to which the matter would then have to be referred. If the Court were shorn of this power it might not be able to take such action in a class of cases which most justified it. The learned Judge also appeared to think (see interlocutory judgment not printed, dated 2nd February 1911) that he was prevented from acting by reason of the fact that the question reflected not on the witness but on a third party, and that sec. 150 of the Evidence Act must be referred back to sec. 146 which, in the opinion of the learned Judge, had no application. I am myself not prepared to hold that, even if sec. 146 did not apply, the Court could not do that which is necessary for the effective exercise of its disciplinary powers over advocates; but I may further point out that even on a strict reading of these sections, sec. 146 did apply, for the question, though it did reflect on third parties, also reflected on the witness. I

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wish further to add that in my opinion it is not sufficient even to plead instructions. Counsel have a responsibility in the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

"In connection with this question of cross-examination, which appears to have been often conducted both in form, manner and tone in an insulting and provocative way, I notice that Mr. Dutt claimed to be entitled to regulate the civility which he should extend to a witness On an objection by Mr. Gregory to the offensive tone of Mr. Dutt's examination of Captain Weinman, he is recorded as saying 'I have been more civil than he deserves.' I see no ground for this observation in the evidence, and provocative remarks of this kind to witnesses should be disallowed. On another similar objection in the case of another witness, the Court is reported to have remarked that it must allow some latitude to Counsel. In my opinion, no latitude should be allowed in such matters at all. The cross-examination also contains a large number of unfair and misleading questions. When, moreover, Counsel puts it to the witness that he may take a statement from him, or otherwise states the case, care should be taken to see that the witness may not have ground for thinking that his confidence has been misplaced."

* * * * *

"I now pass to the charges made in respect of Surendro Nath Mukerjee, a co-accused of the Plaintiff's son. It is charged that, on the 11th August 1908, (though Mr. Dutt opened the 13th) this man received three kicks in the stomach from Lal Mohun, which are said to have been of so serious a nature as nearly to kill him and to have caused him to involuntarily pass a stool and urine. The second charge is that the Police produced a false and tutored confession from him on the 15th August. Learned Counsel for the Defendants objected, and I think rightly, on the ground of irrelevancy, at having to go into these charges which occupied so considerable a portion of the record, but were overruled. Had the "primary" conspiracy of which Mr. Dutt speaks been relevant, possibly (though it is not necessary to decide it) that portion of the evidence which relates to the procurement of the confession might have been relevant, though even then it would be doubtful whether the evidence as to the alleged kick would be material, seeing that it is not alleged to have been the inducing factor of the confession, and if it were, it would, I presume, have been put forward, which it was not, in the criminal trial. As matters, however, now stand, it is obvious that the fact that a third party was kicked (if the story be true) on the 11th August, has no bearing on the issue whether the Defendants put a bomb in the Plaintiff's house prior to the 8th of the preceding July, or arrested without cause the Plaintiff on the 23rd of that month, however reprehensible in itself such savagery would be. Objection was also taken to the reference which the learned Judge says he made after the trial was over to some medical works not stated. The objection is well-founded, for whatever a Court relies on should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point, *Durga Prasad* v. *Ram Doyal* (4). The matter is not, however, in the view I take of the facts, of importance, for the question with which the learned Judge deals only arises if and when it is proved that the kicks were given

(4) I. L. R. 38 Cal. 153 (1910).

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the alleged results of which the learned Judge discusses."

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"I now deal with the question whether Mr. K. B. Dutt should have accepted a retainer in this case; whether he should have been called as a witness; and what is the effect of his not having in fact been called. Though these matters raise questions of professional conduct, I am not dealing with them simply on this ground but because they have a most important bearing on the decision of this case. Objection was taken before Mr. Justice Fletcher to Mr. Dutt's appearance as Counsel in this case on the following main grounds:—that he had a personal interest in and had in fact 'engineered' the case; that he had a personal knowledge of the facts of the case; that he was a proper and material and, indeed, necessary witness to facts in the case; that having been concerned in preferring charges he should support them by his testimony; and that both witnesses and Counsel would be embarrassed by his appearance, the more particularly so as serious charges, such as bribery, were personally made against him. The learned Judge overruled these objections in the following passage:—'It was made a matter of deliberate and unrestrained attack on Mr. Dutt that he had not gone into the witness-box Mr. Dutt has himself explained the reason of his abstention, and that reason appears to me to be satisfactory. His client, in whose favour his testimony would have been given, with full knowledge of this saw fit to retain him as his Counsel, and it cannot be suggested that there was anything improper in Mr. Dutt's accepting the retainer.'

"I will deal first with the question whether Mr. Dutt should have appeared as Counsel in this case. Mr. Justice Fletcher is of opinion that it cannot be suggested that there was anything improper in his doing so. I should have myself, in the absence of any other authority, thought that under the circumstances of this case to which I shall refer, it was not proper. I am, however, fortified in this view by the answers which were given by the Bar Council to certain questions put to them on this very matter, and in respect of this very case. We have referred to the Bar Council's report with the consent of Counsel on both sides. It will be found set out in 16 C. W. N. xlvi. Their decision is of course not binding on us as Judges. But the Bar Council are the recognised authority on all matters of professional conduct and etiquette affecting Counsel, and their opinion therefore is of the greatest weight and value. Their reply to the questions put to them was this: (1) If Counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept a retainer therein (2) If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client. (3) If Counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case he ought not to accept a retainer. (4) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned but finds in the course of the case that it is so impugned he ought to adopt the same course of conduct as is mentioned in clause (2) *ante*. (5) In either of the cases mentioned in cls (2) and (4), there is no rule of professional

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ethics which debars a Counsel if he continues to act as Counsel in the case from going into the witness-box and being cross-examined.

"I agree with this opinion. The question then is wheth r Mr. Dutt does not come within rule (1), and of this on the facts there is, in my opinion, no question Mr Dutt is, I believe, one of the leading citizens of Midnapore and an old resident there, where he is or was the Chairman of its Municipality. He is also engaged in politics, was Chairman of the Midnapore Conference and the chief of what is called the 'Moderate' section of Nationalist politicians. His position is set out in the statement which he made under sec. 161 of the Criminal Procedure Code to the Defendant Lal Mohun Guha. Mr. Dutt took some part in what are called *swadeshi* cases. He must be, from his position, of course well aware of the political condition of Midnapore, and the ins and outs of Nationalist politicians, whether Moderate or Extreme, in the district. He was himself implicated in the informer Laha's reports as being a member of the so-called "bomb conspiracy." It is in evidence that from the 9th July to the 23rd July the Plaintiff consulted him almost daily, and reported to him what was being done as regards his son in prison, the alleged misdoings of the Police as also the Plaintiff's own alleged conversations with Mr. Weston in particular; and this is extremely important: he was, according to the Plaintiff, told that Mr. Weston had declared to the Plaintiff that he knew him to be innocent, that he need not be nervous, but had notwithstanding told the Plaintiff that he would arrest him if he did not get his son to make a confession which the Plaintiff understood Mr. Weston to know to be a false one. Mr. Dutt was one of the spokesmen of the alleged grievances of Midnapore at the visit of Mr. Maddox on the 4th August 1908. If we are to believe Maity he can also speak to the fact that Mr. Weston sent more than one chit to the Plaintiff and the contents of them. He was present at the Pleaders' Library on the 15th August when Ashutosh made his alleged revelations about the Police. On the 16th August he telegraphed and thereafter communicated with Government on the subject of the alleged misconduct of the Police. He appears to have been concerned in the preparation of the statements of witnesses sent to Government against the Police on the 27th August. He is said to have directed that note-books should be kept recording complaints against the Police. He was present as Counsel on the 31st August, when it is alleged that the Court was of set purpose kept by him in ignorance of the fact that his clients were filing petitions of retractation of confession. He is concerned in the subsequent proceedings. He was present as spokesman and gave evidence at Mr Macpherson's enquiry He is said to have had information of a large number, if not all, of the principal incidents in this case, such, for instance, as the alleged kicking of Surendro, and to have had personal knowledge as to others He is charged with having written a letter offering a bribe to the witness, Akshoy Pal, and is alleged to have bribed a large number of other witnesses in the case. In addition to his own personal interest, a number of the actors and witnesses in this case are Mr. Dutt's relations or connections, such as Madhu Sudan Dutt in charge of the room where the bomb at Saroda Dutt's house was found, Rash Behary Bose, who Mr. Justice Fletcher thinks sent the "stabbing portrait" to Mr. Weston threatening his life, Sreenarain Pal, implicated by the reports, Jogjiban, an accused in the Arms Act case and the Midnapore Bomb

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conspiracy case, Santosh Dass, the latter's mother-in law, and Nibaran Chunder Mitter. The circumstances point to his having an interest in and having taken an active, and I think leading, part in the institution and prosecution of this suit which represents in effect his own claims and grievances and those of others. It is not necessary therefore to go into every detail. It is sufficient to say that Mr. Dutt's name crops up in every part of the evidence either as the person directly concerned or as having personal knowledge of the facts or as being in a position to corroborate them.

"It is obvious that, under these circumstances, Mr. Dutt must have known that he was an important witness in the case and it was therefore not proper of him to have accepted a retainer in the action. I wish to add a reference to a decision of this Court. One of the results of Mr. Dutt's appearance was this—that he had to examine and cross-examine as to matters on which he had personal knowledge, such as alleged conversa tions between him and the witness. And he actually cross examined a witness, who made charges of personal corruption against himself, a most unseemly spectacle. In the decision to which I refer, which is unreported (In the matter of certain Counsel, 4th August 1908) the Full Bench observed as to the unprofessional and objectionable character of Counsel cross examining a witness as to facts within his personal knowledge. Sir Francis Maclean, C. J, then said, delivering the judgment of the Court: 'I agree with what has fallen from the Advocate-General that the effect upon the minds of a Jury of a cross examination conducted in this method might prove injurious to the administration of justice' The Chief Justice here refers to its effect on the Jury, but as I will later show the fact that Mr. Dutt has conducted this case has had a prejudicial effect on the mind of the learned Judge. The Chief Justice continued: 'Suppose for a moment that a leading Advocate were in cross-examination to put to the witness in the box a question of this sort, why did you not tell me so and so and so and so.' The possible effect upon the mind of the Jury might be that they might regard the suggestion of Counsel as being pitted against the statement of the witness, an entirely fallacious view, with the result that, in consequence, they might disbelieve the latter. The Chief Justice then considered the effect which might be produced upon the mind of the witness himself; how such an examination might be very embarrassing and conducive to his giving answers he might not otherwise have given. To these I add the obvious embrrassment of Counsel on the other side in examining or cross-examining to personal charges against their opponent. The objection I may lastly add was not removed by Mr. Dutt saying instead of 'did I not do so,' 'did I not say so,' "did not Mr. K. B. Dutt do or say so?'

"I nextly deal with the question of whether, having accepted such a retainer, Mr. Dutt should nevertheless have gone into the witness-box. Mr. Justice Fletcher then says 'Having done this (that is accepted the brief) it was in strict accordance with the rule of professional ethics of almost universal application that having taken up the position of an advocate he should refrain from testifying at a trial which was being conducted by him.' The learned Judge places the matter too high, as amongst other matters, a reference to cl 5 of the Bar Council's report show. There is nothing necessarily unprofessional in Counsel giving evidence in a case in which he appears as such. There have been several cases both in England and this country, in which this course has been taken without objection.

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Two unreported instances are noted in *Sethna* v. *Mirza Mahomed Shirazi* (5). It is true that in that case Mr. Justice Beaman held absolutely that the Court would not allow Counsel conducting cases to give evidence on behalf of their clients in respect of matters with which they were acquainted before they were retained, but that they might do so as regards matters occurring after their retainer. But such decision is in my opinion erroneous. It omits to notice that *Stones* v. *Byron* (6) and *Dlane* v. *Packwood* (7) were not followed in *Cobbett* v. *Hudson* (8). It is opposed to Mr. Inverarity's case, which the learned Judge cites. Considered as a rule of absolute exclusion as opposed to an expression of opinion of what is desirable, the decision is in direct conflict with the Evidence Act, and both with the Privy Council decision to which I next refer and the opinion of the Bar Council regulating questions of professional conduct above cited. The learned Judge who decided that case failed to distinguish between competency and the opinion that as a general rule it is desirable that the same person should not be both advocate and witness. In the Privy Council decision, *Victor Corea* v. *Peiris* (9), a gentleman named Schroder was examined as witness, though counsel in the case. The Judicial Committee did not disapprove of this as contrary to the professional ethics of which Mr. Justice Fletcher speaks, but on the contrary there stated that Counsel had been properly examined.

"The true rule in such matters is, in my opinion, as follows. Counsel though they may be engaged in the case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer [*see* sec. 118 of the Evidence Act, *Cobbett* v. *Hudson* (8)]. The Court has no authority to exclude such evidence if tendered. It is not in all cases a breach of professional ethics for a Counsel retained in the case to give his evidence in it. There are cases in which he properly may and, indeed, should do so. At the same time it is recognised by both the Court and the profession that, as a general practice, it is undesirable, when the matter to which Counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting. In judging the matter from the point of view of what is desirable as opposed to what is legal much must depend on the circumstances of each case. In the present case, having regard to Mr. Dutt's interest in the proceedings, the fact that he has taken part in the events referred to in them and has both personal and reported knowledge of a very large number of the facts testified to in the evidence, it was in a high degree undesirable that he should have been both Counsel and witness. The real objection in Mr. Dutt's case is that he was Counsel in the case and not, therefore, as he would properly otherwise have been, a witness. I may add that *Curry* v. *Walter* (10) to which Mr. Bose referred, has no bearing. There Counsel was subpœnaed to prove what had been stated by him on motion in Court. The Court was of opinion that on such a matter Counsel should not be called, but that the party should prove it by other means or witnesses who are present; but it should be at the option of the Counsel whether he would give his testimony or not. The Court therefore decided that it was not obligatory on Counsel in such a matter to give evidence,

(5) 9 Bom. L. R. 1044 (1907).
(6) 4 Dowl and L. 393 (1846).
(7) Dowl. and L. 395n 11 (1847).
(8) 1 E. and B. 11 (1852).
(9) 14 C. W. N. 86 (1909).

(8) 1 E. and B. 11 (1852).
(10) 1 Esp. 456 (1796).

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though he might do so if he liked. It did not decide that he could not give evidence. It is further of no authority in this country where a Counsel must obey a subpœna to give evidence as any one else must do.

"The next point (which is the material one here) is whether the Appellants were entitled to ask the learned Judge to draw inferences adverse to the Plaintiff from the fact that Mr. Dutt had not been called. This they were clearly entitled to do. If it be a fact that under the circumstances of this case Mr. Dutt could not properly have been both Counsel and witness, those circumstances also show that it was improper of him to have been Counsel at all. And if he were not Counsel there can be no possible question but that he was a material and necessary witness. It was not open to Mr. Dutt to act in breach of a professional rule, and then to plead the fact of such breach both as a reason why he could not be a witness and also why adverse comment should not be made upon the fact that he was not a witness. If it be that as Counsel he ought not, under the circumstances of this case or otherwise, to have been a witness, then it was the act of his client which made Mr. Dutt Counsel and he cannot plead his own act against such comment. If Mr. Justice Fletcher's view were correct, then if a litigant is aware that a particular Counsel has knowledge of a fact which he does not wish disclosed or that such Counsel's evidence if given would contradict him, he has only to retain him and then say to the Court: 'You must not draw inferences against me, because I do not call the man who can speak to the facts which I ask the Court to believe, for I have made him my Counsel.'

"The next question is what is the nature of the inference which should be drawn from the fact that the Plaintiff has put forward Mr. Dutt as his Counsel and not as his witness. The learned Judge says: 'Mr. Dutt has himself explained the reason of his abstention (from the witness-box) and that reason appears to me to be satisfactory.' What those reasons were are not stated, and the learned Judge has therefore not placed us in a position to appreciate them. But if those reasons were that Mr. Dutt had not in fact personal knowledge of the facts, or were a statement of the extent to which he was concerned in those facts, or as to the nature of those facts, such a statement, being in the nature of evidence should have come from him in the stand and not from his place at the Bar. The learned Judge next says 'His client, in whose favour his testimony would have been given, with full knowledge of this fact saw fit to retain him as his Counsel.' How and on what grounds could the learned Judge assume, as he here does, that had Mr. Dutt been a witness, which he was not, his testimony would have been given in favour of his client? This observation indicates the danger to which Sir Francis Maclean, C. J., in the case cited referred, namely, that inferences unsupported by the evidence of Counsel himself may be drawn from his mere appearance in support of a cause of the facts of which he is alleged to have personal knowledge. So far from the inference being what the learned Judge states, it is precisely the other way. The learned Judge has himself correctly stated the rule when dealing with the Defendants' case, *viz*, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.' The same rule applies to Mr. Dutt, for whether he could or could not as Counsel have given evidence in this case he should not have been Counsel and could and should have given evidence for the reasons I have given.

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"On this matter it only remains to indicate on what points such presumption should in this case work. It works as regards every one of the facts to the chief of which I have alluded in which Mr. Dutt was himself an actor, or had alleged personal or reported knowledge. I need not repeat them here. They are also mentioned in detail in the evidence. I only say here that in my opinion the most important points affected by this presumption are the alleged reports made to Mr. Dutt between the 8th and 23rd July as to the alleged conduct of Mr. Weston and the Police, subsequent information on the same points received by him, the circumstances leading to the institution of this suit; and matters in the suit itself, such as the incident of the 31st August which Mr. Dutt who was then Counsel makes the basis of a charge of dishonesty against the Defendants and the presiding Magistrate Mr. Nelson. So far from presuming, as the learned Judge does, that Mr. Dutt's testimony on these and other points would have been in favour of his client, I presume the other way and the learned Judge might have himself so found if Mr. Dutt had gone into the stand. One of the chief grounds on which this suit has been decreed against Mr. Weston are the alleged conversations he had with the Plaintiff when he is supposed to have repeatedly told the latter that he was innocent, that there were therefore no grounds for proceeding against him and that he need not be nervous and yet that he expressly avowed his alleged illegalities in telling the Plaintiff that he would arrest him nevertheless if he did not get a confession from his son. These conversations are said to have been reported to Mr. Dutt at the time. Is it to be conceived that if Mr. Dutt had been told about these at the time it would not have been of the first importance that this should be proved? Would not Mr. Dutt have been called to give that presumptively independent evidence which the suit now lacks. I assume that Mr. Dutt was not called because he could not corroborate the Plaintiff or his case on this or other points. Had he done so, it would have been necessary for him to explain how he did not mention the subject of the alleged reported conversations to Mr. Maddox on the 4th August, but had on the contrary no complaint to make against Mr. Weston; how he did not mention it in his letter to Government of the 27th August; how it finds no place in the subsequent proceedings and does not see the light of day until this suit, and then, after Bonomali's charge had failed it is put forward as the basis of the new case on which the suit has been decreed.

"In this connection I desire in justice to Counsel for the Appellants in the first Court to deal with another matter. Mr. Justice Fletcher who has, in my opinion, erroneously approved of Mr. Dutt's conduct, has on the other hand in my opinion passed an undeserved judgment on the conduct of Counsel for the defence. After having observed that Mr. Dutt had followed the rule of profesional ethics, he continues: 'I may observe that this rule of professional conduct was not, I regret to say, observed by Mr. Dutt's opponents.' This observation is based on the fact that Mr. Norton called Mr. Gregory (a junior Counsel in the the case) as his witness, and the latter gave his evidence. Mr. Gregory was called to repel a suggestion of Mr. Dutt, who in his numerous charges has not spared members of his own profession, that Mr. Gregory had not in respect of a particular matter, *viz.*, that arising out of exhibit 61, properly and fairly conducted the case before the Sessions Judge and had attempted to keep back the document from the Court. Mr Gregory

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from his place at the Bar gave his explanation. Though not so bound, it was properly open to Mr. Dutt to accept a statement made in such a matter and in such circumstances from a fellow member of his own profession. He refused and objected to the statement being made. Thereupon Mr. Norton put Mr. Gregory in the witness-box when he was cross examined at length by Mr. Dutt who amongst other matters thrice made to him the misleading suggestion that the Counsel Mr. Morrison was not present in Court on the 23rd when A. K. Pal who speaks to this document was examined, though it is clear from the record that he was in fact present I have already stated what in my opinion the general rules are as regards the calling of Counsel as witness. In my opinion Mr. Norton was fully justified in calling Mr. Gregory both in protection of the latter's professional reputation which had been in fact groundlessly assailed and of his own client's interest.

"In this connection I may cite an observation of Sir Francis Maclean, C. J., in the case of *Nundo Lal Bose* v. *Nistarini Dasi* (11): 'I can scarcely suppose that any Counsel if he understood that the other side were not prepared to accept his statement made upon his word of honour would not himself ask that he might not be allowed to give his evidence in the usual way.'

"Mr. Norton has also invited our opinion on another matter on which the learned Judge has censured him. During the examination of the witness Mr. Wilson, the latter produced at the request of Mr. H. D. Bose, who was cross-examining him, a private pocket book. An irrelevant cross-examination on it followed. The book being a private one, Mr. Norton marked the pages to which Counsel might refer in respect of the subject of his cross-examination, the other pages referring to other matters. Mr. Bose, however, looked at pages which had not been so marked. On the face of it this was highly improper on the part of Mr. Bose, and Mr. Norton appears to have naturally expressed his opinion strongly to this effect. The learned Judge is, however, stated not to have then and there, as I think should have been done, determined who was in fault. Mr. Bose brought in next day a written explanation of his conduct which the learned Judge is said to have refused to have gone into, and then the matter ended until the judgment when the learned Judge observed as follows:—'I may further add that I viewed at the time and still view with complete disapproval Mr. Norton's unfounded and abusive attack on Mr. Dutt's junior, Mr. H. D. Bose.' I do not know what the explanation was which Mr. Bose offered and on which the learned Judge refused to adjudicate, and I am not therefore in a position to say whether Mr. Bose was to blame. *Primâ facie* and in the absence of proper explanation Mr. Norton was justified in taking strong exception to Mr. Bose's conduct. The matter might have been decided then and there, but as it was not, I cannot say that Mr. Norton was open to censure. I may further observe that the judgment states no grounds on which it is based, though the admitted fact that Mr. Bose from one cause or another looked at the unmarked pages in my opinion called for them."

* * * * *

COXE, J.—I entirely concur with the judgment of Mr. Justice Woodroffe both as to the order and as to the grounds therefor.

D. CHATTERJEE, J.—This Appeal arises out of a suit described as one for damages for wrongful confinement and malicious prosecution. The Defendants pleaded

(11) 4 C. W. N. 169, 182: s. c. I. L. R. 27 Cal. 428 (1900).

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limitation before the Court below, but were overruled. The question of limitation has been pressed before us and I shall deal with it first.

The Plaintiff was arrested on the 23rd of July and discharged on the 31st of August 1908. The suit was filed on the 15th of November 1909, *i.e*, more than one year after the discharge, and would therefore be barred in so far as it was one for wrongful confinement or false imprisonment and malicious prosecution under Arts. 19 and 23, Schedule I, Limitation Act. The Plaintiff's legal advisers evidently saw this, and it was stated in the 14th paragraph of the plaint that the period of the notices served under sec. 80 of the Criminal Procedure Code being excluded, no part of the Plaintiff's case was barred. The Court below has held, however, that no such notice was necessary, and no exception has been taken to that view of the law before us, and no reliance has been placed upon any such notice as an answer to the plea of limitation. It has been contended, however, that the suit was based on a conspiracy between the several Defendants, and as conspiracy is a distinct cause of action by itself, the suit must fall either under Art. 36 or Art. 120, and is therefore not barred; it has been further contended that the illegal search of the Plaintiff's house is a cause of action which at least is not barred, as it would fall either under Art. 36 or Art. 39 or Art. 120. The first contention as regards conspiracy has found favour with Mr. Justice Fletcher, and I shall deal with it first. The learned Judge has relied on the case of *Quinn* v. *Leathem* (12), and Mr. Dutt has also relied on the same in support of his argument. The learned Judge says: "The truth of the matter is that in a case like the present the Plaintiff has two causes of action—one to recover the damage that has been occasioned to him as the result of the conspiracy, and the other to recover damages for malicious prosecution against the Defendants as joint tort-feasors. This is well illustrated by the case of *Quinn* v. *Leathem* (12)." With great deference I think that case itself contains an answer to the argument. Lord Halsbury, in delivering the first judgment in that case, says: "There are two observations of a general character which I wish to make—one is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." Now what are the facts in *Quinn* v. *Leathem* (12), and what does the case decide? The Defendants were the office-bearers of a trade union; they threatened the Plaintiff with injury if he employed men who were not members of the union; the Plaintiff was willing to have his men enrolled as members, but Defendants insisted on his dismissing them and taking members of the union in their place; the Plaintiff refused, and they then threatened a large customer of the Plaintiff with injury if he dealt with the Plaintiff and thus compelled him to cease to deal with the Plaintiff. The Plaintiff brought a suit for damages. The Plaintiff had every

(12) L. R. [1901] A. C. 495.

(12) L. R. [1901] A. C. 495.

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right to carry on his trade in the way most profitable to him, provided he did not infringe on the rights of other people, and so had the customer of the Plaintiff every right to deal with whomsoever he pleased under similar restrictions, and the Defendants had maliciously invaded this right of the Plaintiff and injured him by unlawful means and Defendants were therefore held liable. It was found that there was conspiracy and threats carried into execution by the Defendants to the injury of the Plaintiff, the object being not to serve any trade interests of their own, but to injure the Plaintiff, because he would not comply with their requisition to dismiss his innocent servants. It is true that the concerted action of a number of men has an element of aggravation, and is more irresistible than the unaided act of a single individual, and some of the cases support the view that a combination of several persons to do an unlawful act may be actionable when a similar act by an individual is not, but I do not think there is any authority for holding that a tort when committed by several persons acting in concert is different from the same tort committed by a single individual. A trespass is a trespass, whether it is committed by one person or by more, and so is a malicious prosecution or false imprisonment. The combination in such cases may be an element of aggravation in the assessment of damages, but does not to my mind suffice to make it a different tort. In the very case of *Quinn* v. *Leathem* (12), Lord Lindley said: "It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these Defendants did. One man exercising the same control over others as these Defendants had could have acted as they did, and if he had done so, I conceive that he would have committed a wrong towards the Plaintiff for which the Plaintiff could have maintained an action."

In a similar case, *Giblan* v. *National Amalgamated Labourers Union* (13), Lord Justice Romer said: "I should be sorry to leave this case without observing that in my opinion it was not essential, in order for the Plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of;" and Lord Justice Stirling said: "I am far from satisfied that they are not such as to be illegal even if done by a single individual." Read by the light of the facts, the case decides no more than this, that a number of persons who without justification intimidate a third person by threats of doing him harm and thereby coerce that third person into causing harm to the Plaintiff are guilty of an actionable wrong. *Giblan's* case (13) shows that conspiracy or wrongful combination is not a material element in the constitution of the wrong. In this country the Legislature has made a general provision that suits for damages for false imprisonment or malicious prosecution must be brought within a certain period, and no distinction is made in respect of the number of persons by whom the wrong may have been perpetrated. If it were not so, the greatest uncertainty would be introduced into the law of limitation applicable to a

(12) L. R. [1901] A. C. 495 at p. 537.

(13) [1903] 2 K. B. 619.

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particular case, for a Plaintiff might easily take his case out of the statute by charging more than one person with a wrong, and a Defendant would not know when he is secure against a charge. But supposing that conspiracy to perpetrate a wrong was a separate cause of action by itself, it would not be actionable unless it caused special damage by itself. In the present case, however, the whole damage caused is by reason of the imprisonment and prosecution. The Plaintiff deposes that the imprisonment cost him Rs. 1,000 in law charges, and that is the only damage proved and decreed. The present case, therefore, considered as a suit for damages for wrongful confinement and malicious prosecution is barred by limitation under Arts. 19 and 23 of the first Schedule to the Limitation Act.

The next contention on this head is that the unlawful search of the Plaintiff's house on the 8th July 1908 was pleaded as a separate cause of action and that at least is not barred by limitation. I am not quite sure that this was a part of the original case of the Plaintiff. It was not mentioned as one of the causes of action in the notice under sec. 80, Civil Procedure Code, and the main contention in the argument was that this was one of the overt acts in the conspiracy. Reading the plaint and the issues framed together, however, the contention is, I think, permissible, and if it is found that the search was unlawful or in any case amounted to a trespass, the Plaintiff may be entitled to some damages for the same. The issue framed in this connection was: (2) Did the Defendants, or any two of them in furtherance of such conspiracy, maliciously, wrongfully or illegally—

(*a*) search or cause a search to be made in Plaintiff's house on the 8th of July;

(*b*) trespass or cause a trespass to be made upon the premises of the Plaintiff.

The learned Judge has come to no finding on this part of issue No. 2, and I must find whether the Plaintiff has made out his case on this point. The gist of the case on this point is that the Defendants acting in concert and conspiracy with each other wrongfully and illegally caused a search to be made in the Plaintiff's house and Defendants 2 and 3 trespassed into the Plaintiff's house and conducted such pretended search. This is the statement in the plaint. In the evidence it was attempted to be made out that the Maulvi, Defendant No. 2, caused the bomb found in the Plaintiff's house to be prepared and induced Bonomali, a servant of the Plaintiff, to introduce the same into the house of the Plaintiff and knowing that the bomb had been so put in secured a search-warrant and made a search for a thing which he had himself caused to be introduced and for which there was no need for a search. If this were proved, it would certainly make out a good case against the Maulvi, and the other Defendants would also be liable if their complicity in the nefarious deed of the Maulvi were proved.

I shall first consider whether the Bonomali incident is true. Bonomali's evidence is that he was taken to the Maulvi by a constable named Kartic and on a subsequent date on the 7th July the Maulvi gave him the bomb for being placed in the house of Santosh and he did so place it in the *boitakhana*: that on the same day, the 8th of July, after the bomb had been found he was taken by a constable by train to Santragachi and left there to shift for himself. From there he went to Podra, where he served one Kali Babu for some time, and then returned to Mid-

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napore in October. He met Ashu and was at once taken to a pleader and his statement taken. The evidence of this witness has been disbelieved, and I think rightly disbelieved, by the lower Court. Bonomali places his introduction to the Maulvi about three weeks before the 8th of July. That would be in the middle of June at a time when Kartic is shown to have been at Ramjibanpore. It is not made out that there was another Kartic who was transferred, and the Kartic examined as a witness and identified by Bonomali is not shown to have been at Midnapore about the time in question. The books produced from the Ramjibanpore thana and proved by police-officers from that place make it quite clear that Kartic was not absent from Ramjibanpore at or about the time when he is said to have conducted Bonomali to the Maulvi. His present evidence is that he was taken to Santragachi by the 1-30 P.M. train on the 8th of July by a constable, who left him with an up-country man with whom he slept for the night. Before the Sessions Judge he could not name the station, whilst before Mr. N. K. Ghose, Deputy Magistrate, he said he was set adrift at Howrah, where he slept in the night and went to Santragachi in the morning, following the railway line. Both these stories are specific, and one of them must be false. It is quite clear from his cross examination in this Court that he has made various contradictory statements at various stages in the history of this litigation, and no reliance can be placed upon him.

Besides, important witnesses who could have corroborated him have not been examined. Rakhal Laha is said to have called him to the Maulvi on the 7th of July. Rakhal is not examined in this Court. The pleader to whom he was taken by Ashu and to whom he made a statement immediately on his arrival back at Midnapore is not examined. Kishoripati Roy, the pleader to whom Kartic constable is said to have made a disclosure of this part of the story, is not examined in this Court. The mother of Bonomali is not examined. Jotindro or Jitendro, the nephew of Kali Babu who took him from Santragachi, is not examined. These witnesses could have thrown some light on this part of the case. Then, if the Police were bent upon keeping him away from Midnapore, they could have done so much more effectually than by setting him adrift at Howrah or Santragachi, whence he could easily find his way back to Midnapore. I am of opinion therefore that the Bonomali incident is not only not proved but false. The Plaintiff having made a specific case and given positive evidence to prove the same, I do not think the Plaintiff can ask us to make a different case for him. As the Plaintiff has failed to prove that the Police put the bomb in his house in the manner stated by his witness, he is not entitled to impeach the search as a pretended one. The search was made under a warrant from the Magistrate and conducted with all legal formalities, and resulted in the finding of the bomb which is not shown to have been introduced by the Police in the manner alleged. The case of illegal search and trespass therefore fails. I may add that Mr. Weston is not shown to have been aware of the search until after it had been made, and the approval admitted in the written statement must be read by the light of his evidence and understood as approval subsequent.

This I think is sufficient for the disposal of the case. My learned colleagues have, however, gone into and considered the other facts in the case, and it is but fair that I

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should express my opinion on some of the more important matters.

The bomb found in the house of Peary Mohan is the central fact in this case. The history of this instrument of death will be found in the reports of the informer Rakhal Laha. Mr. Dutt has admitted before us that the reports are genuine, except that of the 7th of July which he says was written out subsequently. We must take it that these reports were made by Rakhal when they purport to have been made. Rakhal was appointed on or about the 20th of May 1908. His reports for the month of May were made directly to the Maulvi, who took them down in his confidential diary. That diary is not before us, as Government claimed a privilege in respect of the same. There is, however, exhibit SS, Rakhal's statement entered in the Crown brief for Rakhal's examination: there is also exhibit G prepared by head constable Asadullah from three or four note-books of Rakhal to serve as a connected narrative for helping Rakhal to give his evidence.

There was a search of Plaintiff's house on the 3rd of May at the instance of the Calcutta Criminal Investigation Department, and nothing incriminating was found. The informer gives an explanation that Santosh had written from Ranchi to pre warn his family, and all arms and weapons had been removed by a window into Jogendro Mullick's house. There is no evidence to show that Santosh could have had any intimation of the intended search which was to have been simultaneous with the Murari-pukur search in Calcutta and actually took place the next day by a mere mischance. The explanation is evidently false.

On the 23rd May the informer went at noon to the first floor of Jamini's house and saw some strips of jute, sulphur and shots scattered there. Surendro said he would prepare a bomb and kill Lal Mohun, Maulvi and Mr. Weston as they had arrested Satyendro, Jogjiban and Sarat Dey for nothing, and that very evening Kisen Saha, Jotindronath Sen and Sachindra Mohan Sen would return from Calcutta after learning the art of manufacturing bombs. This was at noon. In the evening he went to the Plaintiff's house where he saw Kisen Saha, Jotin and Sachin. Suren came in with one seer of something like sulphur, two pounds of large shot and some strips of jute. I may note here that this part of the history of the bomb is not to be found in exhibit g. On the 26th May he goes to the house of Kisen Saha and Kisen tells him that he had learnt to make bombs and had got jute and sulphur but no place as yet. On the 27th of May he again goes to Jamini Mullick, who shows him a letter from his nephew Kisto Prosad Dey about bombs: he takes the letter clandestinely to the Maulvi, who keeps a copy, and the letter is replaced by the informer. This copy of a letter dated the 28th May is to be found in exht. 56 under report dated the 1st June, and speaks of 25 bombs as the surplus stock in hand, asks what those who had learnt bomb-making in Calcutta were doing, and promises to wait 2—3 days for a letter or man from Midnapore and then go away with them in any line. This was a very important piece of evidence; and supposing that the discrepancy in the date is due to some mistake somewhere, one would expect that the letter should be kept back, for it had been only stolen by the informer, and Jamini would not have known that Rakhal had purloined it; in any case one would expect an officer of the Criminal Investigation Department of the Maulvi's experience to keep a more reliable proof of its identity by keeping a photograph. Besides, the letter, if correctly copied, contains inconsis-

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tent language. The addressee, who is the uncle and saluted, is told "করিবে" instead of "করিবেন" We do not see any search made for Kisto Prosad Dey and his 25 bombs or his factory; nor do we see any prosecution of Kisto Prosad. It is true he has not been examined in this case; but even if he had been, he could not be examined with reference to any original letter of his, for the original is not in, and was, I think, never in existence unless one purporting to be an original had been forged by the informer and passed off as a genuine one before the Maulvi. If Jamini's house had been searched at once, this important piece of evidence could have been spotted at once with the aid of the informer and gone a great way to prove a bomb conspiracy at Midnapore.

On the 1st of June there was a meeting at the Rasmanch of the Mullicks, at which Babu Motilal Mukerjee made a stirring speech, and proposed to raise a subscription of Rs. 1,000 to Rs. 1,200 for preparing bombs. On the 2nd of June he goes to Jamini's, and Satkaripati Roy, Sub Deputy Collector, is shown the letter of Kisto Prosad Dey and subscribes Rs 25 to the fund for making bombs. On the 3rd of June Jamini tells him he had gone to Mr. K. B Dutt, who said Rs. 1,000 or Rs. 1,200 would not do, but Rs. 2,000 or Rs. 3,000 must be raised, and he would speak to the Raja of Narajole for a place. On the 4th June he goes to Jamini Mullick's. Jamini proposed to bring bombs from Kisto Prosad, but Purnanand Chatterjee said that if they could get a house they would prepare 1,500 to 2,000 bombs. Jamini also told the informer that he had been to Mr. K. B. Dutt, and Mr. Dutt told him he had written to the Raja for a place.

On the 5th June Jamini sends him to inspect the Raja's house at Gope, and he found it suitable. Jamini told him he would find one-fourth of the Rs. 3,000 to be raised for bombs and he had sent for brass pipes for making bombs. On the 7th June one Satish Bhuttacharji comes from Calcutta and complains of want of money in Calcutta. Jamini tells him either bombs would be prepared at Midnapore or Rs. 2,000 to Rs. 3,000 will be sent. On the 8th June a bridal party comes from Calcutta, and one of the party advises Ashu to prepare bombs with cocoanut shells. The informer then gives a subscription list for making bombs, and Mr. K. B. Dutt, the Bar Library, and several pleaders and others are shown as subscribers. On the 9th June another meeting in the house of Gopal Banerji, pleader, about bombs: on the 11th June another meeting at the house of the Raja of Mohisadal, in which speeches are made about bombs and a subscription list is prepared. Surendro Mukherji, Kissen Saha, Amulya Bose, Bibhu Dutt agree to prepare bombs. Baroda Dutt agrees to prepare picric acid. On the 14th he says Jamini had written to his nephew Kisto for electric wire. On the 16th June Debdas Karan admits his receipt of a sample bomb from Calcutta, after which bombs would have to be prepared at Midnapore. On the 17th June Surendro appears with a bomb in the house of Rajabala prostitute, places it upon two pillows and makes a speech. Then there is a meeting at the house of Kamini prostitute and speeches are made and witnesses are tutored by Moti Babu pleader. On the 18th Suren Mukherji and Jotin go about with the bomb for killing Lal Mohun; on the 30th June at the house of Saroda Dutt, Rash Bihari comes with photos of bombs and dynamite, and Santosh and Suren come with the bomb. Suren gives it to Santosh. On the 3rd of July there is a meeting at Upendra Maity's and Santosh

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and Suren appear with the jute wrapped article and Suren explains why he had kept it with Santosh. On the 7th of July the Raja of Narajole appears in a coach and pair to see the bomb and it is fetched and shewn to him and then taken back to the house of Santosh to be found on the search on the next day.

I agree with Mr. Justice Fletcher in thinking that the whole of this story about the genesis and the peregrinations of the bomb is a pure invention and entirely false.

Several subscription lists are spoken of; none of them has been found; photos of bombs and dynamite are spoken of: none has been traced: brass pipes, electric wire and picric acid are spoken of; not a vestige of any of these things has been detected anywhere in Midnapore. The Raja of Narajole is said to have paid large subscriptions for the preparation of bombs; his account books have been searched and nothing about bombs found. The Bar Library is said to have subscribed Rs. 400; the accounts of the Bar Library ought to have shown the disbursement, if any. The informer and his associates must have expected to find a connection between the Muraripukur band and some of the Midnapore people; picric acid, brass pipes, electric wire were therefore spoken of at random from the knowledge derived from the disclosures in the Alipore case. No such connection, however, could be established, and sulphur and jute are the ingredients resorted to and a bomb is produced which anybody could prepare with materials available in many villages for making throw-down bombs. The training of experts in Calcutta comes to no use.

The informer is an avowed drunkard; he is without any means and is more or less dependent on his uncle. Such a man is sought out for ruling the destinies of the most respectable gentlemen of the town of Midnapore. Abdur Rahman says he was appointed for giving information about swadeshi and bombs, and if Rakhal had been examined he would most probably have said the same thing. That being the work for which he would have his Rs. 25 per mensem, he must find materials for a report, and as some swadeshi meetings did undoubtedly take place he wove into the story of some swadeshi meetings the story of a bomb. Although I have held that the Bonomali incident is false for reasons I have given, I cannot hold that the bomb came to be in the Plaintiff's house in the manner stated by the informer. Were the people of Midnapore mad? Otherwise why should a conspiracy to kill the officials or to overthrow the British Government be talked about at public meetings in all sorts of places at a time when the Military Police were parading the streets of the town and when some of the townsmen had been actually arrested for political offences Drunkards are notorious for their inability to keep secrets; would drunkards be made partizans to conspiracies of such a heinous nature so that they might bruit it about in their drunken brawls? Are the houses of prostitutes the proper places for the consideration of ways and means? If the bomb was made by Suren it was made by him for a secret crime. Why should he produce it in a prostitute's house and publish it to a set of drunkards like Rakhal and Nikunja and to the prostitutes themselves? Could he be going about with the bomb in his hand at a time when the whole town was under a panic and the Police were going about and making searches and arrests? Are the pleaders, doctors and zemindars of Midnapore so depraved and so devoid

of the sense of propriety that they would hold a meeting of this sort in a prostitute's house? Are there no private houses of any of them suitable for such a meeting? But why are these meetings located in these places? These are places where Rakhal may easily be believed to have been; these places may be some of his familiar haunts. Then as regards the personnel of these meetings—men of education and position in society, men of light and leading in the Bar may well have joined swadeshi meetings and tried to support indigenous manufactures by all legal and legitimate means, and some of them may even have encouraged picketting in some form or other, but I cannot believe that they joined in a conspiracy to commit wholesale murders with bombs. Many of them are University men and are supposed to have some knowledge of history and some intelligence at least. I cannot believe that such men could under any circumstances believe that they could cope with the British Government with a few bazar bombs. To my mind these men have great stakes in the stability of the British Government. The earnings of the pleaders are the outcome of the British Courts; the earnings of the doctors are the outcome of the British system of medicine; the income of the zemindars is the outcome of the British Permanent Settlement. Their savings are mostly secured by Government Promissory notes. They must know that the moment the British Government is gone and the protection of the law is withdrawn, all their belongings will be gone; why should they of all men join in such a conspiracy? As regards the Raja of Narajole, he was no doubt a staunch supporter of the swadeshi cause, and some of his charities may have been misplaced and in fact abused by the recipients as in the case of Hem Chandra Das, to whom he made a grant of Rs. 200 through the Industrial Education Society, but there is nothing reliable on the record upon which I can find that he was either disloyal or lawless and capable of doing what the informer says he did. The part of the story which implicates him seems to be simply puerile. One single bazar bomb of a larger size than usual has been prepared with the object of killing some officer and he comes in his coach and pair to the house of Jamini Mullick impatient for having a look at the strange production. To my mind it is simply absurd, and I have no reason to disbelieve his evidence.

Mr. K. B. Dutta, the leading Barrister of Midnapore, the Chairman of the Midnapore Municipality, the leading man in the town, must also be the leading spirit in this conspiracy. The fracas in the Midnapore Conference showed him out as a Moderate in politics, and even if he were an Extremist, I cannot believe that he would lend himself to such a silly and puerile venture in a heinous crime. It is a pity he has considered himself debarred by some supposed rule of professional etiquette from going into the witness-box to give the lie to the serious insinuations and charges that have been made against him, but I cannot believe that there is any truth in the allegations of the informer about him. It may not be out of place to mention that one of the defence witnesses named Aukhoy Pal has deposed to a document (exhibit 61) as a slip written by Mr. Dutt to one Permanand Saha for subscribing to a fund for bribing the said witness. Not satisfied with the assertion of Permanand that this was a chit from Mr. Dutt, the witness

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says he went over to Mr. Dutt's place and Mr. Dutt admitted to him that the chit was genuine. I have carefully compared this document with Ex. LXXXVIII, which is admittedly in the handwriting of Mr. Dutt, and I can find no resemblance either in the style of the handwriting or the formation of the letters, and I have no hesitation in holding that exhibit 61 is a forgery and Aukhoy Pal is a witness of falsehood.

If the reports concerning the bomb are false, then the confessions of Santosh and Suren are necessarily false, and if they are, how did they come into existence?

It seems quite clear from the evidence that both the Police Defendants had almost unlimited access into the jail for questioning the accused Santosh as well as Suren, and I have no doubt that they used both threats and inducements for the procurement of the confessions, but did not succeed until immediately after the arrest and imprisonment of the old and suffering father of Santosh. This to my mind was the last turn of the screw and the poor son could not hold out any longer. It is true the confessions do not tally exactly with the reports in their details, but the main story—the story of of the bomb—is identical, and that was all that was wanted. The evidence, however, about the manner in which these confessions were recorded is evidently exaggerated and embellished with falsehoods. For instance I do not believe that Mr. Weston put from the informer's reports questions in the leading form to which the deponents had to say yes: it is admitted that he suggested some questions and to some suggested questions answers were given before the recording Magistrate re-put the questions, and this was exaggerated into the evidence that we have that every question was put by Mr. Weston as stated above in a leading form.

I have also no doubt that the arrest and imprisonment of the Plaintiff had a decisive effect upon Santosh, and the implication of Suren by Santosh had a decisive effect upon Surendro. The next question that I shall deal with is whether Peary Mohan was arrested and imprisoned not *bonâ fide* but with the indirect object of inducing Santosh to make a confession.

I agree with Mr. Justice Fletcher that Mr. Weston believed in the story of the informer. This story contained no charge of complicity against Peary, and it does not appear that there was at first any intention on the part of the authorities to proceed against Peary. It is quite clear that Peary had several interviews with Santosh in jail and also several interviews with Mr. Weston. The point in issue with regard to these interviews with Mr. Weston is whether Mr. Weston threatened Peary with arrest and imprisonment unless he could induce his son to make a confession. It is admitted that Mr. Weston told him that if his son was guilty the best thing for him would be to make a clean breast of the whole affair. If Mr. Weston believed the case against Santosh to be true, as I think he did, he would be quite within his rights in giving such an advice, although it would have been better if he had not given any. I cannot believe that Mr. Weston would threaten Peary with arrest unless he succeeded in getting a false confession from his innocent son, and I do not believe that he did threaten Peary with arrest unless he succeeded in getting a true confession from his guilty son. Mr. Weston as a Civilian of experience must be expected to have known

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that any threat or any inducement used for extracting a confession would nullify the confession. As a respectable gentleman of position also he would not demean himself by acting in the manner suggested. I think Peary misunderstood Mr. Weston and has exaggerated the circumstances of the interviews and the conversations held therein. One of the most important factors in the Plaintiff's case is the delay in the arrest of Peary. Mr. Dutt said that he would have had nothing to say if Peary had been arrested on the 8th July, *i.e.*, as soon as the bomb was found in his house. The explanation of Mr. Weston is that he found fault with the Police at once, but awaited the report of the Chemical Examiner, of which the demi-official intimation was received on the 20th July, and as the 23rd July was the date fixed for the case against Santosh he waited till the 23rd. Against this it is said that the contents of the bomb were known to be dangerous on the 9th of July from the opinion of Major Weinman, and the police-officers throughout insisted on the dangerous character of the thing. Even on the 11th of July the Maulvi in his application to the Magistrate for an interview with Santosh says "it has been found to contain explosives and shots." On the same day, the 11th of July, the Chemical Examiner sends his demi-official report to Mr. Plowden, and on the 17th July Mr. Denham says "Copy forwarded to Mr. Cornish," and this document is endorsed as received by the Maulvi on the 20th July at 6-30 P.M. On the 16th of July Mr. Cornish sends a reminder to the Criminal Investigation Department office and Mr. Denham signs it on the 17th with a remark "Sent." It is not quite clear when it was posted: there is no evidence as to that, and for all that we know the actual posting may have been delayed. There is not sufficient reason therefore for holding that Maulvi's entry of "received" on the 20th is a false entry. Mr. Cornish says he sent information at once and Mr. Weston may have received this late in the evening on the 20th. There is a chit of Mr. Weston, Ex H., dated the 20th July asking Peary to come and see him on Wednesday (the 22nd July) and not on Tuesday "as arranged." Mr. Weston says he wrote this before he received the Chemical Examiner's demi-official. This is very likely the case; as Mr. Weston could not have received it until after evening. Then the question remains whether there was an interview on the 22nd of July. Mr. Weston admits that the visit of the 21st was fixed at 7 P.M., an unusual hour for enabling Peary to see his son before that time. Peary admits that he did not see Mr. Weston at 9 P.M. on the 22nd, as he had failed to induce Santosh to confess, but he says he saw Mr. Weston in the evening. The history ticket of Santosh shows that Peary had interviews with him both on the 21st and the 22nd. Now 22nd was a Wednesday on which Peary had a general order to see his son: the interview of the 21st must therefore have been under a special order. I have no doubt that his interview of the 21st was to ascertain whether Santosh was going to make a statement. Then the question is, did Peary see Mr. Weston on the 22nd as he says he did? Mr. Weston denies that this interview took place and he is positive that he did not grant any interview to Peary after he received the demi-official of the Chemical Examiner. I am not quite sure as to whether there is not some mistake in respect of this interview. Even, however, if he did grant an interview on the 22nd for ascertaining whether Santosh was going to make a true confession, that would not defeat his case that the arrest of Peary was

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bonâ fide, for according to his case the arrest had been determined upon to take place on the date fixed. It may be that so long as there was any reasonable chance of getting a confession from Santosh Mr. Weston was not inclined to prosecute Peary for having the bomb in his house. The evidence against Santosh was extremely frail, and there was then hardly any chance of a conviction; but there was a *primâ facie* case against Peary; the bomb had been found in his house and he was bound to explain how it came to be there. This at least in the view that the authorities took of the law which had been only recently passed. There is evidence that Mr. Plowden had found fault with Lal Mohun for not arresting Peary, and so had Mr. Weston on the 8th of July after the arrest of Santosh. Although the confession of Santosh followed very soon after the arrest of his father and must have been to a very great extent induced by the same, it does not necessarily follow that the arrest of the father was purposely made for inducing that result and not for vindicating the law. In any case it is I think a sound principle of law that in the absence of proof to the contrary credit should be given to public officers who have acted *primâ facie* within the limits of their authority for having done so with honesty and discretion, and I do not think there is in this case any *proof* to the contrary. The coincidence of the confession following close upon the arrest may no doubt raise a suspicion, but suspicion is not proof. I think therefore that on the whole no case has been made out against Mr. Weston, who acted under circumstances of great difficulty. At a time when a political party with revolutionary ideas was believed to exist in the town; at a time when his very life and the lives of his subordinates were threatened, at least according to reports which he believed; at a time when outrages had been attempted or committed in several other places upon public officials by members of the anarchist party, some of them young men from Midnapore, he cannot be blamed for believing his subordinates, the police officers, and the reports procured by them and acting upon them.

The case for the Plaintiff in the Court below was that the reports were invented and concocted by the Police in support of a false case they contemplated making against the gentry of Midnapore and was sign d by Rakhal in one day. Mr. Dutt has abandoned that theory, and his case before us is that the reports were genuine except that of the 7th July which was subsequently put down. I am not sa isfied that the report of the 7th July was not in existence on the 7th July. The search warrant was obtained upon some information of the kind and on the 11th July the Police Defendants are said to have tutored Santosh from the reports. If the reports are genuine, *i.e.*, were made by the informers appoin ed by the Police but were false repor s, the Defendants are not responsible for them. But did they believe the reports? The lower Court has found that they did not, principally on two grounds, first, that the reports were *primâ facie* incredible and no man of intelligence and experience could have believed them; and, secondly, that the Defendants adduced false evidence in support of the reports. As regards the first point, I have myself held that the reports were incredible and false as to the main incidents, but I have looked upon the facts from a distance of time and space under circumstances quite different from those in which the Defendants acted. It was a time of great commotion; there

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NOTES.

Chief Justice's bereavement.

We have to convey our sincere condolence to his Lordship the Chief Justice in his sad bereavement owing to the death of his elder brother. We have all along expressed the sincere desire of the people of this Presidency that his Lordship should continue to preside over the High Court for many years to come. We do hope that his private affairs will not interfere with this general desire and that he will, even if it be at considerable personal inconvenience, arrange matters at home so that he may stay on for some years to come. Now that the reorganisation of the Calcutta High Court and the splitting up of its territorial jurisdiction are engaging the attention of the Government of India it is a matter of supreme importance to the Presidency of Bengal that Sir Lawrence Jenkins should be at the helm of affairs of the Calcutta High Court. Any temporary incumbent to his office during this period of changes and transition would find himself in a most embarrassing position. Even if it be too much to ask of his Lordship, yet we know that it is the general desire that his Lordship should not within the next three years leave India even on a temporary leave. It is well nigh going to be ten years since changes have been following upon changes in the Presidency of Bengal and we seem to be still on the move. We are longing for the day when equilibrium will be restored to us so that once for all we may feel ourselves to be in a stable position. During this transitional period it is of the utmost importance that the administration of the Province in all its spheres should be in the hands of persons who may command public confidence.

Pay and prospects of Original Side clerks.

Although it was only in 1911 that the scheme for strengthening the ministerial staff on the Original Side of the High Court and improving their pay and prospects was sanctioned, we regret to say that it is not all that could be desired with regard to the pay and prospects of the clerks on that side. A number of limited posts in the Rs. 50 and Rs. 60 grades have been blocking the way to promotion to a number of hard working officers in the lower grades. With regard to this it may no doubt be said that the time for revision has not yet arrived as the scheme only received sanction in 1911 and a sufficient time has not yet elapsed to judge of its weak points. But there can be no doubt that the defect to which we have drawn attention is both real and palpable and it will cause no appreciable drain on the public purse to remove the grievances of hard-working clerks especially when the prices of the necessaries of life have gone up certainly 25 per cent. higher since the scheme referred to came first to be formulated.

Assistant Taxing Officer.

The scheme sanctioned in 1911 omitted also to take into consideration the inadequacy of the pay of the Assistant Taxing Master. He is practically the head of a department and his duties are of a highly responsible nature often involving questions of a *quasi* judicial character. He has to safeguard the interests of every suitor on the Original Side and protect him against all improper charges either at the instance of his own lawyers or his legal adversaries. Besides exercising his discrimination and judgment constantly, he has also to guide his department so that there may not be any undue delay in the assessment of costs. It may be mentioned in this connection that the staff of the Taxing Office

have to take a lot of work home to prevent a congestion in the department through the accumulation of arrears.

It is quite anomalous therefore that the Assistant Taxing officer should receive the same pay (*i.e.*, Rs. 300) as he used to in the days of the Supreme Court. The Registrar's duties have increased immensely since then and he has been provided with several Assistant Registrars to enable him to cope with the work of his department. The scale of pay for some of the more responsible Assistant Registrars has now been fixed on a scale rising from Rs 400 to Rs. 600. The duties of the Assistant Taxing Officer is by no means less onerous and responsible than theirs and we consider it but just and fair that his salary should also be on the same scale. The Assistant Taxing Officer in the Bombay High Court, we understand, gets Rs. 700 a month. The claims of this officer in Calcutta should therefore receive the sympathetic consideration of the Government of India.

Limited Hindu woman's estate if may be created by contract.

The case of *Meda Burgamma* v. *Mitta Chelimayga*, I. L. R. 36 Mad 484, which lays down that a woman's estate can be obtained by a Hindu female not only by inheritance but also by contract of parties is based on the decisions of the Privy Council in *Radha Prosad Mullik* v. *Ranimoni Dasi*, L. R. 35 I. A. 118, and *Karimuddin* v. *Govind Krishna Narain*, L R. 36 I. A. 138. The facts were that on the death of one of two undivided brothers the surviving brother entered into an agreement with the widow of the deceased, who left behind him besides her a daughter by another wife, that he would give her in adoption one of his sons, if sons were born to him, and in default of his so doing he finally agreed to give her a half share in the property. After his death without any issue the widows of the two brothers divided the property in equal shares between themselves. On a suit by the daughter of the first brother the question arose, "in what capacity did the widow of the brother who died first take a half share in the property?" On a construction of the agreement their Lordships held that it was the intention of the parties that she was to have the half share as the representative of her deceased husband. On behalf of the widow it was contended that what she took was a gift from her brother-in-law to whom the property had passed by survivorship, that a woman's estate could be obtained by a Hindu female only by inheritance and such an estate could not be created by contract of parties or by grant, that in any case even if she was intended to be given a life interest her right could not be taken to be a widow's estate descendible to the reversionary heirs of her husband. The Court overruled this contention and held that a widow's estate was created by the agreement and the Plaintiff was, as the next reversioner, entitled to succeed. It appears that the words in the agreement were "I shall give you a half share, after division of the property." In the absence of anything further tending to show that the idea of the widow taking the property in her absolute right was present in the mind of the promisor it seems that the view taken by their Lordships is in conformity with the general principles of Hindu Law regarding acquisition of property by females.

Civil Procedure Code, s. 92.

In *Muhammad Abdul Majid Khan* v. *Ahmed Said Khan*, I. L. R 35 All. 459, their Lordships interpreted the scope of sec. 92 of the Code of Civil Procedure. The Plaintiff brought a suit in the Court of the Subordinate Judge for a declaration that he was entitled to the office of Mutwali of a certain Wakf property and for possession of the same by the ejectment of the Defendant. The defence raised was that the suit as brought came within the scope of sec. 92, C. P. C., and should have been brought in the "principal Civil Court of Original Jurisdiction" and the Court of Subordinate Judge had no jurisdiction to entertain it. Their Lordships on a consideration of reported cases under the corresponding section (539) of the old Code held that the scope and application of sec. 92 was very limited in character and the Plaintiff not asking for any of the reliefs specified in the section and not suing on behalf of the public or of any section of the public but merely as an individual to enforce his own alleged individual rights, the suit was not one within the purview of sec. 92 and so within the jurisdiction of the Court of the Subordinate Judge.

CURRENT INDIAN CASES.

(CIVIL.)

Transfer of Property Act—Mortgage—Subrogation.

NARAYAN *v.* PECHIAMMAL, I. L. R. 36 Mad. 426.

A mere agreement either with the creditor holding a mortgage or with the debtor owing it cannot give a person lending money to discharge the mortgage a lien over the property.

Insolvency proceedings—Scheduled creditor.

AMINUDDIN HAIDAR, I. L. R. 35 All. 402.

A judgment-creditor of a declared insolvent cannot enforce his claim against property acquired by the debtor subsequent to his discharge if he was not a scheduled creditor in the insolvency proceedings.

Usufructuary mortgage—Sub-mortgage—Money decree.
BALGABIND *v.* NAGINA MISIR, I. L. R. 35 All. 405.
The mortgagee of an usufructuary mortgage in respect of an occupancy holding in his turn mortgaged his rights to a third person.
Held—That the sub-mortgagees were entitled to a simple money decree for the amount covered by the sub-mortgage.

Reviews.

CHITTY'S STATUTES OF PRACTICAL UTILITY, Vol. XVII—Part III. *By W. H. Aggs, M. A., L. L. M, Bar-at-Law. Sweet and Maxwell, Ld., 3, Chancery Lane, and Stevens and Sons, Ld., 119 and 120, Chancery Lane, London. 1913.*

The volume under notice reproduces in alphabetical and chronological orders with notes and Indexes the statutes of practical utility passed in the year 1913, with incorporated enactments and selected statutory rules. The National Insurance Act, The Mental Deficiency Act, The Children (Employment Abroad) Act, The Forgery Act, etc., may be cited as some among the more important legal enactments embodied in this collection.

INDIAN DECISIONS (New Series). Madras, Vol. III. *Edited by the Lawyer's Companion Office. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row, Law Printing House, Madras. 1913.*

The volume under notice is a reprint of Vols. 8 to 10 of the Indian Law Reports, Madras Series. The present volume embodies all the praiseworthy features of the series to which it belongs.

GHOSH'S INDIAN DIARY for 1914: *By J. N. Ghosh, Krishnaghur, Bengal. Pocket size from 5 to 8 as. Demy Octavo size from 12 as. to Re. 1-6 as.*

The special features of the present issues of the above diaries consist in the quantity and the variety of information contained in them. Besides legal information on such topics as Court-fees, process fees, registration fees, forms of powers-of-attorney, etc., they contain within a short compass a variety of railway, postal, telegraphic and other information of general interest. There are also tables of weights and measures, of income tax and exchange, of servant's wages and interest, of fares on important railway lines, a list of Judges, Barristers, Solicitors and Vakils of the Calcutta High Court, a directory of the streets of Calcutta. Corresponding dates of the English, Bengalee, Fuslee, Samvat, Mahomedan and Burmese years form, of course, the main feature of these diaries. The various editions differ in some allotting one day to a page, some two days, and some being interleaved with blotters.

Notes of Cases.

ENGLISH LAW COURTS.

[PRIVY COUNCIL.]

APPEAL FROM BOMBAY.

LORD SHAW.
LORD MOULTON.
MR. AMEER ALI.
1913,
10, December.

SORABJI HORMUSJI BATLIWALLA
v.
JAMSHEDJI MERWANJI WADIA.

Friend's liability to a friend for injuries caused by negligent motor driving at an excessive speed near a railway crossing.

This was a petition for special leave to appeal from a judgment of the Bombay High Court, dated 1st September 1913, affirming the judgment of the said High Court in its original civil jurisdiction. The Plaintiff sued to recover Rs. 69,000 damages for injuries received by him by reason of the Petitioner's (Defendant's) negligence. The facts were as follows:—

In September 1910, the Plaintiff and the Defendant with their friends were staying in two adjoining bungalows:—The Defendant had a motor car. One day the Defendant took out the Plaintiff in his car along with other persons, and the Defendant was driving the car. Near a Railway crossing an accident took place with the result that a girl was killed and the Plaintiff was seriously injured. The Plaintiff alleged that the Defendant was negligent, *first*, in driving the motor when he was incompetent to do so; *second*, in driving the car when overloaded; and, *third*, in driving at an excessive speed. Macleod, J., found against the Plaintiff on the first two allegations, but found that the Defendant was guilty of negligence because he was driving at an excessive speed. He held that the accident was due to the Defendant approaching the crossing at an excessive speed in order to get over the crossing before the gates were shut for the approaching train and awarded Rs. 38,000 to the Plaintiff. On appeal Sir Basil Scott, C. J., and Batchelor, J., affirmed the judgment of Macleod, J., but reduced the amount to Rs. 36,000. In the course of their judgment they observed as follows:—

"It is unnecessary here either to attempt to fix the precise difference between negligence and gross negligence, or to define the exact degree of the Defendant's liability. For, in our view of the facts of this case, the Defendant's negligence and carelessness were such that, putting the law as to his responsibility most favourably to him, it is impossible to acquit him of liability; assuming that gross negligence amounting to culpable default is required, then we think we have it here.

It appears to us however that the determina-

tion of this point of law will be facilitated if we consider not so much the degree of negligence which would expose the Defendant to liability as the nature of the positive duty, which in the circumstances of this case was cast upon him. Upon this aspect of the matter we have the guidance of the Earl of Halsbury's "Laws of England" (title 'Negligence,' Art: 641). Mr. Setalvad admits that the driving of a motor car is a business or occupation requiring skill, and undoubtedly the Defendant had that skill; that being so, and he being a volunteer the article cited lays down that he was bound to act to the best of his skill, which must be such as a person skilled in such matters may reasonably be expected to possess . . . . . . In the present case the Defendant was admittedly a person of competent skill in driving a motor car though the evidence suggests that he was a nervous driver. Moreover he places himself in a situation which implied the possession of competent skill. If this is a correct statement of the law, the only question which remains is whether the Defendant at the critical point of the drive exercised such skill as a person skilled in driving motor cars may reasonably be expected to possess. We entirely agree with Macleod, J., that this question must be answered in the negative. In our opinion the evidence establishes that the sole cause of the disaster was the excessive and reckless speed at which the Defendant was driving."

Hence this petition.

Sir Robert Finlay, K. C. (with him *Mr. Arthur Page*) submitted that the appeal involved an important question of law. He contended that the Defendant was not liable to the Plaintiff, who was a bare licensee, except upon proof of gross negligence, or for "setting a trap." Mere excessive speed was not enough to make the Defendant guilty of an actionable breach of duty. Reliance was placed on the following authorities: *Indermaur* v. *Dawes* (L. R. 1 C. P. 274 at p. 286). *Moffatt* v. *Bateman* (L. R. 3 P. C., p. 121). *Shiells* v. *Thorne*. (H. Blackstone's Reports, Vol. 1, p. 159).

Their Lordships rejected the petition.

Solicitors:—*Messrs. T. L. Wilson & Co.* for the Petitioner.

B. D. *Leave refused.*

PRIVY COUNCIL.

[APPEAL FROM THE SUPREME COURT OF CANADA.]

LORD ATKINSON.
LORD MOULTON.
LORD PARKER OF WADDINGTON.

1912,
21, October.

THE EASTERN CONSTRUCTION Co., LD.,
v.
THE NATIONAL TRUST Co., LD., and others.

Rights and liabilities of bailors and bailees—What constitutes agency by ratification.

The Respondent Company brought jointly with John Shilton and William Hollaway Wallbridge, an action against the Appellant Company, William Miller and William Dimmie Dikson, to recover damages for trespassing on their land, cutting down and carrying away certain pine and tamarack trees growing thereon, and injuring the land. The Respondents, Therese Schmidt and John Shilton, brought a similar action against the same Defendants to recover damages for similar trespasses and wrongful acts alleged to have been committed on their lands, claiming similar relief. A third party action was instituted by notice by Miller and Dickson against the Construction Company, claiming to be indemnified. Before the trial a notice was served by the Plaintiffs in both of the two main actions to the effect that an application would be made at the trial to the presiding Judge to amend the statements of claim by alleging that the Defendants after felling this timber manufactured it into ties or railway sleepers, and wrongfully converted those ties to their own use.

The actions were tried together before Mr. Justice Clute without a jury and resulted in judgment being recovered in the first action against the Defendants.

The Defendants appealed in both cases to the Court of Appeal of Ontario. That Court, by its judgment and order dated the 1st of April 1911, reversed, with some modifications, the judgments and orders made by the trial Judge in both cases. On appeal by the Plaintiffs in both suits to the Supreme Court of Canada, that Court, by its orders of the 21st of March 1912, reversed the decision of the Court of Appeal of Ontario, and held that the two sets of Defendants, the Construction Company and Miller and Dickson, were equally liable to the respective Plaintiffs for the sums awarded against them by the trial Judge in each case for damages, not, however, on the statement of claim as it originally stood, nor yet as it was proposed to be amended, but in detinue in respect of certain pine and tamarack timber cut and removed by Miller and Dickson from the mining locations of the respective Plaintiffs. Hence these appeals.

Their Lordships' judgment allowing the appeals was delivered by LORD ATKINSON:—

"It appears to their Lordships that according to the only construction of which these instruments are reasonably susceptible, the property in the pine trees growing on these locations remained in the Crown. Indeed, this point was scarcely contested by Mr. Ewart. He did contend, however, that the proprietary right of the Crown was limited in two directions, first, by the provisions of sec. 2 of the Crown Timber Act (R. S. O, 1897, c. 32), passed in the same session of Parliament as the Mines Act; and, secondly, by the provisions of the latter Act itself conferring

as they do on the patentee and lessee respectively the right to cut timber for mines, &c., and amounting when coupled with the finding of the trial Judge as to the bare sufficiency of the supply for these last-named purposes, to a prohibition against the giving by the Crown of any licence or authority to cut for other purposes any of the pine trees growing on these locations. As to the first point, this section of the Timber Act plainly applies only to licences about to be granted to cut timber on land which are not at that time the subject of a grant to anyone, but which are in the possession of the Crown. As to the second, it may well be that, having regard to the finding of the learned trial Judge, if licences were granted by the Crown to cut this timber, the patentee or lessee, as the case might be, might have a right to recover by petition of right from the Cown damages in respect of the injury thus done to their respective mining locations. It is not necessary in this case to decide that point. But even if the effect on the rights and powers of the Crown were such as it is contended for, it is a wholly different proposition that the propety in the pine trees when felled even by a trespasser would not belong to the Crown. In the opinion of their Lordships it is perfectly clear that the pine trees when felled were, in this case, the property of the Crown. It may well be doubted if in truth and fact the timber felled ever passed out of the possession of the servants of Miller and Dickson into that of the Plaintiffs. "Taking the view, however, of the facts most favourable to the Plaintiffs, namely, that it did so pass, the Plaintiffs could only have had possession of it as the bailees of the Crown. No doubt in that position of things, if nothing more had occurred, they would have been entitled to have recovered from Miller and Dickson, and possibly from the Construction Company, the full value of the timber felled, as well as any special damage they might themselves have sustained by reason of being deprived of the possession of the felled trees, not because they had in truth and fact any proprietary right in, or title to the property in the trees or in the ties into which they were manufactured, but because to use the words of Lord Campbell in *Jeffries* v. *Great Western Railway Company*, 5 E. & B. 802, p. 806, as "against a wrong-doer possession is title." That is no new doctrine. It was decided in 1796 in *Armory* v. *Delamirie*, 1 Strange 505. "That the finder of jewel though he does not by such finding acquire an absolute property or ownership yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." That principle was affirmed as applicable to a bailee by the case of *The Winkfield*, 1902, P., p. 42. Both this case and the case of *Jeffries* v. *Great Western Railway Company* were approved of by Lord Davey in giving the judgment of the Judicial Committee of the Privy Council in *Glenwood Lumber* v. *Philips* (1904), A. C. 405—410, and it must be now taken as conclusively established. But it would be against all notions of justice that the bailee who recovers the full value of the goods wrongfully taken out of his possession, should be able to retain it for himself. The goods were not his, they belonged to the bailor. The money recovered under the judgment represents, and is substituted for the goods themselves. To allow the bailee to keep it for himself would be to compensate him in damages for a loss he has never suffered; and accordingly it was decided in *Turner* v. *Hardcastle* (11 C. B. (N. S.) 683), and approved of in the judgment in the *Winkfield* case, that the bailee who in such circumstances recovers the full value of the goods must account to the bailor for the sum recovered. In *Nicholls* v *Bastard* (2 C. M. and R, at p. 660), Parke, B, said no doubt the bailor may recover as well as the bailee, "and whichever first obtains damages is a full satisfaction." These being the rights and obligation of the bailee it is obvious that if, before action brought by him against the wrong-doer, the bailor has clothed that wrong-doer with the ownership of the goods, the bailee cannot recover from the wrong doer, thus converted into the true owner, the full value of the goods, no more than he could recover their full value from the bailor himself. In such an action the Defendant would not be setting up a *jus tertii*, but, as donee or assignee of the tertius, a *jus sui*. Lord Collins, the Master of the Rolls as he then was, was careful to point out this qualification of the bailee's rights in his judgment in the *Winkfield* case.

* * * * * * * *

Then there remains the question as to the adoption by the Construction Company of the action of Miller and Dickson in trespassing on the Plaintiffs' location. There are many answers to the Plaintiffs' contention on this point. In the first place Miller and Dickson were not the servants or agents of the Construction Company. They were independent contractors. That point was relied upon in the letter of the Construction Company to the solicitors of the Plaintiffs, dated the 11th June 1909, and it is quite clear from the terms of the agreement in writing entered into between the Construction Company and these gentlemen, that this was the true relation between them. Next it is essential to constitute an agency by ratification, that the agent in doing the act to be ratified shall not be acting for himself, but should intend to bind a principal actually named or ascertainable, *Keighley, Maxted & Co.* v. *Durant* (1901), A. C. 240. In *Wilson* v. *Barker and Mitchell*, 4 B. and Ad., 614, it was held by Littledale, Parke and Patterson, JJ., in effect,

that if A wrongfully seizes a chattel for his own use B cannot ratify the act. No doubt, ultimately, the severed timber, when manufactured and delivered by Miller and Dickson for the use of the Construction Company, would come to the Company as a consequence of the tortious acts of the former, but they would be entitled to hold it, not by virtue of those tortious acts, but by virtue of the assignment or donation of the Crown. The doing of the acts furnished no doubt the occasion for the exercise by the Crown of its bounty, but in the absence of evidence to the contrary it is not to be presumed that in using this timber as their own, the Company were taking advantage of these tortious acts rather than taking advantage of the bounty of the Crown, or, in other words, that they had elected to rely on a wrongful rather than a rightful title. Again, ratification must be evidenced by clear adoptive acts, which must be accompanied by full knowledge of all the essential facts It is quite clear from the correspondence, that down to the 11th of June 1909 the Construction Company had not full knowledge of the precise place where these logs were cut, or of the details of the alleged trespasses. And upon that date, as already pointed out, they informed the Plaintiffs that Miller and Dickson were sub-contractors for whose actions they were in no way responsible. Their Lordships are therefore of opinion that there was no evidence before the trial Judge upon which it could be reasonably or justly held that the Construction Company had adopted the trespasses which Miller and Dickson are alleged to have committed, or were in any way responsible for them."

B. D. *Appeals allowed.*

PRIVY COUNCIL.

[APPEAL FROM AUSTRALIA.]

THE LORD CHANCELLOR.
LORD SHAW.
LORD MOULTON.
LORD PARKER OF WADDINGTON.
1913.
25, July.

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
v.
THE ADELAIDE STEAMSHIP CO., LD., and others.

Contract in restraint of trade—Monopoly—Freedom of trade—Freedom of contract.

This is an appeal from an Order of the High Court of Australia in its appellate jurisdiction reversing a judgment of Mr. Justice Isaacs, dated the 22nd December 19[illegible], and made in an action instituted by the Attorney General of the Commonwealth under the provisions of the Australian Industries Preservation Act, 1906, and two amending Acts, No. 5 of 1908 and No. 29 of 1909. Their Lordships dismissed the appeal. In the course of their judgment delivered by Lord Parker the history of the law relating to monopolies and contracts in restraint of trade was discussed. They said :—

At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the *bonâ fide* exercise of the doer's own trade or business and with a single view to his own interests (*The Mogul* case, 23 Q. B. D., 598, and 1892, Ap. C. 25). But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the latter case the contract on which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common, that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests.

The right of the Crown to grant monopolies is now regulated by the Statute of Monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll being a derogation from the public right of passage could not be granted without the like consideration. In the case of new inventions the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. In the case of sole rights of trading with foreign parts it might be found in the interest of the public in new countries being opened to trade. But for the validity of every monopoly some consideration moving to the public was necessary. Many of the monopolies purported to be granted by the Tudor or Stuart Sovereigns were bad for want of such consideration, and it was the vexatious interference with trade under cover of these invalid grants which led to the passing of the Statute of Monopolies. Further, monopolies were in the eyes of

the lawyers of that time attended with the following evils:—first, increase in the price of the wares, and secondly, deterioration of the wares themselves, both evils being due to the want of healthy competition (11 Coke, 86 *b*.).

Contracts in restraint of trade were subject to somewhat different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has, however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in the case of *Nordenfelt* v. *Maxim Nordenfelt Co*, 1894, Ap. C. 535. For a contract in restraint of trade to be enforceable in a Court of law or equity, the restraint, whether it be a partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal, C. J., in *Horner* v. *Graves*, 7 Bingham, 735) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public. Lindley and Bowen, L.J.J., had suggested in the Court below that though a restraint might be reasonable as between the parties to the contract it might be unenforceable because of the "law which forbids monopolies," or because it was calculated to create "a pernicious monopoly," and there is a similar suggestion by Lindley, L. J., in *Underwood* v. *Barber*, 1899, 1 Ch. 300. The term "monopoly" cannot be here used in its proper legal signification of a right granted by the Crown, nor can the expression "the law which forbids monopolies" refer to any common law or statutory rule limiting the Crown's prerogative in this respect. The learned Lords Justices are contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, and are indicating that if a restraint on trade is likely to produce this result, it may on grounds of public policy be unenforceable however reasonable in the interests of the parties to the contract. Such a state of circumstances may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted by the Crown, and may therefore in a popular sense be called a monopoly. It is so called by Lord Justice Farwell in the case of *The North Western Salt Company* v. *The Electrolytic Alkali Company, Limited*, 107 L. T. n.s. 439, now under appeal to the House of Lords.

The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led no doubt to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. III. c 71. It also lay at the root of the common law offence of engrossing, which, according to Hawkins Pleas of the Crown, Vol. I., book 2, ch. 29, s. 9, consisted in buying up large quantities of wares with intent to re sell at unreasonable prices. It influenced the courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade though reasonable in the interests of the parties may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen, L J.J., as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent. In this connection it should be noticed that the Act of 7 & 8 Vict., c. 24, which abolished the common law offence of engrossing, does not apply to the States of the Commonwealth, and the monopolies in the popular sense of the word are more likely to arise, and if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff. It is, however, in their Lordships' opinion clear that the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question

of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible.

It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly, combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful, or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others (*The Mogul case, ubi supra*).

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before FLETCHER AND N. R. CHATTERJEA, JJ. APPEAL FROM APPELLATE DECREE NO. 2603 OF 1912. KEDAR NATH DAS AND ANOTHER, Appellants *v.* HEMANTA KUMARI DASI, Respondent. 17th December 1913.

Suit to set aside decree—Previous suit not known to Plaintiff—Previous suit false—Jurisdiction.

The suit was brought to set aside an *ex parte* decree which had been obtained against a woman of the town for goods sold and delivered to her. That *ex parte* decree was executed and the money was obtained; and, subsequently, the Defendant in the first suit brought the present suit against the original Plaintiff to set aside the *ex parte* decree. It was found that the fact of the previous suit was not known to the present Plaintiff and that the said suit was in fact, a false suit.

Held, that the Court had jurisdiction to set aside the previous decree.

If the case which was placed before the Court was a false one, the Court had jurisdiction in a subsequent suit to set aside the decree which was obtained by fraud practised on the Court.

Lukhi Churn v. *Nur Ali* (I. L. R. 38 Cal. 936) and *Munshi* v. *Surendra* (16 C. W. N. 1002) distinguished.

Abouloff v. *Oppenheimer*, 10 Q. B. D. 295, and *Vadala* v. *Lawes*, 25 Q B. D. 310, referred to.

Babu Bepin Behary Ghose for the Appellants.

Babu Bankim Chandra Mukerjee for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA AND TEUNON, JJ. APPEAL FROM APPELLATE DECREE NO. 2391 OF 1912. SYAMA CHURN PAHARY, Appellant *v.* RAM PROSAD DAS AND OTHERS, Respondents. 4th December 1913.

Adverse possession—Landlord and tenant—Rent, payment of, by tenant to some other person.

The Plaintiff Respondent brought this suit for a declaration of his title to the land in dispute after correction of the record-of-rights in which the Defendant No. 1 had been recorded as the landlord and the Defendant No. 2 as the tenant of the land. The Plaintiff claimed title to the land through one Akhoy Acharji while the Defendant No. 1 said that the land belonged to one Brahmani from whom he and his brother obtained it by inheritance and under a Will in equal shares and that subsequently his brother conveyed his half share to him, that Annapurna and Nilmoni were the successive tenants under Brahmani, that the Defendant No. 2 had acquired the interest of Nilmoni and that the Plaintiff had no title to the land. The Court of first instance found that neither the Plaintiff nor his predecessor-in title had ever realised rent from the tenants in actual possession and that the Defendant No. 1 and his predecessor-in title had been in possession of the land by receipt of rent from the tenants. On these findings the Court of first instance dismissed the suit. On appeal, the lower Appellate Court reversed that decree on the ground that the mere fact that no rent was realised by the landlord from the tenant for more than 12 years would not necessarily show that the possession of the Defendant No. 1 was adverse to the landlord unless it was shown that such realisation of rent by the Defendant No. 1 and his predecessor-in title was in assertion of an hostile title to the knowledge of the Plaintiff and his predecessor and that that not being shown, the Plaintiff was entitled to succeed and it accordingly gave a decree to the Plaintiff.

Held, that the mere fact that the tenant paid rent to some other person would not necessarily show that the possession was adverse to the landlord unless it was shown that such possession was in denial of title of the real owner to his knowledge.

Babu Jyotish Chandra Hazra for the Appellant.

Babu Probodh Chandra Chatterjee for the Respondents.

A. T. M. *Appeal allowed: Case remanded.*

DONALD WESTON v. PEARY MOHAN DASS.

was the Naraingarh outrage in December 1907: there was the political fracas in the Midnapore Conference about the same time: there was the Mozufferpur outrage in April 1908 by a Midnapore man, and immediately afterwards the Muraripukur Bomb Factory was unearthed, and a gang of anarchists, some of whom were intimately connected with Midnapore, were arrested: there was the Midnapore local paper preaching sedition of the worst kind: there were anonymous letters threatening Mr. Weston with assassination: there were undoubted cases of picketting and rioting in support of the swadeshi propaganda: Midnapore figured conspicuous as a most suspected spot: these circumstances naturally alarmed the executive authorities and extraordinary precautions were taken. Military Police paraded the streets of the town, and the Maulvi was sent by the Criminal Investigation Department as a special officer for investigating the situation. He sought for informers and obtained two—Abdur Rahman and Rakhal. These naturally were found amongst men of a low standard of morality, and they made their best to deserve their Rs. 25 a month from the secret service fund. The Maulvi wanted them to report about swadeshi and bombs and they supplied such reports. Did he believe all these reports? It is difficult to say that he did at the outset at least; for although he went on making his confidential reports to his superiors he did not take any action until the 7th of July, when he was assured that a real bomb was to be found in the house of the Plaintiff. A search was made and a bomb was found. Accepting as I must the case of Mr. Dutt before us that the reports were genuine and not concocted to suit a case in the process of fabrication, the Maulvi cannot be blamed for taking the reports thenceforward as a basis to work upon. There were no doubt circumstances in the reports which could be verified at once as the reports were made, but the inaction may have been due to uncertainty. In working out the case, however, he acted in a manner which has exposed him and his subordinate Inspector Lal Mohun to severe criticism. I have held that they induced Santosh and Suren to make the confessions which they afterwards retracted, and I have no doubt upon the evidence that they used all means of persuasion and threat for attaining their end. It is clear also that some of the documents were altered for making out a consistent case. For instance, Ex. 56 was altered to suit the confession of Suren and exhibit SS to suit Ex. 56. Ex. 61, an alleged chit from Mr. Dutt produced by Aukhoy Pal was supported by the evidence of Aukhoy Pal, and I have held Ex. 61 to be a forgery and Aukhoy Pal a false witness. The other witnesses examined in support of the reports are more or less insignificant and unreliable. I generally agree with Mr. Justice Fletcher as to the credit to be allowed to these witnesses. The letter from Krishna Prosad Dey said to have been copied into Ex. 56 by the Maulvi also I have held to be a copy of a false document. The bomb formula, Ex. IX, could not have been obtained in the manner stated by Abdur Rahman: in the first place, the formula had already appeared in the *Jugantar* paper, which used to be sold in Midnapore, and in the second place, the technical terms used in the document could not have been written from dictation by a man of Abdur Rahman's education in letters. These circumstances no doubt throw discredit on the Police Defendant

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who are responsible for the same, but it does not necessarily follow that they did these things because they wanted to prove a false case to be true. We know of false evidence being given to support a true case when missing links have to be supplied. I cannot therefore positively find that they knew the reports to be false.

The arrest of the Plaintiff was, however, under the orders of Mr. Weston, which they were bound to obey. As the order for arrest was upon the findings within the jurisdiction and authority of Mr. Weston, the case against them also fails.

There is a side issue as to whether Mr. Dutt ought to have appeared as a witness in the case and not as Counsel. I think he ought to have appeared as a witness. He could have thrown light on many parts of the case in which we have had to grope in the dark. I think the case of the Plaintiff on the facts has suffered materially by reason of his absence from the witness-box, whilst he himself has been made the subject of repeated attacks without any means of adequately answering them. I think he has been sadly misadvised in this matter. There was a reference to the English Bar Council by the legal advisers of the Appellants and an opinion obtained which will be found in page xlvi, 16 Calcutta Weekly Notes. This, I have no doubt, is no authority for the Court and was allowed to be read only with the consent of Mr. Dutt. The opinion of the Council is against Mr. Dutt. The opinion of the Privy Council in the case of *Victor Corea* v. *Peiris* (9), also seems to support the same view. There the Respondent tendered his own Counsel as a witness and the District Judge refused to admit his evidence. The Supreme Court of Ceylon on appeal had him examined and the Privy Council say as to this: "He was tendered as a witness for the Respondent at the trial, but the District Judge ruled, on some quite unsustainable ground, that being the Respondent's advocate his evidence was inadmissible. The Supreme Court most properly, in their Lordships' opinion, permitted him to be examined." It is a pity therefore, I repeat, that he considered himself debarred by any rule of professional ethics from giving his evidence in the case.

Complaint has also been made that some of his questions in cross-examination were without justification. It may be that his own personal knowledge of the facts supplemented his instructions in these matters, but that is the more a reason why he should have given his evidence under the sanction of an oath and subject to the test of cross-examination. The suggestions made, however, have been abandoned.

I have had the advantage of going through the elaborate judgment of Mr. Justice Woodroffe, and I regret that some of my conclusions are at variance with his, but after a most anxious consideration of the case I could not persuade myself to come to any other conclusion. In arriving at these conclusions I have not overlooked the discrepancies in the evidence, but given prominence to the general tenor of the same. I have also borne in mind that mofussil witnesses were examined and cross-examined under extraordinary surroundings in this august tribunal in its Original Side. I respectfully differ from Mr. Justice Woodroffe in my appreciation of the evidence of the pleader witnesses, especiallly Babu Upendra Nath Maity, the leader of the Midnapore Bar. They are pleaders of position, and it is not probable that they would

(9) 14 C. W. N. 86 (1909).

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deliberately give false evidence. They may have made mistakes from lapse of memory, but I cannot hold that they have told deliberate falsehoods. Maity has made an evident error in respect of a date, and Peary has made some confusion about the circumstances relating to the petition of the 31st of August. But that does not mark them out as false witnesses. It is a pity, I repeat again, that Mr. Dutt did not come to the box, as he was the only man who could have thrown any definite light on the point. But we have not also got the Court Inspector, the custodian of the records. The records disclose several petitions on which stamps were not punched or orders passed on the dates they were filed, and I am not prepared to hold that this petition was smuggled into the record A petition was admittedly made for bail, and this is the only petition for Santosh which asks for bail. Mr. P. K. Bose says that Mr. Dutt said he wanted to make some important petitions and therefore wanted the prisoners to sign the petition : a mere bail petition is not such an important petition : it is usually done by the pleader or mukhtear signing for the prisoner. I agree with Mr. Justice Fletcher that there was some misunderstanding about this petition.

The result is that although upon the findings I have arrived at the Plaintiff was innocent of the bomb and has suffered in various ways, his suit must be dismissed and the Appeal is allowed with costs.

Messrs. Orr, Dignam & Co, Solicitors, for the Appellants.

Mr. J. C. Dutt, Solicitor, for the Respondent.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
Heard, 30 and 31, October.
Judgment, 20, November.

ANANDA GOPAL GOSSAIN, since deceased (now represented by Ram Chándra Gossain and ors.) and ors., Appellants,
v.
NAFAR CHANDRA PAL CHOWDHURI and another, Respondents.

Putni, *sale of, for arrears*—Khas *possession, suit for, by auction-purchaser—Bengal Tenancy Act (VIII of 1885), sec. 167—Encumbrances, notices for annulment of—Mode of service when addressed to several persons—Non-joinder of party—Addition of party Defendant at hearing of appeal, effect on other Defendants—Prejudice, absence of.*

In a suit for khas *possession of certain mouzahs comprised in a* putni *taluk purchased by the Plaintiffs at an auction sale under a decree for rent obtained by the zemindar, the Defendants, who with one N claimed to be* durputnidars *of the mouzahs in suit, having objected that N had not been joined as a party, the suit was dismissed by the Subordinate Judge* inter alia *on the ground of non joinder of N, but on the Plaintiffs' application to the High Court at the hearing of their appeal from the decision of the Subordinate Judge, N was ordered to be made a party Defendant to the suit which was remanded to the lower Court. N did not appeal against the decision of the High Court :*

Held—*That N was not at any time a necessary party to the suit so far as the other Defendants were concerned and they were not prejudiced by the fact that N was added as a Defendant when the suit was*

in appeal and the omission to make N an original Defendant did not make the suit bad for non joinder as against the other Defendants who were the Appellants before the Privy Council.

That the Plaintiffs having proved that the notices of annulment of incumbrances were served on the Defendants in the manner prescribed for service of summons in the Civil Procedure Code, the notices were duly served in accordance with Government Rules made in that behalf.

This was an appeal from the judgment of the Calcutta High Court delivered by Rampini and Sharfuddin, JJ.

The Plaintiffs instituted two suits, Nos. 239 and 240, which were tried together as analogous suits by consent of the parties. They related to a putni in Mahal Dihi Panchpota comprising of mouzahs held by the putnidars under the zemindar, the Maharaja of Krishnagar. The Plaintiffs' case was that the putni being sold for its own arrears, free from all incumbrances under sec. 165 of the Bengal Tenancy Act, was purchased by the Plaintiffs with powers to annul all incumbrances, that notices under sec. 167, Bengal Tenancy Act, were served upon the Defendants for the annulment of the incumbrances held by them under the putni, that the incumbrances held by the Defendants therefore came to an end and the Defendants were consequently no longer entitled to occupy the land. The Plaintiffs accordingly sued for khas possession and mesne profits and damages.

The Subordinate Judge dismissed the Plaintiffs' suits holding that they were defective for non joinder and mis-joinder of parties and that the Plaintiffs failed to prove the service of the notices issued under sec. 167 of the Bengal Tenancy Act.

On the question of non-joinder the Sub-Judge found as follows:—"In Suit No. 240 the Defendants prove that Brojendro Kumar Gossain (who had a durputni right of two annas and eight pies share in the mouzahs in suit) died long ago, before the issue of the Plaintiffs' notice and the institution of the rent suit by the Maharaja against the putnidars. Brojendro left two sons, Sarat Chandra and Ramani Mohan, of whom the latter died unmarried leaving behind him his mother Nitharmoni as his only heir. In the plaint only Sarat Chandra has been made a party and Nitharmoni, the other heir, who along with Sarat Chandra represents Brojendro's share has been excluded."

As to the service of notices under sec. 167, Bengal Tenancy Act, the Subordinate Judge found—"The evidence adduced by the Plaintiffs fails to show that there has been a strict compliance with the rules laid down by Government for the service of notices under sec. 167 of the Bengal Tenancy Act. Those rules lay down that in case of the notice being addressed only to one individual the service shall be effected in the manner prescribed for the service of summons upon a Defendant under the Civil Procedure Code and that when notices are addressed to more than one person the service shall be caused either in the above manner or by proclamation and beat of drum by posting it in the presence of not less than two persons on some conspicuous place in the village and also by fixing it up in the village office, if any, where the rent is collected.

The Plaintiffs appealed to the High Court which directed that Nitharmoni be made a party to the suit which was remanded to the lower Court for decision of the issues other than those of misjoinder and non-joinder and service of

notice, so far as she and the other Defendants were concerned. The concluding portion of the judgment of the High Court was as follows:—

"The notices in Suit No. 240 were addressed to several persons. Hence service could be effected by proclamation and beat of drum, by affixing them to conspicuous places in the villages and by fixing them up at the village offices, if any, where the rent is usually paid. There cannot be the shadow of a doubt as to the proclamation and beat of drum. There is also good evidence that the notices were affixed to trees in the village. The witnesses who went to serve the notices say they were told there were no village offices and that the rent was usually collected at the Sadar Kachari. Two witnesses for the opposite party say that there are village offices in three of the villages. We are not satisfied that this is true. In any case the Defendants are *durputnidars*. The village offices referred to in the rule must, we think, be the offices in which the rent of persons whose tenure is to be annulled is paid. We are satisfied that there were no such offices in any of the four villages which are included in the durputni. Hence we consider that the notices in Suit No. 240 were duly served. . . . .

"In Suit No. 240 the only defect alleged is that a lady named Nitharmoni has not been made a party. The Appellants pray that she may be made a party now. We direct that this be done and the Suit No. 240 be remanded to the Subordinate Judge for decision of the other issues so far as she and the other Defendants are concerned. Costs will abide the result. The Respondents' pleader requests us to note that the Subordinate Judge has not decided the second part of the third issue; *viz.*, whether the notices issued and served under sec. 167, Bengal Tenancy Act, were valid. The Subordinate Judge should consider and decide this question as well as the remaining issues in the suits."

Mr. G. E. A. Ross, K. C., and *Mr. G. C. O'Gorman* for the Appellants submittted that the service of the notices on the Defendants was not proved, and if proved, it was not effected in accordance with the terms of sec. 167 of the Bengal Tenancy Act. The Subordinate Judge's view of the evidence was right.

Mr. Loundes for the Respondents submitted that the returns of the serving peons together with the orders recorded by the Deputy Collector shewed that the notices were duly served. The Code of Civil Procedure, 1882, and not the Bengal Tenancy Act, applied. Under sec. 80 of the former it was a good service and the decision of the High Court was quite right.

Mr. Ross replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an Appeal from a decree of the High Coart of Judicature at Calcutta, dated the 28th of August 1907, which set aside a decree of the Subordinate Judge of Nadia, dated the 31st of July 1905, and by which the suit was remanded to the Court of the Subordinate Judge for trial of issues which had not been disposed of by him.

The suit was brought to obtain khas possession of mouzahs which were comprised in a putni taluk which had been purchased by the Plaintiffs at an auction sale under a decree for rent which had been obtained by the Maharaja of Nadia. The Plaintiffs also claimed mesne profits and other reliefs. The Defendants raised various defences, to two of which only is

it necessary to refer for the purposes of this Appeal. One of these defences was that certain notices which should have been served under sec. 167 of the Bengal Tenancy Act, 1885, Act VIII of 1885, had not been served. The other of these defences was that the suit could not be maintained by reason of the non-joinder of one Nitharmoni Debi as a Defendant.

The Subordinate Judge of Nadia found that service of the notices under sec. 167 of the Bengal Tenancy Act, 1885, had not been proved, and further, that the suit was bad by reason of the non-joinder as a Defendant of Nitharmoni Debi, and dismissed the suit with costs. From the decree of the Subordinate Judge the Plaintiffs appealed to the High Court.

On the Appeal, the High Court not being satisfied that there was in any of the villages in question an office where the rent was usually paid, and finding that the notices had been served by proclamation and beat of drum, and by posting them on trees in the villages, held that the notices required by sec. 167 of the Bengal Tenancy Act, 1885, had been duly served in one of the manners prescribed for service of such notices by the Government Rules then in force.

In the Court of the Subordinate Judge it had apparently been contended that the notices had been served in the manner prescribed for the service of a summons on a Defendant under the Code of Civil Procedure, 1882, and also by proclamation and beat of drum and by posting them, in the presence of not less than two persons, on some conspicuous place in the village. Under the circumstances of this case either manner of service would have been sufficient. In the view of the evidence which their Lordships take, it is not necessary to express an opinion as to whether there had or had not been effective service by proclamation and beat of drum, and by posting the notices as required by the Government Rules relating to the service of such notices. Their Lordships find on the evidence which was brought to their attention that the notices were served in the manner prescribed for the service of a summons on a Defendant under the Code of Civil Procedure, 1882, which was the Code of Civil Procedere which was in force at the time when the notices were served.

On the Appeal to the High Court the only defect in the framing of the suit which was alleged by the Defendants, who were Respondents to that Appeal, was that Nitharmoni Debi had not been made a Defendant. On the application of the Plaintiffs, who were Appellants in the High Court, the High Court ordered that Nitharmoni Debi should then be made a Defendant, and she was accordingly added as a Defendant. She has not appealed against the decree of the High Court, and it is not necessary for their Lordships to express any opinion as to her position in this litigation. It was not seriously contended before this Board, indeed it could not have been argued successfully, that the omission to make Nitharmoni Debi an original Defendant made the suit bad for non-joinder as against the other Defendants who are the Appellants here. Nor could it have been successfully argued that the order of remand was bad in law, so far as these Defendants are concerned, by reason of the fact that Nitharmoni Debi was added as a Defendant by the High Court when the suit was in appeal before the High Court. Nitharmoni Debi was not at any time a necessary party to the suit so far as these Defendants-Appellants are concerned, nor have they been prejudiced

by the fact that she was added as a Defendant when the suit was in Appeal.

This Appeal fails and their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellants must pay the costs of the Appeal.

Solicitor: *Mr. G. T. B. S. Turnell* for the Appellants.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 58 OF 1911.

JENKINS, C. J.
WOODROFFE, J.
1912,
17, February.

RAMJI and others, Defendants, Appellants,
v.
JANKI DAS and another, Plaintiffs, Respondents.

Indian Contract Act (IX of 1872), sec. 230—Contract of sale—Person purporting to contract for undisclosed principal where no such principal exists, if entitled to enforce performance.

A person who purports to contract for an undisclosed principal where no such principal exists is not entitled to enforce the performance of it.

This was an action brought by sellers against buyers for damages for breach of a contract for the sale of gunny bags. Under the contract deliveries were to be made by the Plaintiff to the buyers at the rate of 20,000 bags a month from December 1907 to April 1908. The December instalment was not taken but the loss due on it was settled under a settlement contract between the Plaintiff and the Defendant and the money due to the Plaintiff was paid. A similar course was taken with regard to the January instalment and the present action was with reference to the February instalment.

Mr. Justice Harington decreed the suit whereupon the Defendant preferred the present appeal.

The chief issue at the original trial and on which this appeal was argued was:—

"Did the Plaintiff contract as agent for an undisclosed principal or was the Plaintiff the real principal," and if so, was he entitled to enforce the performance of the contract?

Mr. Sarkar for the Defendants-Appellants.—The fact that the Plaintiffs as brokers were the agents of the Defendants is conclusively proved, and also that the alleged principal was not a *bonâ fide* principal at all but was a mere name for the Plaintiffs. The brokers were interested in the result of the contract and were not entitled to sue thereon, such contracts being against public policy. If the Plaintiffs wanted to deliver their own goods (if any at all) they were precluded from suing by reason of sec. 230 of the Indian Contract Act.

Mr. Pugh (with him *Mr. A. N. Chaudhuri*) for the Plaintiffs-Respondents.—The Plaintiffs were ready and willing to deliver these bags to Defendants and offered them delivery which Defendants failed to take. The Plaintiffs content themselves with merely proving the contract. There is no evidence that there was a person behind the Plaintiffs who was in fact a principal whose name they did not disclose. But whether there was a real principal behind or not, does not affect the case because the relationship of principal and agent did not exist between the Plaintiff and the Defendants. The rights of the Defendants are not affected in any way and it has not been shown that the Plaintiffs acted as agents for the Defendants.

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The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This Appeal arises out of a suit brought on a contract No. 3525 of the 6th of November 1907, for the sale to the Defendants of a lac of gunny bags of the sort described in the sold-note. The terms of the contract are set out in the sold-note, and it there appears among other things, that the price was Rs. 30 4 as. per 100 bags free alongside, and that delivery of the goods was to be given and taken, 20,000 monthly, from December 1907 to April 1908. That contract is signed by the Plaintiffs as brokers and it purports to be addressed to principals. The instalments of December and January were settled, and no question arises regarding them, except as to brokerage, as to which nothing has been said before us. The February instalment was not delivered; and according to the plaint, damage to the extent of Rs. 972-14-3 p. was thereby sustained by the Plaintiffs and became due to them. The total sum claimed in this suit is thus Rs. 1,031-9 as. The case was instituted in the Presidency Small Cause Court, but was transferred to the High Court, and came on for hearing before Mr. Justice Harington who has passed a decree in the Plaintiffs' favour. From his judgment the present Appeal is preferred.

It is not denied that the Defendants entered into a contract in the terms of the sold-note: but it has throughout been denied that the Defendants entered into such a contract as is alleged, that is to say, a contract as is set forth in the plaint, which represents the Plaintiffs as vendors to the purchasers. When the case came before Mr. Justice Harington, the following issues were raised: (1) Did the Defendants enter into the contract stated in the plaint?; (2) Did the Plaintiff contract for undisclosed principal or for himself?; and (3) were the Plaintiffs ready and willing to deliver?

Objection was taken to the third issue, but not to either of the other two—no objection could be taken to either of them, because they embodied and amplified that which was set forth in the written statement from the very commencement.

The Plaintiffs Respondents have been represented before us by Mr. Pugh who very properly accepted the position that this case must turn upon whether or not the Plaintiffs are able to establish that they had an undisclosed principal behind them. The Plaintiffs, as I have already said, purported to sign as brokers. If the contract was with the Plaintiffs, it was entered into with them in their character of agents, and as no principal was disclosed, then the position must be that there was an undisclosed principal or that there was no principal at all. The Plaintiffs' contention is that there was an undisclosed principal, one Bhai Kubiram, and that the existence of this undisclosed principal entitles them to sue, under the provisions of cl. 2 of sec. 230 of the Contract Act: so that what we have now to see is whether in truth Kubiram was the undisclosed principal or whether he is an afterthought. The plaint as drawn is opposed wholly to the idea that there was an undisclosed principal. It treats the Plaintiffs as themselves the vendors. In the same way the settlements of December and January appear to me to point, if anything, not to Kubiram being the undisclosed principal but to the Plaintiffs themselves claiming to be the principals. There is no

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brokerage charged to Kubiram. As far as we can see there is no contract with Kubiram, and for some reason, which I am wholly unable to understand if the case is a true one, Kubiram was not put into the box: No book of his was produced, and we are told, and the statement has not been contradicted before us, Kubiram's name never came to light until the opening of the Plaintiffs' case. I am not satisfied that Kubiram was an undisclosed principal of the Plaintiffs. If Mr. Justice Harington had held otherwise, I should have hesitated to differ from him on a question of fact like that but as I read the judgment of the learned Judge he is careful to avoid that conclusion. All he says is that "there is evidence that in this case there was a person behind the Plaintiffs who, they said, was in fact a principal whose name they did not disclose." The learned Judge does not say that he believed that evidence. He does not discuss the various elements in the case which tell against the view that Kubiram was really and truly the undisclosed principal, but he goes on to say that in his view it is immaterial whether there was the relationship of principal and agent between Kubiram and the Plaintiffs. But if Kubiram was not the undisclosed principal then sec. 236 of the Contract Act applies. In order to appreciate the true scope of that section, one must bear in mind the general scheme of Ch. X of the Contract Act which deals with the subject of agency. The sections of that chapter are divided into a series of groups, and of those I only need refer to two: There is the group comprising secs. 211 to 221 which deal with the agent's duty to the principal: Then there is the group which includes secs. 226 to 238 which deal with the effect of agency on contracts with third persons. Mr. Justice Harington in accepting the view that it was immaterial whether there was an undisclosed principal or not was influenced by the consideration that the relationship of principal and agent did not exist between the Plaintiffs and the Defendants. At the outset it is difficult to see how it could be said that there was not that relationship; and the Defendants certainly did not accept that view. But it is unnecessary to discuss the case from that point of view. Sec. 236 is clear and distinct: It provides that "a person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting not as agent, but on his own account." Having negatived the theory of Bhai Kubiram being an undisclosed principal we have a position to which sec. 236 of the Contract Act applies with precision. It is to no purpose to consider what the line of cases is which that section seeks to embody or whether it is in accord with the English rule of law: Enough to say that the section as it stands is the final exposition of law in India, and, in my opinion, Kubiram disappearing, sec. 236 governs the case. The Plaintiffs therefore are the persons with whom a contract has been entered into in the character of agents and so they are not entitled to require the performance of it inasmuch as in reality they were acting not as agents but on their own account.

For these reasons I think the judgment of Mr. Justice Harington cannot be upheld and we must reverse his decree and dismiss the suit with costs throughout to be paid by the Plaintiff.

WOODROFFE, J.—I agree.

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Messrs. S. D. Dutt and Ghose, Solicitors, for the Defendants-Appellants.

Messrs. Dey and Kshatrya, Solicitors, for the Plaintiffs-Respondents.

A. K. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS

Nos. 239, 281 TO 284 OF 1911.

N. R. CHATTERJEA, J. WALMSLEY, J. 1913, Heard, 28, July and 15, August. Judgment, 29, August.	MOHAMAYA PROSAD SINGH and others, Decree-holders, Appellants, *v.* ABDUL HAMID and others, Judgment-debtors, Respondents.

Bengal Tenancy Act (VIII B. C. of 1885), sec. 184, Sch. III, Art. 6—Decree incapable of execution—Amendment of decree—Limitation—Time if runs from date of amendment.

A decree which does not specify the reliefs granted is incapable of execution and cannot be considered as time barred and legally dead even though three years have elapsed from the date of the decree.

An application for execution of a decree for rent which was originally incapable of execution is not barred by limitation although presented more than three years after the date of decree but within three years from the date of amendment of the decree making it capable of execution.

This was an Appeal preferred on the 23rd of May 1911 against the order of A. Mellor, Esq., District Judge of Zillah Darbhanga, dated the 24th of February 1911, affirming the order of Babu Jaya Prasad Panday, Munsif of that place, dated the 5th of March 1910.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose and *Babu Shoroshi Charan Mitra* fot the Appellants.

Moulvi Mahomed Mustafa Khan and *Moulvi Abdul Ashan* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

No. 239—

This Appeal arises out of an application for execution of a decree for rent under the Bengal Tenancy Act not exceeding Rs. 500, and the question is whether the application for execution is barred by limitation having regard to the provisions of sec. 184 and Art. 6, Sch. III of the Bengal Tenancy Act.

It appears that in the rent suit, the Court of Appeal by its judgment, dated the 23rd December 1902, held that the Plaintiff was entitled to rent at the rate claimed by him and allowed the plea of part-payment set up by the Defendant. The decree, however, which was prepared, did not mention the amount claimed, the annual rent, or the amount of rent and costs decreed. The Defendant's appeal to the High Court was dismissed on the 28th April 1905 and the decree of the lower Appellate Court was accordingly confirmed. The decree-holder applied for execution of decree in December 1907, but the Court rejected the application on the ground that the decree could not be executed. Thereupon the decree-holder applied to the High Court for amendment of the decree by inserting in it the annual rent, the amount claimed and the amounts decreed as rent and costs.

This Court thereupon made the following order on the 6th July 1908: "The decrees passed by the lower Appellate Court in these cases do not state what reliefs are granted to the successful parties before it. The decrees should specify the reliefs

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granted. We accordingly direct that the decrees be modified and the reliefs granted be specified from a perusal of the plaints and judgments of the lower Appellate Court." This order appears to have been made in the absence of the judgment-debtor who subsequently made an application stating that he did not get notice of the decree-holder's application in time for instructing pleader to oppose the said application and prayed for setting aside the said order. And the following order was made on the 16th July 1898 :—" The order made by us on the 6th July last on the application of the Respondents for amending the decrees of the lower Appellate Court will stand, but that order should contain a further direction that the present Petitioner, namely, the Appellant in this Court, will be entitled to raise any question as to limitation in the execution proceedings and our order for amendment of the decree will not affect any such plea of limitation. We do not express any opinion on the question of limitation." The deceee was accordingly amended on the 23rd June 1909.

The present application for execution of the decree was presented on the 2nd October 1909, and the judgment-debtor opposed it on the ground that it was barred by limitation. Both the Courts below have given effect to the objection, and the decree-holders have appealed to this Court. We are of opinion that the application for execution of the decree is not barred by limitation. Art. 6 of Sch. III of the Bengal Tenancy Act no doubt provides a three years' limitation for an application for execution of a rent decree passed under that Act not exceeding Rs. 500 and the time is to run from the date of the decree. But that limitation can apply only where there is a decree which can be executed at the date it is passed. The decree in the present case as originally passed was one wholly incapable of execution and until it was amended under the order of the High Court in 1909 there was no decree which was capable of being executed. We think that if Art. 6 of Sch. III of the Bengal Tenancy Act were to apply to such a decree, the decree-holder may be deprived of the fruits of a judgment in his favour through the fault or delay of the Court or of its officer in drawing up a decree which can be executed. It is not a case where the decree could be executed although the decree-holder could not obtain the full benefit of the judgment owing to the decree not being in accordance with and not fully expressing the result of the judgment. A similar view was taken in the case of *Muhamad Suleman Khan* v. *Muhamad Yar Khan* (1). In that case the decree as originally framed was found by the High Court to be incapable of execution and was not finally amended by that Court so as to become capable of execution, until nearly twelve years after it was passed, and it was held that an application to execute such decree which was made within three years from the date of the amendment of the decree was within time.

The learned Judges in that case were of opinion that Art. 178 of the Limitation Act was applicable to such a decree, but it seems to us that so long as no decree capable of execution is in existence, no question of limitation arises with respect to it.

We do not express any opinion upon the questions whether the decree holder can get a fresh start from the date of amendment of a decree which is capable

(1) I. L. R. 17 All. 89 (1894).

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of execution though such decree may not be in entire accordance with the judgment, and whether a case of amendment of decree comes within the words 'review of judgment' in Art. 6, cl. (3) of Sch. III of the Bengal Tenancy Act, the provisions of which are similar to those which were contained in cl. 3 of Art. 179 of Act XV of 1877 (before cl. 4 was introduced by the present Limitation Act IX of 1908) as to the construction of which there is some difference of judicial opinion. The facts of the present case are peculiar. The decree did not at all specify the relief granted, and the judgment-debtor succeeded in getting the application for execution made in 1907 rejected on the ground that the decree was incapable of execution. Under these circumstances we do not think that it is now open to them to say that the decree was capable of execution before it was amended.

The learned District Judge has held that the decree was "time-barred and therefore legally dead" at the time when the application for amendment was made, three years having passed from the date of the original decree. But we think the decree stands practically in the same position as it would have stood, had it not been signed by the Judge all this time. In either case it would not be capable of execution, and we do not see how a decree which cannot be executed could be 'dead' or time-barred. We are fully alive to the fact that the object of the Legislature in prescribing a three years' period of limitation for execution of rent decrees under the Bengal Tenancy Act, is that such decrees should not be kept pending for a long time like ordinary decrees, but we think the decree for which a limitation is prescribed by Art. 6 of the Bengal Tenancy Act is one which is capable of execution. We are accordingly of opinion that the application for execution is not barred by limitation. In this view it is unnecessary to consider whether the present application for execution can be said to be a continuation of the previous application made in 1907. The orders of the Courts below are set aside, and the case is sent back to the Court of first instance so that it may proceed with the application for execution according to law.

The Appellant is entitled to his costs in this Court. We assess the hearing-fee at one gold mohur. Each party will bear his own costs in the Courts below.

This judgment will govern the other Appeals, Nos. 281 to 284 of 1911.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1798 OF 1913.

N. R. CHATTERJEA, J.
WALMSLEY, J.
1913,
12, August.

UPENDRA NATH GHOSH, Petitioner, Appellant,
v.
JAMINI MOHAN PAL and ors., Opposite Party, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 105—Record-of-rights, correctness of, if can be impugned by landlord under sec. 105—Unrecorded landlord, if can apply.

The correctness of the record-of-rights can be impugned by the landlord in an application made under sec. 105 of the Bengal Tenancy Act.

Issues mentioned in sec. 105A can be tried in a proceeding for settlement of rent under sec. 105.

Where an applicant under sec. 105 purchased a tenure in an estate of which he himself was the proprietor,

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Held, *that the mere fact that his name did not appear in the* khatian *as owner of the tenure was no ground for holding that he was not entitled to apply under sec. 105 of the Bengal Tenancy Act.*

This was an Appeal preferred on the 14th of June 1913 against a decree of G. Mumford, Esq, Special Judge of Faridpur, dated the 21st of May 1913, affirming a decree of Mr. B. C. Prance, Settlement Officer of that District, dated the 21st of March 1913.

The Appellant in this case made an application before the Settlement Officer of Faridpur which purported to be made under secs. 105 and 105 (A) of the Bengal Tenancy Act. In that application he asked to have a fair and equitable rent settled in respect of the land held by the alleged tenants. He further asked to have his name brought into the settlement record as landlord, on the ground that he had purchased the right, title and interest of the recorded landlord at an auction sale, and he also asked to have the record amended so as to shew the tenants as raiyats whose rents will be liable to enhancement instead of as tenure-holders paying a fixed rate of rent. The Settlement Officer rejected the application holding that an application for settling rent under sec. 105, Bengal Tenancy Act, could not be filed which at the same time impugned the accuracy of the record-of-rights. The Special Judge, on appeal, confirmed the decision of the Settlement Officer. The Petitioner then preferred this Second Appeal.

Mr. B. C. Mitter and *Babu Susil Madhub Mullick* for the Appellant.

No one for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal arises out of an application under sec. 105 of the Bengal Tenancy Act. The Appellant, who was the applicant before the Settlement Officer, is the proprietor of an estate and it appears that he purchased within that estate a tenure within which the holding of the opposite parties is situated. The application was rejected by the Settlement Officer and that order has been confirmed on appeal by the Special Judge. The Petitioner has appealed to this Court.

The first ground upon which the learned Judge proceeded was that as the Appellant was not the recorded landlord he could not maintain the application. It does not appear that any objection was raised by the opposite parties that the applicant had not acquired the interest of the recorded landlord. As we have already stated, the applicant had purchased a tenure (in execution of a decree for arrears of rent) in an estate of which he himself is the proprietor and the mere fact that his name does not appear in the khatian as owner of the tenure is no ground for holding that he is not entitled to apply under sec. 105, Bengal Tenancy Act. We are accordingly of opinion that the first ground upon which the learned Judge proceeded has no substance in it.

The second ground was that an application under sec. 105 could not be maintained where any question impugning the correctness of the record of rights was raised and that, at any rate, such an application could not be maintained by the landlord. We are of opinion that the learned Judge was wrong in the view he took of the provisions of sec. 105 and sec. 105A of the Bengal Tenancy Act. Sec. 105 provides :—" When either the landlord or the tenant applies within two months from the date of the certificate of the final publication of the record-of-

rights under sec. 103A, sub-sec. (2), for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant." The application under sec. 106 must, therefore, be made within two months of the final publication of the record-of-rights. A party dissatisfied with any entry in the record-of-rights may proceed under the provisions of sec. 105 of the Bengal Tenancy Act within three months of the final publication: but if he adopts the procedure prescribed in sec. 106, it is practically impossible for him to avail himself of the provisions of sec. 105 for the settlement of fair rent, because the application under this latter section must be made within two months of the final publication of the record-of-rights and a suit under sec. 106 is not likely to be disposed of within two months. Most of the matters which can be gone into under sec. 106 are dealt with in cls. (*a*) to (*f*) of sec. 105A and it seems to us that the obvious intention of enacting sec. 105A was that, where a party without resorting to the provisions of sec. 106 applies for the settlement of fair rent under sec. 105 and the issues mentioned in sec. 105A are raised, they shall be tried and decided by the Revenue Officer and rent under sec. 105 will be settled accordingly. It is, we think, sufficient to refer to the provisos to secs. 105A and 106 to show that the issues mentioned in sec. 105A can be tried in a proceeding for settlement of rent under sec. 105. The proviso to sec. 105A runs thus:—"Provided that the Revenue Officer shall not try any issue under this section which has been or is already directly and substantially in issue between the same parties or between parties under whom they or any of them claim and has been tried and decided or is already being tried by a Revenue Officer in a suit instituted before him under sec. 106." Similarly the proviso to sec. 106 lays down that the Revenue Officer in a suit under that section shall not try any issue which has been tried and decided or is being tried under sec. 105A. It is obvious therefore that any of the issues mentioned in sec. 105A can be tried in a proceeding under sec. 105 provided such an issue has not been tried and decided or is not being tried in a suit under sec. 106.

Then, we do not see any reason for holding that an issue under sec. 105A can be raised only by the tenant. For instance, cl. (*b*) says "whether the land although entered in the record-of-rights as being held rent-free is liable to the payment of rent." Now, an entry in the record-of-rights that the land is held rent-free is an entry in favour of the tenant, and therefore it is the landlord who would challenge the correctness of such entry. Some of the issues mentioned in the other clauses may be raised by the landlord, others by the tenants, and some again by either of them.

We are accordingly of opinion that the issues mentioned in sec. 105A can be tried in a proceeding under sec. 105. The judgment and decree of the Courts below must be set aside and the case sent back to the Court of first instance for trial on the merits. We make no order as to costs.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION].

APPEAL FROM APPELLATE DECREE No. 1787 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 22 and 23, April. Judgment, 25, April.

MIR MOZAFFER ALI and others, Plaintiffs, Appellants, *v.* KALI PROSHAD SAHA and another, Defendants, Respondents.

Santhal Pergunnahs Regulation (Reg. III of 1872), secs. 11, 25, 25A—Entry in record-of-rights operating as decree—Claim not expressly negatived by Settlement Court, if open to investigation in Civil Court—Entry in record set up as plea in bar—What must be proved for entry to operate as res judicata—*Proof that entry obtained by fraud.*

Where in a suit for rent instituted by the Plaintiff in part as zemindar and in part as mokuraridar, *the Defendants objected to the recovery of the rent alleged to be due to the Plaintiff as* mokuraridar *on the ground that in the record-of-rights prepared and finally published under the Santhal Pergunnahs Regulation III of 1872, the Defendants were recorded as* putnidars *only :*

Held—*That under sec. 11 of the Regulation the entry operated as a decree of a Civil Court.*

That it was not open to the Plaintiff to urge that as there was no express decision of the Settlement Court upon the question of the dar-mokurari *status of the Defendants the matter was open for investigation in a Civil suit inasmuch as it must be held that there was such a decision by implication.*

Held, *however, that it was for the Defendants, who pleaded the entry as a bar, to establish the circumstances in which the decree was made and to prove conclusively that the decree does operate as* res judicata.

That the Defendants must prove that in the preparation and final publication of the record-of-rights the requirements of the statute had been fulfilled, and it was open to the Plaintiff to urge and prove that the entry which was to operate as a decree was obtained by fraud.

RAM NARAIN SINGH *v.* RAM RUNJAN CHUCKERBUTTY (1), NADIAR CHAND SINGH *v.* CHANDRA SIKHOR SADHU (2), RAJIB *v.* LAKHAN (3), NISTARINI *v.* NUNDALAL (4) *relied on.*

This was an Appeal preferred on the 14th of July 1911 against a decree of H. Allanson, Esq., District Judge of Zillah Santhal Pergunnahs, dated the 16th of March 1911, affirming a decree of S. S. Day, Esq., Subordinate Judge of Rajmahal, dated the 22nd of December 1910.

The material facts of the case will appear from the judgment.

Babu Bepin Behary Ghosh for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Gunada Charan Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Plaintiffs in a suit for rent. The case for the Plaintiffs is that the Defendants are liable to pay rent on the basis of a putni as also a *dar-mokurari*. The Courts below have decreed the claim based on the putni, but dismissed the claim founded on the *dar-mokurari*, on the ground that no such claim can be put forward in view of sec. 25 of Reg. III of 1872. The Plaintiffs are zemindars to the extent of ten annas and they also claim to be *mokuraridars* of sixteen annas in respect of some lands included in the zemindari. Their case is that the Defendants hold under them as *putnidars* and also as *dar mokuraridars* ; the hypothesis is that the *dar-mokurari*

(1) I. L. R. 13 Cal. 245 (1886).
(2) I. L. R. 15 Cal. 735 (1888).
(3) I. L. R. 27 Cal. 11 (1899).
(4) I. L. R. 30 Cal. 369 (1902).

lands are distinct from and not included in the putni lands. In the record-of-rights prepared under Reg. III of 1872, the Defendants are, however, described as *putnidars*; and there is no mention that they are *dar-mokuraridars* in respect of any land included in the villages now in dispute. The Courts below have accordingly held that the Defendants are liable to pay rent, only in their character as *putnidars*, and that it is not open to the Plaintiffs to establish in a suit in the Civil Court that the putni does not extend over all the lands of the village and that the Defendants are *dar-mokuraridars* of lands not included in the putni.

It appears to have been argued on behalf of the Plaintiffs in the Courts below that notwithstanding the absence of an entry in the record-of-rights to the effect that the Defendants are *dar-mokuraridars*, they are at liberty to establish by evidence in this suit that the Defendants are as a matter of fact *dar-mokuraridars* of some lands. This contention has been, in our opinion, very properly overruled. The fact that the Defendants have been recorded as *putnidars* of all the lands in the village implies a decision that they have no *dar-mokurari* right in respect of any of the lands included in that village. This decision operates as a decree of Court under sec. 11 of Reg. III of 1872. Sec. 9 provides that the Lieutenant-Governor may declare that a settlement shall be made of the whole or any part of the Santhal Pergunnahs for the purpose of ascertaining and recording the various interests and rights in the land. Sec. 10 lays down that the Lieutenant-Governor may appoint officers by whom the settlement is to be made and may invest any officer or officers with the control over them by way of appeal and revision and may make rules for the procedure of such officers in investigating into rights in the land, and the hearing of suits and generally for the guidance of such officers. Sec. 11 then provides that except as provided in sec. 25A, no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules, and the decisions and orders of the Settlement Court made under these rules regarding the interests and rights mentioned above shall have the force of a decree of Court. It has been argued on behalf of the Plaintiffs that as there is no express decision by the Settlement Court upon the question of the *dar-mokurari* status of the Defendants, the matter is open for investigation in a Civil suit. In our opinion, this contention is obviously fallacious. If this view were accepted, the object which the Legislature had plainly in view in framing sec. 11, might be completely defeated by the omission of a party, it may be a deliberate omission, to raise a question before the settlement authorities. In the present case, as we have already explained, there is a decision, though a decision by implication, that the Defendants are not *dar-mokuraridars* in respect of any land included in the disputed villages the whole of which is held by them in putni right. That decision has the force of a decree of Court. The question consequently arises whether it is open to the Plaintiffs to avoid in any manner the effect of this decree.

One of the methods by which a decree of this character may be avoided is mentioned in sec. 25A, namely, where only the rights of zemindars and other proprietors as between themselves are concerned, a suit may, unless it is barred under sec. 13 of the Code of Civil Procedure, 1882, be brought in a Civil Court

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to contest the finding or record of the Settlement Officer within three years from the date of the publication of the record-of-rights or of the final order of the Revenue Court. But no such suit shall be brought in any Civil Court after the expiration of three years from such date. Another method is provided in sub sec. (1) of sec. 25 which provides that after the expiration of six months from the date of the publication of the record-of-rights in any village, such record shall be conclusive proof of the rights and customs therein recorded other than the rights mentioned in sec. 25A, except so far as concerns entries in such record regarding which objection by parties interested may still be pending in Original or Appellate Courts or may still be open to appeal. Notwithstanding anything contained in sub sec. (1), the Settlement Officer may, at any time, before the settlement is declared by a notification in the *Calcutta Gazette* to have been completed, enquire into and correct any material error in such record and revise any order or decision passed by himself or by an Assistant Settlement Officer. The Plaintiffs have not adopted either of these methods.

But it has been explained on their behalf that they have not done so, because till the settlement records were produced at the trial of the suit and used against them, they were not aware that an entry had been made therein to their detriment. It has further been argued that they were kept out of the knowledge of their right to challenge the record-of-rights, by reason of the fraudulent conduct of the Defendants who concealed from them the fact that the record had been made in their favour. In support of this allegation, it has been stated that, even after the record had been made, the Defendants confessed judgment in a suit for recovery of arrears of rent of the *dar-mokurari* and that they have thereafter amicably paid rent on the same basis. Under these circumstances, it has been argued on behalf of the Plaintiffs-Appellants that they should be allowed even now an opportunity to controvert the record-of-rights, specially as the record-of-rights was not specially pleaded as a bar in the written statement, although a vague reference was made thereto. In support of this contention, reliance has been placed upon the decisions in *Ram Narain Singh* v. *Ram Runjan Chuckerbutty* (1) and *Nadiar Chand Singh* v. *Chundra Sikhor Sadhu* (2). In our opinion, there is considerable force in the contention of the Appellants. In the case last mentioned, it was pointed out that an entry in the settlement record had, under sec. 11 of Reg. III of 1872, the force of a decree of Court, consequently when a Defendant pleads the record-of-rights as a bar to the suit, he raises in essence a plea of *res judicata*, and it is therefore obligatory upon him to establish the circumstances under which the decree was made and to prove conclusively that the decree does operate as *res judicata*. Here it is worthy of notice that under sec. 24, after the Settlement Officer has made the record-of-rights for any village, he shall notify the publication of such record to the persons interested by posting it conspicuously in the village and otherwise in such manner as may be convenient. The object of this procedure is obviously to enable persons interested to bring forward, in the Settlement Court, within the prescribed period, any objection they may desire to make to any part of such record : and under sec. 25, it is only after

(1) I. L. R. 13 Cal. 245 (1886).
(2) I. L. R. 15 Cal. 765 (1888).

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the record-of-rights has been published as provided in sec. 24, that it becomes conclusive proof of the customs and rights therein recorded. Consequently, if the Defendants rely upon the record-of-rights as conclusive under sec. 25 and urge that the entry therein operates as a decree under sec. 11, they must prove that the requirements of the statute have been fulfilled. As soon as this has been accomplished, it becomes open to the Plaintiffs to urge under sec. 44 of the Indian Evidence Act that the entry which operates as a decree was obtained by fraud. It is not necessary that the Plaintiffs should institute a separate suit to set aside the record-of-rights on the ground of fraud: the same result may be attained if they are allowed to take the plea of fraud under sec. 44 of the Indian Evidence Act. [*Rajib* v. *Lakhan* (3), *Nistarini* v. *Nundalal* (4)]. In view of the circumstances of this litigation, we are of opinion that there should be a full enquiry into this matter.

The result is that this Appeal is allowed, the decree of the Court below set aside, and the case remanded to the Court of first instance for the determination of three points: namely, *first*, was the record-of-rights published in accordance with the statutory provisions on the subject and does it operate as a decree between the parties under sec. 11, and conclusive under sec. 25 of Reg. III of 1872? *secondly*, if the record was published in strict conformity with the statute, was the entry therein obtained by fraud as the Plaintiffs allege; and, *thirdly*, are the lands alleged to be comprised in the *dar-mokurari* distinct from and independent of the lands included in the putni? If the first question is decided against the Defendants, the second question need not be investigated: but if the first is determined against the Plaintiffs, the second must be examined. If the second question is determined in favour of the Defendants, the record is conclusive and the claim for *dar-mokurari* rent must stand dismissed. If the second question is decided against the Defendants, the third need not be investigated.

As the ground on which the Appeal succeeds was not taken in the Courts below, the Appellants must pay the Respondents their costs both in this Court and in the Court of Appeal below: the costs in the Court of first instance will abide the result.

Appeal allowed.

(3) I. L. R. 27 Cal. 11 (1899).
(4) I. L. R. 30 Cal. 369 (1902).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1698 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
16, December.

WAZED ALI KHAN PANEE and anr., Petitioners,
v.
THE KING EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1908), sec. 526, cl. 8, if applies to proceedings under sec. 107—Adjournment pending application for transfer—Proceeding under sec. 107, if a criminal case.

A proceeding under sec. 107 of the Code of Criminal Procedure is a criminal case and the provision in cl. 8 of sec. 526 of the Code is applicable thereto and an applicant is entitled to an adjournment of the proceeding to enable him to move for a transfer as is contemplated in that clause.

This was a Rule granted on the 24th of October 1913 against an order of Mr. C. Gurner, Sub-Divisional Magistrate of Tangail, dated the 18th of August 1913.

The facts material for this report will appear sufficiently from the judgment.

WAZED ALI KHAN PANEE *v.* THE KING-EMPEROR.

Messrs. Norton and A. B. Guha and *Babu Probodh Chandra Chatterjee* for the Petitioners.

Babu Srish Chandra Chowdhury for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Petitioners in this case have been ordered to execute bonds with sureties under sec. 107, Cr. P. C., to keep the peace. At the trial of the case they applied to the Magistrate, before the examination of witnesses had commenced, for an adjournment under cl. 8 of sec. 526, Cr. P. C., to enable them to move this Court for a transfer. The application was refused for the reason that proceedings under sec. 107 were not governed by cl. 8 of sec. 526 and the Magistrate proceeded to try the case. The prosecution examined 11 witnesses but the Petitioners declined to cross-examine them, the claim being that the Petitioners were entitled to an adjournment under the law. When called upon to enter on their defence, for the same reason they declined to examine their witnesses. The Magistrate then made an order binding them to keep the peace. Against that order they moved this Court and obtained this Rule on the ground that the Magistrate had erred in law in holding that cl. 8 of sec. 526 had no application to cases under sec. 107.

On behalf of the Crown it has been contended that a proceeding under sec. 107 is not a "criminal case" and inasmuch as cl. 8 of sec. 526 refers to "criminal case or appeal" it cannot be said to apply to a proceeding under sec. 107. We cannot accede to this argument. It is true that every case that is governed by the Code need not necessarily be a "criminal case" but it does not from that follow that only such cases are "criminal" as relate to offences already committed or said to have been committed. Under sec 107 a Magistrate is empowered in his discretion to detain a person, who is the subject of the proceeding, in custody until the completion of the enquiry. The Code further provides that if a person ordered to keep the peace does not give the necessary security he shall suffer simple imprisonment for the period laid down in the order. Such being the provisions of the Code we cannot, in the absence of a legislative definition of the phrase "criminal case," hold that a proceeding under sec. 107 is not a "criminal case." In our view cases under sec. 107 are subject to the application of cl. 8 of sec. 526 and the Magistrate erred in refusing the adjournment sought.

This Rule, therefore, is made absolute and the order binding the Petitioners to keep the peace is set aside. We, however, desire to remark that if in the opinion of the Magistrate there is still apprehension of a breach of the peace between the parties it is open to him to adopt such preventive measures for the preservation of peace as he thinks proper under the law.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1506 OF 1912.

SHARFUDDIN, J. COXE, J. 1912, Heard, 6 & 9, December. Judgment, 17, December.	CHANDULLA SHEIKH and ors., Petitioners, *v.* THE KING EMPEROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), secs. 99, 147—Right of private defence—Rioting—Trespass—Wrongful possession for 14 hours—Repelling trespass by force if any offence.

CHANDULLA SHEIKH *v.* THE KING-EMPEROR.

Where the Opposite Party erected some huts stealthily at night on a plot of land of which the Petitioners were in peaceful possession and it was alleged that the Opposite Party were in possession of the land for about 14 hours and the Petitioners at break of day on coming to know of this took the earliest opportunity to exercise their own right of private defence and came to the spot armed to turn out the Opposite Party who were found by them still engaged in erecting more huts and there was a free fight between the parties and the Petitioners did not inflict more hurt than was necessary for defending themselves:

Held—*That the Petitioners were not guilty of rioting and that in the circumstances of the case the Petitioners had no time to have recourse to the public authorities and they were entitled to their right of private defence.*

This was a Rule granted on the 20th of October 1912 against an order of G. W. Davies, Esq, Sub Divisional Magistrate of Serajgunge, dated the 30th of August 1912, convicting the Petitioners under sec. 147, I. P. C., and sentencing each to undergo 9 months' rigorous imprisonment, an appeal from which order was dismissed by S. N. Huda, Esq, Sessions Judge of Pabna, on the 30th of September 1912.

The facts of the case will sufficiently appear from the judgment.

Mr. K. N. Chaudhuri with *Babu Mokundo Nath Roy* for the Petitioners.—The Opposite Party were trespassers on the land in question which was in the possession of the Petitioners. On hearing that huts were being erected on their land stealthily the Petitioners were entitled to go and remove them. They had no time to have recourse to the public authorities. They did not inflict more injury than was necessary. Moreover several persons on the Petitioners' side received injuries necessitating their detention in hospital for a number of days. The Petitioners availed themselves of their right of private defence of property at the earliest possible opportunity and they were protected by law in doing what they did.

Mr. Norton with *Babus Atulya Charan Bose* and *Bepin Chandra Bose* for the Crown referred to *Moher Sheikh* v. *Queen-Empress* (1), *Kabiruddin* v. *Emperor* (2).

The JUDGMENT OF THE COURT was as follows:—

SHARFUDDIN, J.—This is a Rule on the District Magistrate to show cause why the conviction and sentence passed on the Petitioners should not be set aside on the grounds stated in the petition.

The Petitioners have been convicted of rioting under sec. 147, I. P. C., and sentenced to nine months' rigorous imprisonment.

The common object of the unlawful assembly as stated in the charge was "to obtain possession of some property on Chur Chachalia or to enforce a right to some property on that Chur."

The Petitioners are tenants of what is known as the five annas share, while the Opposite Party are said to be the tenants of the *bara* five annas share. It appears however from the findings of the lower Courts that the tenants of the *maliks* of the different shares had disputes with regard to some lands situated to the north of a certain line of demarcation fixed by Mr. Lloyd, the former Sub-Divisional Officer, in settling that dispute. This line it seems was fixed in accordance with the *thak* map.

(1) I. L. R. 21 Cal. 392 (1893).
(2) I. L. R. 35 Cal. 368 (1908).

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It has been found by the lower Appellate Court that since the settlement of the above dispute, the six annas tenants retained possession of the lands and huts to the south of this line and the five annas tenants, among whom are the present Petitioners, retained possession of lands to the north of this line.

It has been found that the tenants of the five annas share have all along been in peaceful occupation and enjoyment of the lands to the north of the line of demarcation; but it has been contended on behalf of the Opposite Party that they were in actual and physical possession of the land on which the occurrence took place and that as they had been in possession for *over twelve* hours the Petitioners were not justified in disturbing that possession.

It is admited by both sides that a riot took place with regard to the possession of some land to the north of the line of demarcation.

On the findings it is clear that the *bara* five annas *maliks* and the six annas *maliks* were not satisfied with the settlement made by Mr. Lloyd. We find that the *maliks* of these two shares instituted a suit with regard to some lands to the north of the demarcating line. They obtained a decree but the decree did not include the land with regard to which the present occurrence took place.

The above being clear findings by the lower Appellate Court, the question for decision is whether the Petitioners who were in peaceful occupation of the land in question were justified in coming to the place, prepared to drive away the trespassers. This brings us to the incidents that took place during the few hours during which the Opposite Party allege possession of the land.

The findings by the lower Appellate Court with regard to this part of the case are:—

(*i*) That the Opposite Party began to erect some huts on the land in question stealthily in the darkness of the night before the present occurrence.

(*ii*) At break of day the present Petitioners with some others who had been in peaceful occupation of the land on coming to know what was happening came to the place fully armed in order to drive off the trepassers. The result was that there was a free fight between the parties. In this occurrence both sides were wounded and both sides have been convicted and sentenced.

It appears that a large number of the Appellants received injuries and had to be detained in the hospital for a number of days. There can be no doubt on the findings that the Opposite Party were trespassers on the land in question. The whole question resolves itself into this—had the Petitioners, who were in possession of the land in question, when the Opposite Party had stealthily erected some huts under the cover of night, any right to come to the spot prepared to turn out the Opposite Party who were at dawn found by them still engagad in erecting more huts.

In the present case a charge was framed only under sec. 147, I. P. C., and not under any of the sections of the Code that define various kinds of hurt.

The law relating to the right of private defence is in secs. 96 to 106 of the Indian Penal Code. Sec. 99 provides that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Sec. 104 of the Indian Penal Code provides that if the offence, the committing

of which or the attempt to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the preceding section, that right does not extend to the voluntary causing of death but does extend, subject to the restrictions mentioned in sec. 99, to the voluntary causing to the wrong-doer of any harm other than death.

The whole question therefore really narrows itself into this, whether the Petitioners had time to have recourse to the public authorities. We are of opinion that they had not. The construction of huts began at night and stealthily; the Petitioners along with others having come to know what was happening on the land of which they were in peaceful possession, go out prepared to turn out the trespassers from the land. If they had allowed, without any reasonable cause, a few days to elapse and then opposed the trespassers by force they would not have been justified in doing so as there would in that case have been ample time to have recourse to the public authorities. The authorities placed before us, where the accused had been sleeping over their rights and had allowed the Opposite Party to remain in possession without any attempt on their part to oust them, would not avail the Opposite Party of the present case, inasmuch as the present Petitioners availed themselves of the right given to them by law at the very earliest opportunity. We have been referred to the case of *Moher Sheikh* v. *Queen-Empress* (1). In this reported case the Appellants had acquiesced in their dispossession for five days before they went armed to oust the trespasser and it was, we think rightly, held that they had lost the right of private defence. We have however a recent authority of this Court, namely, the case of *Kabiruddin* v. *Emperor* (2), where it was held that "there is no right of private defence where two parties arm themselves for a fight to enforce their right or supposed right, and deliberately engage in large numbers in a fight. In such a case if it is not shown that the accused were acting within the legal limits of the right of private defence, it does not matter which party was the first to attack." It has been contended on behalf of the Opposite Party that they had been in possession for about 14 hours and hence they had the right to remain there and the Petitioners had no right forcibly to turn them out. The right of private defence would become a farce if it depended on a race between two factions to see who should arrive first. In this reported case it was found that there was ample opportunity to seek the protection of the authorities as there was no pressing necessity for repairing the embankment. In a case under sec. 9 of the Specific Relief Act it has been held that if a party has been in peaceful and uninterrupted occupation which has extended over a sufficient length of time, the inference may properly be drawn that he was in possession. This was so held in the case of *Raj Krishna Parui* v. *Muktaram Das* (3). If the party dispossessed shows by his conduct that he has acquiesced in his dispossession, he loses the right of private defence. In the case of *Browne* v. *Dawson* (4), the learned Chief Justice observed "that a mere trespasser could not by the very act of trespass, immediately and

(1) I. L. R. 21 Cal. 392 (1893).

(2) I. L. R. 35 Cal. 368 (1908).

(3) 12 C. L. J. 605 (1910).

(4) 12 Ad. and Ell. 624 (1840).

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without acquiescence, give himself what the law understood by possession against the person whom he ejected and drive him to produce his title." The above cases are no doubt civil cases but the principle involved is identical.

For the above reasons we are of opinion that taking into consideration that the Petitioners were in actual physical possession of the property in question, that they took the earliest opportunity to exercise the right of private defence, that they had no time to have recourse to the public authorities and that the injuries inflicted by them were within the limits allowed to the right of private defence, they are not guilty of rioting. We therefore make the Rule absolute and acquit the accused who are Petitioners in this case.

COXE, J.—I agree. I have stated the view that I take of the right of private defence in cases of this nature in Appeal No. 573 of 1909 decided on the 12th August 1909. In my opinion the accused in this case on hearing that the huts were being erected on their lands were entitled to go and remove them. If they thought that they would be attacked in so doing they were entitled to go prepared to defend themselves. If they did not intend to cause more hurt than was necessary for defending themselves they were not an unlawful assembly. The circumstances of the case, particularly the amount of harm done to the other side, indicate that they did not intend to exceed the right of private defence. In these circumstances they have not, in my opinion, committed any offence.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

GOVERNMENT APPEAL NO. 4 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 23 July, and 8, August.
Judgment, 8, August.

THE DEPUTY SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL, Appellant,
v.
GAYA PROSAD, Accused, Respondent.

Criminal Procedure Code (Act V of 1898), secs. 4 (t), 492, 417—Appeal by Local Government against acquittal—Legal Remembrancer of Bengal if Public Prosecutor for Behar and Orissa—Competency of appeal presented by him for the Government of Behar and Orissa—Request to present an appeal if constitutes appointment as Public Prosecutor.

An appeal was preferred to the High Court on behalf of the Government of Behar and Orissa against an order of acquittal passed by a Deputy Magistrate in a case under sec. 193, I. P. C. This appeal was presented by the Deputy Legal Remembrancer of Bengal acting on behalf of the Legal Remembrancer of Bengal. It appeared that the Judicial Secretary to the Government of Behar and Orissa in a letter requested the Legal Remembrancer of Bengal to present an appeal on behalf of the Government of Behar and Orissa in the case in question. Beyond this there was nothing to show that the Legal Remembrancer of Bengal was appointed the Public Prosecutor for Behar and Orissa :

Held—*That under sec. 417, Cr. P. C., the direction of the Local Government to present an appeal against an order of acquittal must be given to a Public Prosecutor. This direction may be given in a letter whereby the Public Prosecutor is appointed as such but it does not follow that the mere fact that a person has been appointed to present an appeal to the High Court from an order of acquittal involves*

THE DEPUTY SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* GAYA PROSAD.

his appointment as Public Prosecutor for the purpose of the case.

That in a case of this description where the liberty of the subject is involved and an appeal is sought to be preferred against an order of acquittal the Statute must be strictly construed and full compliance with its provisions required.

In the present case the High Court held that the appeal was incompetent and dismissed it on that ground.

This was an Appeal preferred under sec. 417, Cr. P. C., against the order of the Deputy Magistrate of Gaya, dated the 17 h of November 1912, acquitting the Respondent, Gaya Prosad, of the charge under sec. 193, I. P. Code.

The facts will sufficiently appear from the judgment.

Mr. B. C. Mitra (Standing Counsel) and *Babu Jyotish Chandra Hazra* for the Appellant.

Babu Monmatha Nath Mukherjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the Government of Behar and Orissa under sec. 417, Cr. P. C. The accused was tried by a Magistrate for an offence under sec 193, I. P. C., and was acquitted by him under sec. 258, Cr. P. C., on the 17th November last. On the 2nd May 1913, this Appeal was presented by Mr. J. Orr, the Deputy Legal Remembrancer of Bengal. A preliminary objection has been taken to the competency of the Appeal so presented.

Sec. 417 provides that the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an Original or Appellate order of acquittal passed by any Court other than a High Court. The term "Public Prosecutor" is defined in cl. (t) of sec. 4, Cr. P. C, which lays down that 'Public Prosecutor' means any person appointed under sec. 492 and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its Original Criminal Jurisdiction. Sec. 492, to which reference is made in the definition, provides in sub-sec. (1) that the Governor-General in Council or the Local Government may appoint, generally, or in any case or for any specified class of cases, in any local area, one or more officer to be called Public Prosecutor. In the matter of the appeal now before us, Mr. Orr professes to act on behalf of the Legal Remembrancer of Bengal. It has not been suggested that Mr. Orr was appointed a Public Prosecutor either generally, or for this special case by the Government of Behar and Orissa; nor has it been suggested that Mr. Orr was directed as a Public Prosecutor to present this Appeal to the High Court. Consequently the authority of Mr. Orr, if any, must be taken to be derivative; in other words, he can act as Public Prosecutor only under the direction of a person who has been appointed Public Prosecutor within the meaning of cl. ( ) of sec. 4. It has been pointed out to us on behalf of the Crown that on the 24th June 1886, a notification was published in the *Calcutta Gazette* to the effect that the Legal Remembrancer of Bengal was to be *ex officio* Public Prosecutor in all cases before the High Court on its Appellate Side except in a case coming from a Presidency or other Magistrate in Calcutta. If this notification is read subject to the notification published in the *Behar and Orissa Gazette* on the 1st April 1912, the view may well be maintained

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Contents.

NOTES

Obituary.

We are grieved to record the death of Babu Taraprasanna Mukerjee of the Burdwan Bar. He was a Vakil of the Calcutta High Court and enjoyed a most extensive practice in the Burdwan Division although mostly in the mofussil. He was engaged in conducting a coal mine case at Purulia for some months past and died all of a sudden of heart failure. He was a lawyer of great ability and was one of the few fortunate members of his branch of the profession who made a fortune at the Bar. Though advanced in years, still his death will be felt as a great loss to the strength of the Vakil Bar.

Royal Commission and the Long Vacation and Saturday sittings.

The final Report of the Royal Commission appointed to enquire into the causes of delay in the King's Bench Division was issued in the middle of December last. Having regard to the fact that the Royal Warrant appointing the Commission was issued on the 31st December 1912, it is very creditable indeed that the Commission finished their enquiry and recorded their deliberations well within a year. Many of the recommendations of the Commission would not be applicable to the High Courts in this country. For instance, with regard to the recommendations for the curtailment of the Long Vacation to two months one has to take into consideration the fact that there is no Whitsuntide Vacation in this country and the Christmas and Easter Vacations are also much shorter. The Annual Vacation in the Calcutta High Court extends ordinarily from the first week of September to the middle of November, *i.e.*, to about two months and 10 days. Regard must be had to the fact that in this Presidency all business is practically suspended on account of the Poojah festivities from October till the middle of November and the High Court is closed only a fortnight before the Civil Courts close. In the High Court, however, many of the minor holidays allowed to the Civil Courts are not observed. Besides the Annual Vacation, the only minor holidays observed by the High Court would not in all exceed three weeks including the Easter and Christmas Holidays and all the Hindu and Mahomedan holidays put together. While the Calcutta High Court works for full 9 months in the year, the High Court in England works only for 7½ months. As for Saturday sittings up to 1-30 P.M. as recommended by the Commission, we have to take into consideration the fact that the Judges on the King's Bench Division sit ordinarily from 11 A.M. to 4 P.M. whereas here Judges sit up to 4·30 P.M. The professional opinion in England is in favour of extending the sitting up to 4-30 P.M. rather than to have a Saturday sitting. A short sitting up to 1·30 P.M. will add to the cost of the parties.

Royal Commission Report on Judges' Pension.

The Royal Commission has made a very practical suggestion regarding the disposal of ordinary business when particularly heavy cases are likely to block the business in some Courts. The Commissioners recommend a more liberal grant of pension to the Judges. They are, as at present, to be entitled to an annual pension of £3,500 after fifteen years' service but they must retire at the age of 72 years unless a special committee recommend an extension of any particular Judge's service after he has attained the age of 72. They further recommend that it would be permissible to Judges to retire after 10 years' service on an annual pension of £2,500. In the case of ill-health or on the attainment of the age limit they may retire after service of 5 years or less on a pension of £1,500. But after 5 years for every year that they may serve on the Bench, they would be entitled to an addition of £200 to their pension. But Judges other than these who have retired on account of ill-health or old age are to be regarded as supernumerary Judges

and it would be obligatory on them to serve on the Bench when their services are requisitioned by the Lord Chancellor. But during the period of such active service they are to receive renumeration on a scale which together with their pension would entitle them to £5,000 per annum. Besides this, they are to receive £400 for a clerk. The difficulty of adopting the above recommendation to any extent in India would be that most of the Judges leave the country on retirement. But the accumulation of arrears in the Calcutta High Court has chiefly been due to some extraordinarily heavy cases blocking some Courts for some months at a time. If some arrangements similar to that recommended by the commission could be adopted in this country to meet such contingencies, that would be a relief to the Court and the litigants alike. It is also worthy of note how illiberally the Judges in this country are treated with regard to their pension. Surely the pension rules regarding the Judges of the High Court require revision.

Bar Council Report—Seats for the Bar and Students.

In the Annual Statement of the Bar Council for 1913, there are only two matters which are likely to prove of some interest to the members of the Bar here. A representation was made by junior members of the Bar to the Council for getting adequate accommodation for them in the Courts. The Council after careful consideration recorded the following resolution a copy of which was forwarded to the Lord Chief Justice:—

(1) That in the opinion of the Council it is undesirable that Lay Reporters should ever be given seating accommodation in immediate proximity to Counsel engaged in the case.

(2) That it is desirable that reasonable accommodation should in all Courts, and in all circumstances, be provided for Barristers not engaged in the case (whether robed or not), and also for Students, in accordance with what the Council believe to be ancient custom.

Whenever practicable the same arrangement should be made in our Courts as well. In the Appeal Court presided ever by His Lordship the Chief Justice, Mr. Norton had once suggested that the barrier should be put back so as to accommodate another row of chairs or preferably a row of benches for increased accommodation, as that would obviate the practice of scraping the chairs and disturbing the hearing at times when the Court happens to be crowded. His Lordship approved of the idea and we hope it will be given effect to at no very distant date. It may at the same time be considered whether the accommodation in the Sessions Court and the Court of Criminal Revision and Appeals may not be similarly improved.

Fee Rules.

The practice which has for some time past been recognised in England that a Junior counsel is entitled to two-thirds fee of his leader has now been recognised by our new taxing rules. The rule as formulated by and followed at the English Bar is as follows:—

"That by long-established and well-settled custom a Junior is entitled to a fee of from three-fifths to two-thirds of his Leader's fee, and that, although there is no rigid rule of professional etiquette which prevents him from accepting a brief marked with a fee bearing a less proportion to his Leader's fee, it is in accordance with the practice of the profession that he should refuse to do so in the absence of special circumstances affecting the particular case, and that he should be supported by his Leader in such action."

The Incorporated Law Society of England while recognising the above rule represented to the Bar Council that with regard to the above rule it should not be applicable to cases where leading counsel demanded "fancy" or "excessive" fees, and that it is not right that Junior counsel should receive the recognised proportion of $\frac{3}{5}$ or $\frac{2}{3}$ but only such fees as they would otherwise have been satisfied with, had a leader been briefed who did not demand such "fancy" or "excessive" fees. The Bar Council with a view to discourage such "fancy fees" has resolved that when such 'fancy fees' are paid by solicitors or clients to a leader the Junior will be entitled to charge $\frac{3}{5}$ or $\frac{2}{3}$ of the fees of his leader. This is what the Bar Council says with regard to the question referred to them.

As it is entirely at the option of the Solicitor and his client to employ a Leader who requires a so-called "fancy" or "excessive" fee, the cost of paying a proportionate fee to the Junior, so far as its increase over his ordinary fee is concerned, is and ought to be regarded as a necessary incident in the cost of briefing such exceptional Leader; and the Council think that the client should be informed of this fact (as no doubt he is) when the increased cost of employing such a Leader is being considered by him. It is obvious that if the present two-thirds rule were abrogated, there would in the result be a strong tendency to increase still further the fee of the Leader at the expense of the fee of the Junior—a change which would be of no benefit to the public.

But the Bar Council draws a distinction between "fancy fees" and Special fees. Counsel in England charge such fees when they have to go to Courts to which they are not "attached" or are briefed in Circuits other than the one where they ordinarily practice. But the fees charged in such cases are 'fixed and uniform' and in such cases the Junior is not entitled to $\frac{3}{5}$ or $\frac{2}{3}$ of such special fees but only to the proportionate share of the ordinary fees which would be charged by leaders in such cases. The Bar Council regard it to be contrary to professional etiquette to charge 'fancy' Special fees. The following extract from the Report of the Council will make the matter clear.

Questions relating to the payment of Special Fees have been before the Council on several occasions, and have from time to time received their careful consideration. All rules laid down by the Council with regard to these Special Fees have had as one of their main objects the prevention of

the infringement of the established practice with regard to the proportion of Counsel's fees; for it will be readily understood that if Solicitors and Leaders could vary the amount of the Special Fee as and when they pleased and in what cases they pleased, the established practice as to two-thirds or three-fifths would soon become a dead letter. It is for this reason that it has been laid down by various resolutions of the Council that it is against professional etiquette for a Barrister to fix either a fancy Special Fee on a particular brief, or a fancy Special Fee for going into a particular Court; but a Barrister may charge a uniform Special Fee for going into a particular class of Court, or a uniform Special Fee for going into Court at all.

CURRENT INDIAN CASES.

(CIVIL.)

Division of offerings, agreement relating to.

SONA DEI *v.* FAKIR CHAND, I. L. R. 35 All. (F. B.) 412.

A family of Maha-Brahmans in a certain village entered into an agreement by which individual members of the family were to take offerings given on certain dates.

Held—That any present made to an individual member of the family in his personal capacity would not fall within the scope of the contract.

Injunction, order refusing—Appeal.

LACHMI NARAIN *v.* RAM CHARAN, I. L. R. 35 All. 425.

An order refusing as well as one granting an injunction is an order passed under r. 1, cl. (4), Or. XLIII, and is appealable.

Order of Appellate Court restoring case—Appeal.

WAHIDUNNISSA *v* KUNDAN LAL, I. L. R. 35 All. 427.

An order by an Appellate Court that the first Court should re-hear the suit dismissed by it on the ground that none of the parties appeared before it is not appealable.

Provincial Insolvency Act (III of 1907), sec. 22—Limitation Act (IX of 1908), sec. 5.

THAKUR PROSAD *v.* PANNA LAL, I. L. R. 35 All. 410.

An application under sec. 22 of the Insolvency Act to the District Judge is not an appeal or application for review of judgment or for leave to appeal and sec. 5 of the Limitation Act does not apply to such applications.

Limitation Act (IX of 1908), Art. 138.

BHAGWANT SING *v.* BHOLI SING, I. L. R. 35 All. 432.

Art. 138 applies only to suits in which the auction purchaser is Plaintiff and the judgment-debtor or some person claiming through him is Defendant.

Suit by auction purchaser for refund of purchase money—Limitation.

SIDHESWARI PROSSAD *v.* GOSHAIN MAYANAND, I. L. R. 35 All. 419.

Under sec. 315 of the Civil Procedure Code of 1882 an auction purchaser was entitled to bring a suit to recover back his purchase money when it was found that the judgment-debtor had no saleable interest. To such a suit Art. 120 of the Limitation Act applied.

Limitation Act, sec. 19—Acknowledgment of debt.

MEGH RAJ *v.* MATHURA DAS, I. L. R. 35 All. 437.

The explanation to sec. 19 expressly states that an acknowledgment may be addressed to a person other than the person entitled to the property or right.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM MADRAS]

LORD SHAW OF DUNFERMLINE.
LORD MOULTON.
MR. AMEER ALI.
1913,
19, December.

NAYANI VENKA RANGA RAU
v.
RAJA KEESARA RAMAKRISHNIAH and others.

Leave to appeal in interlocutory matters.

This was a petition for special leave to appeal from an interlocutary proceeding of the Madras High Court.

Mr. L. DeGruyther, K. C. (with him *Mr. O'Gorman*) appeared for the Petitioners, and *Mr. Kenworthy Brown* for the Respondents.

Before hearing Counsel for the Petitioner

LORD SHAW OF DUNFERMLINE said.—This is an intorlocutory proceeding in the Court below. We quite see that there may be some prejudice unless you take this step to petition, but their Lordships would be very slow to give leave to appeal to bring up a case at an interlocutory stage. On the other hand, they are very anxious that neither party should be prejudiced by the fact that leave to appeal has been refused. They are of opinion that the case should be allowed to proceed according to the judgment of the Court below, and should be determined on its merits; that will leave a final judgment to come up at the proper time here. That is the view their Lordships take, subject to what Counsel might wish to say, their view being distinct that neither party is prejudiced by the fact that leave to appeal is refused at this stage. Furthermore, their Lordships think that the costs of these proceedings ought to be costs in the cause to be determined in the Court below.

Mr. DeGruyther.—May I make one observation upon what your Lordship has been good enough to tell me. The position really is this: the reason why the application for leave to appeal has been made is that if the appeal were successful, it would entirely dispose of a litigation which has been pending since the year 1903.

LORD MOULTON.—If they were unsuccessful.

Mr. DeGruyther.—We cannot suggest that the Order which has been made disposes of the case in any event.

LORD SHAW OF DUNFERMLINE.—We were really anxious to make it clear that while we take this

course this morning, it should be distinctly understood by both parties that neither party should be prejudiced.

Mr. DeGruyther.—I am obliged to your Lordship, because, having regard to the Code of Civil Procedure and the construction placed upon it in India, there is an express provision which says if we do not appeal from this Order, the result would be that we are bound by it.

Mr. Kenworthy Brown, for the Opposite Party.—I do not suggest that applies here.

LORD MOULTON.—That is why we suggested the costs should be costs in the cause, because your petition was necessary.

LORD SHAW OF DUNFERMLINE.—Anyhow, we really determine nothing on the merits, we want to keep both of you free on the merits, so that you can have your full points arguable, and we want to make it so complete as this, that the costs, even of these proceedings, should be costs in the cause in the Court below.

Mr. DeGruyther.—After what has fallen from your Lordships I do not think any argument I could advance would lead to your Lordships making a different order.

LORD MOULTON.—I think you are very well protected.

LORD SHAW OF DUNFERMLINE.—The petition is not dismissed.

Mr. DeGruyther.—I understand that, my Lord.

LORD MOULTON.—It really stands over till the hearing.

LORD SHAW OF DUNFERMLINE.—Until the proceedings get to the merits.

Mr. Kenworthy Brown.—I am quite satisfied with what your Lordships have said, except as regards the costs.

LORD MOULTON.—It was quite necessary that the Petitioner should come here.

Mr. Kenworthy Brown.—I do not think it was, under the section. However, I will not trouble your Lordships further.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE AND BEACHCROFT, JJ. APPEAL FROM ORDER No. 164 OF 1910. RAM CHANDER NEOGI, Petitioner, Appellant *v.* SHYAMA CHARAN BOSE, Objector and on his death his heirs and legal representatives PUNNALAL BOSE, CHUNI LAL BOSE and minor PROBODH CHUNDRA BOSE of his guardian *ad litem* BASANTA KUMARI DASI, Respondents. 22nd August 1913.

Insolvency, adjudication of—Proper order—Salary of property of the insolvent—Sec. 60, Civil Procedure Code—Provincial Insolvency Act, sec. 16 (2).

The Petitioner having been arrested in execution of a decree applied to be adjudicated an insolvent. The adjudication was made and he was directed, pending the realization by sale of his assets, to pay Rs. 25 a month into Court until the sum realized from him should equal one-third of the amount of a decree obtained against him by a creditor. Subsequently the Judge ordered that the amount deposited by the insolvent should remain in deposit in Court and that the insolvent should show cause why the adjudication should not be annulled on the ground that the proper order would have been an order for composition under sec. 27 of the Provincial Insolvency Act. At the same time he expressed doubt as to whether the Court had power to order payment of instalments from the insolvent's pay after an order for adjudication had been made. Later on the Judge ordered that as the insolvent had failed to abide by the condition that he should pay one-fourth of his salary to the receiver the order of adjudication must be annulled.

Held, that the Petitioner having applied to be declared an insolvent on being arrested in execution of a decree he was rightly adjudged an insolvent and that the subsequent order annulling the insolvency on his failure to pay one fourth of his salary into Court is bad and must therefore be set aside.

That it is open to the High Court not only to reverse the order of annulment of insolvency but also to consider what direction should be given when this order had been vacated at the instance of the insolvent.

Held, further, that the proper course for the Judge would have been to direct the receiver to arrange for payment to him of one half of the salary earned by the insolvent. The salary of the Petitioner insolvent being Rs 100 a month one-half of it vested in the receiver appointed by the Court. (Sec. 16 (2) (a), Provincial Insolvency Act, read with sec. 60 of the Provincial Small Cause Courts Act).

Held, further, that salary is "property of the insolvent" within the meaning of sec. 16 (2) (a) of the Provincial Insolvency Act.

(1897) 1 Q. B. 266; (1900) 1 Q. B. 130; (1896) 1 Q. B. 417, considered.

Babus Narendra Kumar Bose and *Surendra Kumar Bose* for the Appellant.

Dr. Dwarkanath Mitter and *Rishindranath Sarkar* for the Respondent.

Appeal allowed.

that from that date the Legal Remembrancer of Behar and Orissa became *ex officio* Public Prosecutor for that Province. This proposition, however, is of no assistance to the Crown; because the present appeal has not been preferred by the Legal Remembrancer of Behar and Orissa. As already stated, the appeal has been presented under the direction of the Legal Remembrancer of Bengal. The question consequently arises whether the Legal Remembrancer of Bengal has been constituted Public Prosecutor for Behar and Orissa, either generally or especially for the purpose of the case before us. As there is no suggestion that the Legal Remembrancer of Bengal has been appointed Public Prosecutor generally for Behar and Orissa, the question narrows down to this: Has the Legal Remembrancer of Bengal been constituted Public Prosecutor by the Government of Behar and Orissa for the case now before us? On behalf of the Crown it has been contended that he has been so appointed and in support of this position reference has been made to the letter addressed by the Secretary to the Government of Behar and Orissa in the Judicial Department to the Superintendent and Remembrancer of Legal Affairs of Bengal on the 23rd April 1913. The passage in the letter upon which reliance is placed is in these terms. "I am directed to request you to be so good as to file an appeal in the High Court on behalf of this Government under sec. 417, Cr. P. C., against the order of Moulvi Saiyed Abdul Hayat, Deputy Magistrate, improperly acquitting the accused in the marginally noted case on a charge of perjury." This passage in the letter no doubt authorises the Legal Remembrancer of Bengal to institute this appeal. But it does not appoint him Public Prosecutor within the meaning of sec. 492, Cr. P. C. On behalf of the Crown it has been urged that this sentence by implication appoints the Legal Remembrancer of Bengal as Public Prosecutor for the purposes of the case mentioned. In our opinion, the construction suggested cannot be reasonably put upon the passage. Sec. 417, Cr. P. C., lays down that the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The direction must be given to a Public Prosecutor. Be it conceded that the direction may be given in a letter whereby the Public Prosecuter is appointed as such, yet it does no follow that the mere fact that a person has been directed to present an appeal to the High Court from an order of acquittal involves his appointment as Public Prosecutor for the purposes of the case. Indeed, in view of the fact that the Province of Behar and Orissa has a Legal Remembrancer, it is extremely improbable that the Legal Remembrancer of Bengal could ever have been intended to be appointed Public Prosecutor in a case from that Province. In a case of this description, where the liberty of the subject is involved and an appeal is sought to be preferred against an order of acquittal, the statute must be strictly construed and full compliance with its provisions required. The learned Standing Counsel has urged us to put upon the passage in the letter what he calls a reasonable and common sense construction; but it is plain that the construction which he has pressed us to adopt was never present to the mind of the framer of the letter and that he has been constrained to have recourse to this argument because there is no escape from the

preliminary objection. We hold accordingly that the Appeal is incompetent and dismiss it on that ground.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD SHAW.
LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
Heard, 29 and 30, October.
Judgment, 27, November.

KALI BAKHSH SINGH and others, Appellants,
v.
RAM GOPAL SINGH and others, Respondents.

Purdahnashin *lady, deed of gift executed by—Independent advice, if absolutely necessary—Legal protection as distinguished from legal disability—Outside advice and outside control distinguished—Proof of intelligent and free execution—Burden of proof—Facts showing executant a capable woman of business, and disposition not unnatural, effect of—Explanation of deed to the grantor—Gift to son of mukhtar and paramour—Undue influence, when to be presumed—Evidence of betrayal or abuse of trust needed.*

The protection which the law throws around a purdahnashin *lady in respect of deeds executed by her demands that the burden of proof shall rest not with those who attack but those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to and was really understood by, the grantor. It must also be established that the deed was not signed under duress but arose from the free and independent will of the grantor.*

Inability to prove that the lady had independent advice is not of itself fatal to the validity of the deed. The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction. If upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, the deed ought to stand.

The legal protection which the law gives to a purdahnashin *lady cannot be transmuted into a legal disability.*

MAHOMED BUKHSH *v.* HOSSENI BIBI (3), SAJJAD HUSAIN *v.* WAZIR ALI KHAN (1) *referred to.*

Where it was found that a purdahnashin *lady, who had executed a deed of gift in respect of about one-half of her properties in favour of a son of her paramour who was also her mukhtar, was a woman of strong will and business capacity, and it was not alleged that her outward style or mode of life had been thereby changed or that any impoverishment had occurred and the deed as granted did not appear, in the circumstances of her life, to be in any way an unnatural disposition of a part of her property :*

Held—*That these circumstances, taken with the evidence in the case which showed* inter alia *that the deed was duly executed and attested, and did not disclose any abuse or betrayal by the mukhtar of the trust she reposed in him, went far to establish that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exert-*

(1) L. R. 39 I. A. 156 : s. c. 16 C. W. N. 889 (1912).
(3) L. R. 15 I. A. 81, 87 (1888).

KALI BAKHSH SINGH *v.* RAM GOPAL SINGH.

ed upon it; and that if independent outside advice (which is essentially different from independent outside control) had been obtained, the lady would have acted just as she did.

The evidence of undue influence in such a case would not require to have been very strong but there was no evidence at all of abuse or betrayal of trust, which would lead to the conclusion that undue influence had been exercised.

SMITH *v.* KAY (2) *relied on.*

When the undue influence alleged is not proved affirmatively but has to be inferred from circumstances, the inference must depend to a considerable extent upon the view which is taken as to the capacity of the grantor of the deed.

Where the Courts below differed in their finding as to whether the explanation of a document executed by a purdahnashin *lady was thorough or perfunctory:*

Held—*That upon this matter much depended upon whether the grantor was a person accustomed to busines or to the management of affairs.*

This was an Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh. The Respondent, Bhola Singh, a reversioner, sued to set aside a gift made by Balraj Kuar deceased. The facts of the case sufficiently appear from their Lordships' judgment and from the following extract from the judgment delivered by Mr. Chamier, Judicial Commissioner.

"The facts suggest that the deed of gift must have been procured by the influence of Defendant No.—1. Balraj Kuar was a young *purdanashin* woman in an advanced state of pregnancy cut off by her misconduct from the rest of her family. She was also ill but the evidence as to this is vague. Defendant No. 1 was not bound to her in any way, he might have deserted her at any time yet she made him a present of the best part of her property worth admittedly more than Rs. 25,000.

"It is needless to cite authorities to show that such a gift cannot stand unless it is proved that the lady had independent advice. Any intelligent and independent person would have told her at once that if she wished to benefit her paramour the proper thing to do was to make a will in his favour. There is no evidence whatever as to the origin of the deed of gift. The Registering Officer and the other witnesses who, it may be observed, are all friends or dependents of Defendant No. 1, say that the deed was read out to her and *explained* to her. One knows from experience of these cases what explanation of this kind means. A deed couched in language which is for the most part unintelligible to an uneducated woman is read over to her and she is asked whether she understands it. She replies 'yes' and the deed is registered. In the present case the deed contains Persian words which it is safe to say the lady did not understand. It is easy for witnesses to add that the executant said she is executing it of her own pleasure (*khushi se*) I doubt this part of the evidence but even if it is true it does not avail the Defendants. Defendant No. 1 was present at the time and what is wanted is evidence to rebut the presumption that the lady was acting under his influence. He did not come into the witness-box and there is no evidence whatever that the lady was a free agent and understood the effect of the deed on her interests. According to the witness Mahabir, the Registering Officer told the lady that after the execution of

(2) 7 H. L. Cas. 750 (1859).

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the deed she would have no right left in Asaipur and Baradih. If he did so, he was wrong for she had an one anna share left. The fact that the gift relates to a 9 annas 8 pies share in the two villages and not to the whole of her share is curious. It may be that she thought she was making a will as she did in 1892.

"In my opinion it has not been proved that Balraj Kuar had independent advice or understood the transaction and therefore the deed of gift cannot stand."

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dubé* for the Appellants submitted that the deed of gift in question was perfectly good. It was duly executed by Balraj Kuar who was a literate woman capable of managing her property. The Judicial Commissioners found that she used to sign her own accounts and looked after her own affairs. The deed was witnessed by the Patwari and the family priest, and was openly registered. The Plaintiff's case was that she was not of sound disposing mind and that it was not her act at all. The Plaintiff's evidence has been found to be untrustworthy. Both the Courts below have found that the deed was read and explained to her and that she knew what she was doing. She knew the effect thereof upon her interests. The gift was natural inasmuch as she had a daughter by Kali Bakhsh Singh, and she would have been left unprovided for without the gift. The Court below held that the gift could not stand because the lady had no independent advice. This view was erroneous. What the law required was that the Court should be satisfied beyond reasonable doubt that a *purdahnashin* lady fully understood the terms of the gift and the effect thereof upon her interests in short that it was her conscious act.

The law was settled. Referred to *Sajjad Husain* v. *Wazir Ali Khan* (1). No independent legal advice was essential. *Mahomed Bukhsh* v. *Hosseini Bibi* (3). She was familiar with deeds of gift having herself got the bulk of her property under deeds of gift. She needed no advice to tell her whether she ought to make the gift or not. That was for her to decide—Kali Bakhsh Singh was practically her husband and the fact that he was her mukhtar made no material difference. He held a dual relationship, and the gift ought to be referred to the affection she had for him and his children. *In re Coomber* (4). There was no proof of any undue influence or coercion.

Sir Erle Richards, K. C., and *Mr. G. E. A. Ross, K. C.*, submitted that the onus of proving that it was a free and voluntary gift lay upon the donee and he had failed to discharge it. Balraj Kuar was a young *purdahnashin* lady, cut off from her relations, and was under the influence of her mukhtar Kali Bakhsh Singh. The gift was in reality made to him, and his son's name was a mere matter of form. The circumstances under which the deed was executed were such that there was a presumption of undue influence and the Appellants were bound to shew that no undue influence was exercised upon the lady. That could have been done by Kali Bakhsh Singh alone, but he did not give evidence. That circumstance ought to be weighed heavily against the Appellants' case. The law is summed up in Sir John Trevelyan's Hindu Law, (2nd Edn.) at p. 490, where it is said that a *purdahnashin* lady was not bound

(1) L. R. 39 I. A. 156 : S. C. 16 C. W. N. 889 (1912).

(3) L. R. 15 I. A. 81, 87 (1888).

(4) [1911] 1 Ch. 723.

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by her alienation unless it was distinctly proved that she was aware of all the circumstances and of the nature and effect of the transaction, that no advantage was taken of her position and that she had independent advice. Reference was also made to Woodroffe and Ameer Ali's Evidence Act, pp 694, 697, *Sajjad Husain* v. *Wazir Ali Khan* (1), *Kanai Lal* v. *Kamini Debi* (5), *In re Coomber* (4) were distinguishable as there the gift was from a mother to her son at the express wish of her husband.

There was a presumption of undue influence against the donee, and he must shew that he took no advantage of her secluded position. That can best be done by proving that the lady had independent advice.

[LORD MOULTON.—It must be the act of a free will—that is not in captivity. Referred to *Smith* v. *Kay* (2). In the words of Lord Kingsdown the presumption of undue influence arises only where confidence is reposed and betrayed.]

Sir Erle Richards.—I submit that the principle of that case applies to the facts of this appeal. The onus lay on the donee, who was her trusted agent, to prove that the gift was voluntary. He was not called.

Mr. L. DeGruyther, K. C., replied. The law as summed up by Sir John Trevelyan is not warranted by any high authority. Referred to *Ikramuddin* v. *Naiiban* (6) which laid down that absence of independent advice did not raise a presumption of undue influence.

(1) L. R. 39 I. A. 156: s. c. 16 C. W. N. 889 (1912).
(2) 7 H. L. Cas. 750 (1859).
(4) [1911] 1 Ch. 273.
(5) 1 B. L. R. (O. C.) 31n (1867).
(6) L. R. 25 I. A. 187 (1898).

There was no betrayal of trust here. The property gifted was not more than a moiety and no fraud or coercion was ever suggested.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal from a Judgment and Decree of date the 21st May 1908, of the Court of the Judicial Commissioner of Oudh, which reversed a Judgment and Decree of the Subordinate Judge of Rae Bareli, dated the 15th February 1907.

The Plaintiffs ask that a Decree for actual and proprietary possession of certain shares in villages in Pargana Salon be passed in their favour against the Defendants, and for an account of mesne profits.

It is unnecessary to enter upon many details of the case. The portion of it which was laid before the Board consists in a demand for cancellation of a Deed of Gift, dated the 24th September 1903, executed by one Balraj Kuar in favour of Ganga Bakhsh Singh, son of the Appellant, Kali Bakhsh Singh.

This deed has been upheld by the Subordinate Judge, and has been declared invalid by the Court of the Judicial Commissioner.

It is important to observe what were the grounds for the cancellation of this deed. They are gathered together in the issues framed by the Subordinate Judge, and are as follows :—

(1.) "Did the lady execute the Deed of Gift?";

(2.) "Was it written and completed without her knowledge? Was she able to understand the transaction?"

(3.) "Was she of unsound mind at the time of the writing of the said Deed?"

The relation of the parties to the Deed was, briefly stated, this:—Balraj Kuar, who died two months after the execution

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of the Deed of Gift, was a *purdahnashin* lady. She was possessed of a number of villages, or rather of shares therein, and she had become absolute owner thereof as the result of gifts made by one Bishunath Singh. At least six Deeds of Gift are produced, and there can be little doubt that the lady thoroughly understood this form of transaction. Her husband had died many years before, namely, in 1881, and her property was managed by Kali Bakhsh Singh, who was her mukhtar, and with whom she formed an intimacy, the result of which was the birth of two illegitimate daughters. One of these was alive at the date of the Deed.

Ganga Bakhsh Singh was the legitimate son of Kali Bakhsh Singh, and the suggestion seems to be warranted which points not only to the affection which Balraj Kuar had for Kali Bakhsh, but to the attachment which she had formed to the boy. The interests represented by the Plaintiffs are derived from remote relationship to Brij Mohan Singh, the deceased husband, and to Bishunath Singh, the father-in-law, of the lady.

Upon the issues as framed and the contentions of parties as pled, the Subordinate Judge, who manifestly conducted the case with great care, had no doubt. As to the Plaintiffs' evidence he holds that it "is absolutely unreliable and seems to me a pure concoction." Reasons are given for this opinion, and the judgment upon this part of the case does not seem to be controverted in the Court of the Judicial Commissioner. In short, the attack upon the Deed by the evidence led by the Plaintiffs has failed.

As to the evidence tendered in support of it, the matter stands thus: *Ex facie*, it is duly signed and attested. It bears the signature of Balraj Kuar, of the Patwari, Lachman Pershad, and of three other witnesses, including the family priest. Above all, there is the certificate of Bunyad Hussain, the Sub-Registrar of Salon, as to what occurred when the Deed was produced by Balraj Kuar before him at her residence. It is duly registered. There seems no reason to doubt the value of his testimony, which is believed in its entirety by the Subordinate Judge. Apart from the circumstances to be now mentioned the Deed appears to be beyond suspicion, being attested by just those persons who would be naturally called in for such a purpose and being registered in the usual way by the proper officer.

Their Lordships incline to the opinion that the judgment of the Subordinate Judge would not have been reversed but for the controlling weight which was attached by the Court of the Judicial Commissioner to the fact that the lady in the transaction had not independent advice. The view, put briefly, adopted in that Court is this: The Deed was executed in favour of the son of a paramour, and therefore, to all intents and purposes, in favour of the paramour himself, he also being a person who was her mukhtar. Although there is no direct evidence that he ever influenced her to make a gift in favour of his son, still, in the circumstances, the Deed (so it is maintained) must fall, because the law makes an absolute demand that a person in such a situation should have independent advice. The absence of this element entitles a Court of law to set the Deed aside.

There are several circumstances which favour this conclusion. In the first place, the lady was a *purdahnashin* lady, and the law throws around her a special cloak of protection. It demands that the burden

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of proof shall in such a case rest, not with those who attack, but with those who found upon the Deed, and the proof must go so far as to show affirmatively and conclusively that the Deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the Deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset. It was expressly reaffirmed by this Board in the case of *Sajjad Husain* v. *Wazir Ali Khan* (1), and nothing that is now said can, or is intended to, disturb it.

In the next place, a fact which has given rise in their Lordships' minds to considerable difficulty, has been that Kali Bakhsh, the father of the donee and the mukhtar of the donor, was not examined as a witness.

This brief review is given by way of indication that the judgment now to be announced has been arrived at after a full balancing of the considerations both in fact and in law which affect the question to be determined.

The property conveyed by the Deed of Gift amounted, as the Board were informed, to about one-half of the lady's estate. It was not contended that her outward style or mode of life had thereby been changed, or that any impoverishment had occurred, the case being thus distinguished from those of donations of practically the entire property of the donor, of which the case of *Sajjad Husain* v. *Wazir Ali Khan* (1) above referred to was an instance.

(1) L. R. 39 I. A. 156; s. c. 16 C. W. N. 889 (1912).

Their Lordships are satisfied on the salient features of the case as follows :—

1. As to the execution of the Deed. The challenge of this has failed, and both the Courts below hold the execution to be properly and satisfactorily established.

2. As to the capacity of the grantor. Upon this subject the Courts below are also agreed in holding that competency is proved. In their Lordships' judgment, this is so, as after mentioned, in a special degree.

3. As to the Deed being read over and explained. Again both Courts are agreed. But while the Subordinate Judge thinks that the explanation was thorough, the Judicial Commissioners appear to incline to the view that it was perfunctory. Upon this matter much depends upon whether the grantor of the Deed was a person accustomed to business or to the management of affairs. It is upon this point that their Lordships find themselves in agreement with the Subordinate Judge. In doing so they found upon what is admitted, not only by him, but by the Court of the Judicial Commissioner. It appears that the lady had been in the habit for a considerable period of years of managing her affairs, of entering up her accounts, and of attending to business. Upon another part of the case it rather appears from the judgment of the Judicial Commissioner, Mr. Chamier, that the lady had much strength of will, and that her father-in-law, Bishunath Singh, "used to obey Balraj Kuar more than the latter obeyed him"; while with reference to the issue now under discussion, the same Judicial Commissioner says, "It is proved by evidence adduced by the Plaintiffs that Balraj Kuar signed her own accounts and looked after her own affairs." Their Lordships, in short, do not enter-

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tain much doubt that this *purdahnashin* lady was a capable woman, fully alive to the direction of her own interests, and well aware of what she was doing.

4. As to undue influence. Nothing of this kind is proved affirmatively, and the inference upon the subject must depend to a considerable extent upon the view which is taken as to the capacity of the grantor of the deed. The suggestion that Kali Bakhsh prompted a gift in favour of his son does not seem to rest upon anything more than that he was *mukhtar*, or held a power-of-attorney in regard to the management of her property. It is regrettable that the matter was left thus in the region of conjecture. There is no evidence of any kind that the *mukhtar* either mismanaged or overmanaged anything committed to his charge, or that in any particular regarding her affairs he withstood the lady or controlled her purposes. It is accordingly necessary to consider whether the facts of this case fall under the general and useful category of the principle which, in the language of Lord Kingsdown in *Smith* v. *Kay* (2), "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed." Their Lordships do not find themselves able to affirm that such abuse or betrayal occurred. It is no doubt true that the evidence in such a case would not require to have been very strong, but there is no evidence at all which would lead to the conclusion.

As stated, their Lordships incline to think that the Judgment of the Subordinate Judge would have been affirmed by the Judicial Commissioners but for the view thus expressed :—"It is needless to cite authorities to show that such a gift cannot stand unless it is proved that the lady had independent advice."

In their Lordships' opinion there is no rule of law of the absolute kind here indicated. The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction If she did, the issue is solved and the transaction is upheld ; but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the Deed ought to stand. The present, in their Lordships' judgment, appears to be a case of that kind.

Their Lordships, as already mentioned, have fully in view the fact that the lady was a *purdahnashin* lady, but the evidence as to her strength of will and business capacity, and the fact that the Deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the Deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short, their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *purdahnashin* lady, they

(2) 7 H. L. Cas. 750 (1859).

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cannot transmute such a legal protection into a legal disability. She might, especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction, but in substance and result she would have carried out the same purpose and will as are expressed by the Deed under challenge. They refer to the judgment of Lord Macnaghten in *Mahomed Bukhsh Khan* v. *Hosseini Bibi* (3).

In these circumstances their Lordships will humbly advise His Majesty that the Judgment and Decree appealed from should be reversed and that of the Subordinate Judge of date the 15th February 1907 should be restored. The Appellants will be entitled to the costs since the date of the last-mentioned Judgment and to the costs of this Appeal.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Appeal allowed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 594 OF 1913.

IMAM, J.
1913,
Heard, 1, October, 16 & 17, December.
Judgment, 22, December.

In the matter of a Receiver
P. RAY CHAUDHURI
v.
NOLINI PROKAS SEN and another.

Contempt of Court—Receiver appointed by the Court, interference with, while discharging his duty—Interference by one not a party to the suit, if contempt—Strangers to the suit, duty of, when affected by order appointing Receiver—Practice in contempt matter—Affidavit.

The right of a stranger in possession to continue in possession is not affected by the order appointing a. Receiver, but the fact of his possession does not give him the privilege to interfere with the Receiver directed to take possession of the property. His proper course is to apply to the Court for the redress of his grievance. If he interferes with the Receiver he does so at his peril. The Court will not permit a Receiver appointed by its authority to be interfered with or dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous. The Court requires and insists that application should be made to the Court for permission to take possession of any property of which the Receiver either has taken possession or is directed to take possession.

AMES *v.* THE TRUSTEES OF THE BIRKENHEAD DOCKS (1) *followed.*

In this suit, Arun Chandra Singha and others sued Kumud Behary Sen, who was alleged to be the Assistant Secretary to the Albert Institute and the surviving member of the governing body of the said Institute, for the framing of a scheme for the said Institute, for the appointment of trutees and for necessary inquiries and accounts. Mr. P. Ray Chaudhuri, an advocate of the Calcutta High Court, was appointed Receiver by the Court, by an order passed on the 18th July 1913, whereby amongst other things the said Receiver was directed to take possession of No. 15, College Square and realise the rents, issues and profits thereof. In pursuance of the said order the Receiver took possession of the said property on the 17th September 1913. When taking possession the Receiver was told by Nolini Prokas Sen and Asoke Prokas Sen, two brothers of the Defendant Kumud Behary Sen, that (1) the Defend-

(3) I. L. R. 15 I. A. 81 (1888).

(1) 20 Beav. Rep. 353 (1855).

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ant Kumud Behary Sen was entitled to an undivided one-sixth share in the said premises while they with their other brothers claimed the remaining five-sixth share and were in possession thereof. (2) That they had no objection to the Receiver taking possession of the share of the Defendant Kumud Behary Sen and realising his share of the rents. In the meantime the said two brothers having brought a suit, in the Calcutta Small Couse Court, for the five-sixth share of the rent against one of the tenants, the same was dismissed on the 20th September 1913. After this and on the 24th September, the Receiver sent a durwan, named Akbar Khan, to take care of the property on his behalf. Shortly after his arrival at the premises he came back to Mr. Ray Chaudhuri and stated that he had been obstructed and assaulted. Thereupon Mr. Ray Chaudhuri went over to the premises at about 1-30 P.M. and was assaulted by Nolini Prokas Sen, one of the brothers of the first Defendant, and was obstructed in discharge of his duty by his other brother Asoke Prokas The Receiver thereupon lodged a complaint at the Police station, and shortly thereafter, Mr. Rasul appeared on behalf of the Receiver and brought the matter to the notice of the Court, whereupon a petition was ordered to be filed reporting the facts which being done the Court of its own motion ordered the issue of warrants against Nolini Prokas Sen and Asoke Prokas Sen.

On the next day, *i.e.*, 26th September 1913, a Rule was obtained on behalf of the Plaintiffs, against the alleged contemnors Nolini Prokas Sen and Asoke Prokas Sen calling upon them to show why they should not be committed to prison for having assaulted the Receiver.

Both the matters came on for hearing before Imam, J. On October 1st, when Mr. Rasul appeared for Mr. Ray Chaudhuri, on Mr. Rasul going to read the affidavits Mr. J. N. Roy who appeared with Mr. P. N. Chatterjee on behalf of the two Sen brothers, objected to the reading of the affidavits which were filed on September 26th on the ground that it was a motion for contempt and the procedure must be strictly followed. His Lordship overruled Mr. Roy's objection and allowed the affidavits to be read.

Mr. Roy then read the joint-affidavit filed by Nolini and Asoke in which they denied the allegations made against them by Mr. P. Ray Chaudhuri and said that there could not be any writ of attachment against his clients unless there was evidence that the order appointing the Receiver had been served on them, and that in this case there was no affidavit that the order the breach of which was complained of had been served upon them. His Lordship adjourned the further hearing of the case till November 19th and in the meantime directed Mr. Ray Chaudhuri to file affidavit in reply for which he had had no time.

On the 16th December the matter came up again for hearing and was heard by Imam, J.

Mr. B. Chakravarti, *Mr. H. D. Bose* and *Mr. B. K. Lahiri* appeared on behalf of Arun Chandra Singha and others, the Plaintiffs in the original suit.

Mr. A. Rasul and *Mr. P. K. Sen* for the Receiver.

Mr. K. P. Basu for B. L. Gupta, one of the trustee Defendants of the Albert Institute.

Mr. J. N. Roy and *Mr. P. N. Chatterjee* for the Contemnors.

Mr. Chatterjee first read the affidavits and argued that there was no order on

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his clients as they were no parties to the suit. According to his clients' affidavits Mr. Ray Chaudhuri had given them ample provocation. Any retaliation so provoked by Mr. Ray Chaudhuri should not be the subject-matter of attachment. As Lord Mansfield in his judgment in the case, *Gregory* v. *Onslow* (2), said "that where there appear faults on both sides it would be improper to proceed on an attachment." There was no express direction on them. The order only says "that the said Receiver do take possession of the said property No. 15, College Square and collect rents, profits, etc," and according to Belchambers' Practice, 1884, p. 245, "an attactment will not lie on a rule of Court unless for disturbance of some express direc ion." Reference was made to an unreported case, *Kassinath Dass Khettry* v. *Subodra Dabi* (3). Per Norris, J.—"In this case the party committed for disobedience denied that he had taken the idol. On appeal the order of committal was rescinded, the Court being of opinion that where there was conflict of evidence leaving it doubtful who has committed the act complained of, no order should be made." Then the case of *Deo. d* v. *Earl of Cardigan* (4). "Attactment will not lie on a rule of Court unless for disobedience of some express direc'ion." Nolini and Asoke were "strangers" to the action and were in actual possession of the Institute and so the appointment of the Receiver has no effect on them. Halsbury's Laws of England, Vol. 24, p. 379. Cited *Evelyn* v. *Lewis* (5), *Johnes* v. *Claughton* (6) and *Angel* v. *South Metropolitan Brewing and Bottling Co.* (7). He then argued that the order appointing the Receiver, for the breach of which his clients were alleged to be guilty, was not personally served on them, they being no party to the suit. See Annual Practice (1913), p. 748 : "The order to be enforced must have been personally served" and therefore it was submitted that on these grounds the Rule ought to be discharged. In conclusion, he submitted that "the Court is always jealous of the personal freedom of the subjects of the Crown, and where the liberty of the subject is in question, always requires the utmost strictness in procedure. Application affecting the liberty of the subject are matters *strictissimus juris.*" Oswald on Contempt, p. 210.

Mr. J. N. Roy on the same side submitted that the practice of sending a person to jail for contempt of Court had become obsolete. The Court was generally satisfied with ordering payment of costs and expenses by a contemnor for his improper conduct. He was entitled to treat Mr. Ray Chaudhuri as a stranger—he was going to say a trespasser—in spite of the fact that he was appointed Receiver by the High Court. Having regard to the probabilities of the case there could not be any doubt—upon the admissions made by Mr. Ray Chaudhuri—that a certain amount of blame lay on Mr. Ray Chaudhuri from the manner in which he spoke, the language he used and things that he did. Therefore the contemnors were entitled to the benefit of doubt, and the Rule should be discharged.

Mr. Chakravarti on behalf of the Plaintiffs (1) referred to the various affidavits filed on both sides to show that the case made by Mr. Ray Chaudhuri and his men had been the same from the very

(2) Lofts' Report 35.
(3) Unreported, 19th April 1883.
(4) 7 Com. Bench 794 (1860).
(5) 3 Hare 472 (1845).
(6) Jac. 573 (1828).
(7) W. N. for 1891, p. 31.

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beginning while the case made by the contemnors was a tissue of falsehoods. As a glaring instance of the latter he referred to the allegation that even at the time of occurence Nolini Prokas alleged that he did not know the name of the Receiver, which is falsified by a letter addressed to the Receiver by name on the 26th September: (2) that the Receiver had been clearly in possession from the 17th September 1913: (3) the respectability of the contemnors, he submitted, could on no account be a palliative: it was an aggravation of their misconduct. (4) While Mr. Ray Chaudhuri made a distinct and definite case forthwith—affidavits on the other side were filed some time afterwards and were contrary to facts. Mr. Ray Chaudhuri and his witnesses were offered for cross-examination but the offer was declined. (5) The authority of the Court should be maintained not because Mr. Ray Chaudhuri was concerned—but because individuals, however high placed they might be, however respectable their parentage might be, were not entitled to set at naught the authority of the High Court. Counsel cited Kerr on Receiver, 6th Edition, p. 192: "When the Court has appointed a Receiver and the Receiver is in possession, his possession is the possession of the Court and may not be disturbed without its leave. If any one, whoever he be, disturb the possession of the Receiver, the Court holds that person guilty of contempt of Court and liable to be imprisoned for contempt. . . . . . A man who thinks he has a right paramount to that of the Receiver, must, before he presumes to take any step of his own motion, apply to the Court for leave to assert his right against the Receiver" In a contempt matter the question of title cannot arise: See Beach on Receiver (1887), pp. 246-247. "The Court will not in such a proceeding, do more than pass upon the bare question of contempt. It will not, directly or indirectly, assume to consider or to decide to whom the property belongs, or to decide that the Receiver has or has not, the right of possession in and to it. . . . A dissatisfied party must seek his remedy by appeal and not by setting at defiance the authority of the Court; and strangers to the suit, who, nevertheless, have an interest in the subject-matter, may have their relief by a direct proceeding looking to the removal of the Receiver and the setting aside of the orders in reference to the receivership." Further, that the Receiver has been appointed by this Court to take possession of No. 15, College Square. He must do so no matter whoever may be in possession whether Nolini Prokas or Asoke. If we take that the Receiver went there to take possession of the one-fifth of the property, still Mr. Ray Chaudhuri has a right to every part of the building. They have no legal right to interfere with the Receiver who went there to discharge his duty. Counsel cited *Ames* v. *The Trustees of the Birkenhead Docks* (1), *Russel* v. *East Anglian Ry. Co.* (8).

"Where a Receiver was appointed and the Defendant assigned to him his property consisting in part of a vessel which he had previously leased and upon which there was at the time of assignment, some rent past due to the shipowner, it was held that the act of the owner in issuing a distress warrant for the rent, and the act of a constable in taking possession of the vessel, under the distress warrant, while it was in the possession of the Receiver,

(1) 20 Beav. Rep. 358 (1855).
(8) 3 Mac. and Gordon 104 at p. 117 (185).

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were, each of them, contempt of Court, for which both were liable for punishment. *Noe* v. *Gibson* (9). Service of the order appointing a Receiver is not necessary." Beach on Receiver, p. 238. "So, also if one, with knowledge of the appointment of the Receiver, interfere by attachment or otherwise, with property to which the Receiver is entitled under the order of his appointment, but of which he had not taken possession, he may be punished for contempt. *Richard* v. *People* (10)."

Cited also High on Receiver, 4th Ed., Art. 166, p. 197, where it is stated :—" It is also not necessary that he should be officially apprised of the Receiver's appointment or even that the formal order should have been actually drawn, provided he has actual notice of the receivership or of the order of Court directing the appointment. Any actual knowledge of the granting of the order is sufficient to fix Defendant's responsibility for its violation, the same principle being applicable to such cases as in case of the violation of an injunction." (10) As regards punishment, cited *Price* v. *Hutchinson* (11) ; so far as the question of punishment was concerned it was a matter entirely for his Lordship to determine. Regard must be had to the fact that when the matter came before the Court there was a reckless charge against the Receiver.

[IMAM, J.—Does this remark apply to both the contemnors ?]

Mr. Chakravarti.—Not in the same degree.

Mr. Rasul for the Receiver.—Mr. Ray Chaudhuri's work was done as soon as he came and reported the matter to the Court. On account of this assault Mr. Ray Chaudhuri had lost his honour, and Counsel hoped that he might not lose his character. As far as the punishment was concerned it lay entirely in his Lordship's hands.

(9) 7 Paige 518.
(10) 18 Ill. 551.
(11) L. R. 9 Eq. 586 (1870).

The JUDGMENT OF THE COURT was as follows :—

IMAM, J.—This matter of contempt has come up on a motion and upon a writ issued by this Court against Nolini Prokas Sen and Asoke Prokas Sen for their attachment and committal to prison for obstructing and assaulting a Receiver in the discharge of his duty. On the 18th July last, Mr. P. Ray Chaudhuri, Barrister-at-Law, was appointed by this Court a Receiver of certain properties, the subject of Suit No. 594 of 1913. The two Respondents are not parties to the suit, but their brother Kumud Behary Sen is. The properties in suit comprise among others the premises No. 15, College Square, in the town of Calcutta commonly known as the Albert Hall. On the 16th September last the two Respondents and their three other brothers through their Attorney addressed a letter to Mr. Ray Chaudhuri, informing him that the premises No. 15, College Square, were in their possession and enjoyment jointly with their brother Kumud Behary Sen and that the order appointing him Receiver could not be binding on them or affect their right to the property in question, they not being parties to the suit. The letter further stated that while there would be no objection to the Receiver taking possession of a sixth share of the rents and profits of the premises representing the share of Kumud Behary Sen, they would not allow him to either receive the entire rents or take possession of the entire premises. The Receiver in his affidavit states that

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on the 17th September he went to the premises, walked over and took formal possession of the same. The Receiver thereafter for the safety and protection of the premises and the properties contained therein appointed a durwan of the name of Akbar Khan. On the 24th September in the morning the Rec iver sent the durwan and a clerk of his, Tarkeshwar Ganguli, to remain in charge of the premises. Tarkeshwar Ganguli in his affidavit states that on entering the premises with Akbar Khan he was showing the rooms to the latter when Asoke Prokas Sen objected to the durwan remaining there and on his leaving the durwan there, he came away to report to his master Asoke Prokas Sen's objection. Akbar Khan states in his affidavit that after the clerk left, Nolini Prokas Sen collected some *gundas* and forcibly put the durwan out of the house and closed the gate. Being informed of this Mr. Ray Chaudhuri accompanied by the clerk and the durwan went to the premises and found Asoke Prokas alone there. Mr. Ray Chaudhuri says that he enquired of Asoke Prokas Sen the reason of the treatment given to his men but received no satisfactory reply. Mr. Ray Chaudhuri further says that referring to Asoke Prokas's conduct towards the clerk and the durwan, he remarked that he, Asoke, was an "unworthy son of his illustrious father." Two other witnesses, Profulla Kumar Bannerjee and Ahindra Nath Chatterjee, both of No. 15, College Square, whom the Receiver had taken with him when entering the premises, state that on meeting Asoke Prokas Sen in one of the rooms the Receiver took exception to the conduct of Asoke Prokas Sen and his brother in driving away and assaulting the durwan in the morning which caused an exchange of angry words between them, and while conversation was going on between them, Asoke Prokas sent for his elder brother Nolini Prokas Sen. Mr. Ray Chaudhuri states that at about 1 P.M. as he was about to leave the premises and had come near the gate, Nolini Prokas came from the street outside and immediately caught hold of him and wanted to turn him out, and on his protesting against such conduct assaulted and beat him with blows and fists causing him bruises on his body, specially on his right wrist. After this Mr. Ray Chaudhuri left the premises, and laid an information at the Police Station and then appeared before this Court and verbally reported the incident.

As against the version of the R ceiver and his witnesses the Respondents give their own account supported by statements of their witnesses. Their story is the following: On the 17th September Mr. Ray Chaudhuri came to the Albert Hall but did not take possession of the entire premises. He took possession of only a sixth share owing to the objection of the two Respondents. On the 24th September at about 11 A.M., a durwan accompanied by a person unknown to the Respondents walked into the premises and after some conversation among themselves the durwan's companion went away. The durwan then without any reference to the Respondents, proceeded to close and padlock the doors of some of the rooms in which some classes of the Albert Collegiate School, of which the Respondents claim to be part proprietors and superintendents, were being held. The Respondents protested against the durwan's action. The durwan said that he had been sent there by Mr. Ray Chaudhuri, the Receiver, and on being asked to bring a letter of authority from the Receiver

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he left. The Respondents deny having forcibly turned out the durwan and having called in *budmashes.* At about 1 P.M. Mr. Ray Chaudhuri walked into the room where Asoke Prokas was seated and in a rude and peremptory voice said "Why did you turn out my durwan and assault him?" Whereupon he was told that the durwan had not been turned out but had been prevented from locking up the school rooms. This offended Mr. Ray Chaudhuri who used abusive language to Asoke calling him "scoundrel," "not the true son of your father" etc. On this Asoke Prokas said that Mr. Ray Chaudhuri was not talking like a gentleman and that he, Asoke, "would not answer." This remark excited Mr. Ray Chaudhuri who struck Asoke a blow which the latter did not return. Again Mr. Ray Chaudhuri aimed another blow at Asoke but he lurched and Mr. Ray Chaudhuri's fist violently hit against the chair on which Asoke had been seated whereby he hurt himself. Then Mr. Ray Chaudhuri demanded of Asoke to give him his name and to hand over to him the bunch of keys of the school rooms which the latter refused to do. Thereafter Mr. Ray Chaudhuri threatened to hit Asoke so hard with his stick as to lay him flat on the ground and ordered Asoke to leave the room. He further tried to snatch away the bunch of keys but failed to accomplish his purpose. Asoke then said that he would not leave the room, whatever might happen. After this Mr. Ray Chaudhury left the room and meeting the Respondents' durwan, Shib Lall Tewari, asked him how he dared to turn out his durwan, Akbar Khan, and gave him a slap on the face. Then he walked into the Tewari's chowka (cooking place) and broke the earthen pots with his stick. Having done this he went to the gate and stationed some men there to stop the passage. At this time Nolini Prokas Sen arrived and after some altercation between him and Mr. Ray Chaudhuri in the course of which the former attempted to force his passage, the latter struck him a blow. As Mr. Ray Chaudhuri was about to hit him another blow Nolini Prokas Sen caught hold of Mr. Ray Chaudhuri's hand and a scuffle ensued, resulting in both of them falling on a wall. Then Nolini Prokas Sen went to the Police Station at 1-30 P.M., and made a complaint for assault and abusive language against Mr. Ray Chaudhuri whose name Nolini Prokas says was not known to him at the time.

The two versions are entirely contradictory of each other and I have to find which of the two is true. Mr. J. N. Roy appearing for the Respondents has not impeached Mr. Ray Chaudhuri's veracity, but has urged that he must have been excited when he went to the premises and has suggested that his statements are inaccurate, on account of a natural failure to observe events in a moment of excitement. Mr. Ray Chaudhuri's statements appear to me to be too definite and clear to admit of such an explanation, and if I am to accept them there is no escape from the conclusion that he was obstructed in the discharge of his duty, by both the Respondents and was assaulted by Nolini Prokas Sen. The story set up by them is so incredible in itself, that I have no doubt, it embodies a tissue of falsehoods invented to save them from the present charge. In his statement to the Police, Nolini Prokas Sen did not make any higher case than that of being pushed and it has to be noticed, that he did not

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even mention Mr. Ray Chaudhuri's name; then, to explain the omission Nolini Prokas now states, that he did not know Mr. Ray Chaudhuri's name at the time of the information to the Police. This, however, is contradicted by the statement in paragraph 11 of the joint affidavit of Nolini Prokas Sen and Asoke Prokas Sen from which it is clear, that both the brothers came to know Mr. Ray Chaudhuri by name and sight at least on the 17th September when he had gone to take possession of the premises. I believe Mr. Ray Chaudhuri's version of the incident of the afternoon of the 24th September. I also believe the version of the morning incident as related by Tarkeshwar Ganguli and Akbar Khan.

Mr. Roy has contended that his clients being in possession of five-sixths share in the premises, were not affected by the order appointing a Receiver as it was not binding on them. In support of this contention he has cited a passage from 24 Halsbury's Laws of England, at page 379, which runs thus: "as against a stranger to the action, who is in actual possession, the appointment of a Receiver is of no effect," and has referred to several cases enunciating the proposition. I do not understand the proposition to amount to more than this that the right of a stranger in possession, to continue in possession, is not affected by the order appointing a Receiver, but the fact of his possession does not, to my mind, give him the privilege to interfere with the Receiver directed to take possession of the property. His proper course is to apply to the Court for the redress of his grievance. If he interferes with the Receiver he does so at his peril. It is a settled rule that the Court will not permit a Receiver, appointed by its authority, to be interfered with or dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous; the Court requires and insists that application should be made to the Court for permission to take possession of any property of which the Receiver either has taken possession or is directed to take possession [*Ames* v. *The Trustees of the Birkenhead Docks* (1)]. Mr. Roy has contended that the cases relied upon by Mr. Chakravarti on behalf of the Plaintiffs do not apply to this case, as they all relate to interference with the Receiver by persons who were not in possession of the property. The principle nevertheless that the Court will not allow anyone to interfere with a Receiver while the order lasts, is there.

I hold that Nolini Prokas Sen has been guilty of a contempt of this Court's authority by obstructing and assaulting the Receiver in the discharge of his duty. I further hold that Asoke Prokas Sen has been guilty of a contempt of this Court's authority by obstructing the Receiver in the discharge of his duty. In the case of Nolini Prokas Sen his conduct has been so contemptuous and so grossly disrespectful to this Court, that a mere order for payment of costs will not vindicate the majesty of law. I therefore order the committal of Nolini Prokas Sen to prison for three weeks. The conduct of Asoke Prokas Sen has not been as heinous. I order him to be detained in custody till the rising of the Court and to pay the costs of the Plaintiffs and the Receiver.

[Then Mr. P. N. Chatterjee said that he was instructed to offer a most unqualified apology to the Court and asked the Court to remit the sentence. The Court ordered

(1) 20 Beav. Rep. 332 at p. 358 (1855).

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the matter to be mentioned and an application made at half-past two.

This being done, the Court ordered the discharge of Nolini Prokas Sen and directed him to pay the costs of hearing of the matter to the Plaintiffs as well as to the Receiver, the Receiver's costs as between attorney and client and the Plaintiffs' costs as between party and party. In the meantime he was ordered to give security for Rs. 5,000 to the satisfaction of the Registrar.]

Mr. C. C. Mitra, Attorney for the Plaintiffs.

Messrs. Neogie & De, Attorneys for the Receiver.

Mr. H. N. Dutta, Attorney for the Contemnors.

Mr. O. C. Ganguli & Co., Attorneys for B. L. Gupta.

P. D.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 2 OF 1909.

JENKINS, C. J.
HARINGTON, J.
MOOKERJEE, J.
1913,
Heard, 3, 4 & 5, February.
Judgment, 18, March.

BHAGWAT BAKSH RAY, Plaintiff, Appellant,

v.

SHEO PROSAD SAHU and others, Defendants, Respondents.

Ghatwali *service tenure—Suit for resumption of land by proprietor—*Jaigir, *two kinds of—Not necessarily conditional and inalienable—Tenure created by document, evidence necessary to prove incidents of—Fact of descent of land from father to son for a long time, inference to be drawn from—Facts necessary to be proved even if grant originally made subject to performance of service—Limitation—Fact of service being incapable of being enforced, effect of, on service tenure.*

The Plaintiff brought a suit for the possession of two mouzahs within his zemindari against the Defendants who were in possession, having acquired them by a series of purchases from the persons who previously held them under the Plaintiff. The Plaintiff's case was that the mouzahs in question were a jaigir *conditional on the performance of* Ghatwali *services and as such were inalienable and the original holders having alienated them the Plaintiff was entitled to resume possession :*

Held, *on the evidence, that the Plaintiff had failed to prove that the land was held on a service tenure, whether* Ghatwali *or otherwise.*

That a jaigir *is not necessarily conditional; it may be unconditional and the mere fact that a tenure is described as a* jaigir *is by no means conclusive and its incidents must be determined from other circumstances.*

That where the tenure in question was created by a document, the terms on which the land is held, its alienability and its liability to forfeiture must depend on the terms of the particular grant and not on the terms of grants that may have been made to others.

PER MOOKERJEE, J.—*Assuming that the evidence of terms of grants to other persons was admissible, their probative force in this case was valueless.*

If it is proved by long uninterrupted usage that the lands have passed from father to son for two or three generations without objection, the inference would be that the grant was a grant of inheritance because the fact of descent from father to son is the strongest possible evidence of hereditary character.

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Assuming it to be established that performance of service was annexed to the grant the Plaintiff would have to prove whether the grant was a mere grant in lieu of wages or was a grant subject to a burden of service; and if the grant was made as a reward for past service the Plaintiff would have to prove that merely because performance of service was annexed to the grant, non-performance thereof entitles him to treat the tenure as forfeited. Further, assuming that performance of service could be claimed and had been improperly refused, the Plaintiff would have to establish that the tenure which was held partly at least on condition of payment of rent in cash was liable to forfeiture for mere refusal of performance of service, although the cash rent was being paid.

That the Ghatwali *service if ever rendered having terminated in 1886 and the suit having been brought in 1905 any possible claim of the Plaintiff to enforce performance of the service or to recover possession on the ground of forfeiture by reason of non-performance of service was barred by limitation.*

That on principle it may well be maintained that where service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated.

This was an Appeal under sec. 15 of the Letters Patent, filed on the 25th of May 1909 against a decree of the High Court, dated the 3rd May 1909, made in Appeal from Original Decree No. 345 of 1906.

The facts of the case will sufficiently appear from the judgment.

Dr. Rash Behary Ghose, *Babus Golap Chandra Sarkar*, *Chandra Sekhar Pershad Singh*, *Dr. Sarat Chandra Basak*, *Babus Shyama Kanta Sinha* and *Harihar Persad Singh* for the Appellant.

Mr. B. Chakravarti, *Babus Umakali Mukerjee* and *Raghunath Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The Plaintiff is the proprietor of Tappa Taraia, and included in that Tappa are two villages, Kanda and Tali. These villages were granted by the Plaintiff's ancestors to the ancestors of Dookhbhanjan and Balimanjhi, but as the result of several successive sales, some private and some by Court, and dating from 1877 to 1899, the Defendants Nos. 1, 2, and 3 claim to be entitled to 16 annas of Kanda and 15 annas of Tali. Defendant No. 4 claims to be entitled to the remaining 1 anna of Tali, as a purchaser. According to Defendants Nos. 1, 2 and 3 the price paid by them exceeds Rs. 17,000.

The Plaintiff alleges that the two villages were held by Dhookhbhanjan and Balimanjhi and by their ancestors before them on a service tenure on condition of paying Rs. 19 annually for rent, and that "the service consisted of Ghatwali service at Kanda Ghat, and afterwards when Government made separate arrangement for guarding the ghat by the appointment of police-officers, the same consisted of service as sepoy in Plaintiff's *deori*." It is the Plaintiff's case that the tenure as being a service tenure, was inalienable and was liable to resumption not only on failure of the grantees or their heirs to render service but also in the event of transfer.

The Plaintiff alleges that Balimanjhi died, and since 1898 Dookhbhanjan ceased to render service, and that on the 7th of September 1901 he became aware of the invalid sale to Defendants Nos. 1, 2 and 3

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and later of the invalid purchase of Defendant No. 4. "The cause of action," according to the Plaintiff, "arose in 1898 when service was discontinued—and also on the 7th September 1901, date of the Deputy Commissioner's order and also on the 10th September 1904, date of the order of the Commissioner of Chota Nagpur Division and also when the Plaintiff became aware of the invalid transfer to Defendant No. 4." To these orders of the 7th September 1901 and the 10th December 1904, I will refer later.

It is in these circumstances that the Plaintiff has brought this suit whereby he prays as follows :—

"(*a*). That it be declared that the *jaigir* Mouzahs Kanda and Tali are resumable by the Plaintiff on the omission of the *jaigirdars* to render service for which the mouzahs had been granted.

(*b*). That it be declared that the *jaigir* mouzahs are non-transferable by the *jaigirdars*.

(*c*). That it be declared by the Court that the Defendants have got no valid title to Mouzahs Kanda and Tali on account of the invalid transfer and that the Plaintiff has become entitled to resume the Mouzahs Kanda and Tali.

(*d*). That the Defendants be dispossessed from the entire villages Kanda and Tali and that the Plaintiff be given *khas* possession over the said mouzahs."

It has been stated before us by the Plaintiff that though the word *resume* is used, the purpose of this suit is not the imposition of rent or revenue but recovery of actual possession of the land.

All the Defendants have contested the Plaintiff's claim and their defence succeeded before the Subordinate Judge of Palamau by whom the suit was dismissed. An appeal was preferred to the High Court and heard by Doss and Richardson, JJ. They were divided in opinion. The present appeal is under cl. 15 of the Letters Patent from the judgment of Richardson, J., which was in favour of affirming the decree of the Subordinate Judge and so prevailed.

The principal question is whether the two villages of Kanda and Tali were held on a service tenure and were inalienable and whether they are liable to be forfeited by reason of the non-performance of service and the transfer of the tenure. It is clearly established that there was a grant of these two villages. Unfortunately the grant cannot be produced as it has been lost. This is due to no fault of the Defendants or their predecessors, for it is proved that the document was filed in a case before the Adalat Dewani at Lohardaga, and, with all other records, was destroyed in the Mutiny.

But though the original has been lost, one would have expected the Plaintiff to have in his possession a copy of this document as he has of others. He however declares that the copies of the sanads of Mouzahs Kanda and Tali are not in his sherista.

The grant is one of considerable antiquity, and there has been long continued enjoyment under it. But there has been no lack of endeavour on the part of the Plaintiff and his father to regain possession of these two villages free from any tenure created by the grant.

As far back as 1867 Lachmi Baksh Rai, the Plaintiff's father, instituted a suit in the Court of the Deputy Commissioner of Lohardaga against Rittaran Manjhi for himself and as guardian for others, including Dookhbhanjan, then a minor. The purpose of the suit was to obtain possession of Kanda and Tali, and the case made

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by the Plaintiff was that the village had been granted to the ancestor of the Defendants not on service tenure but as *ijara*, *i.e.*, ticca for life, and that the grantees had all died. The Defendants by their written statement in that suit alleged possession for more than 60 years, that the property in dispute was Khutkutti property reclaimed by Ghansham Manjhi, the common ancestor of the Defendants and of other shareholders "by clearing jungle and uprooting shrubs, and that a hereditary grant had been made." The Deputy Commissioner held that the Plaintiff had entirely failed to prove his case and he remarked that it was not necessary to allude further to the Defendants' title than to say that, regarded relatively, there was much more evidence before the Court to prove it than there was to prove the Plaintiff's claim.

The result was that the suit was dismissed.

An appeal was preferred to the Judicial Commissioner of Chota Nagpur, but it was dismissed, and a special appeal to the High Court met with a similar fate. Delivering the judgment of the High Court, Markby, J, said that "the Defendants and Plaintiff agreed that some 40 years ago the land passed into the possession of the Defendants' ancestors, but the Plaintiff alleged that that was a grant to three specified persons the last of whom died in the year 1858, *i.e.*, 9 years before the commencement of this suit. The Defendant alleged that it was a grant in the nature of *jaigir* given for certain services and it is admitted that they remained in possession up to the time that the suit was brought." Much has been made by Plaintiff of the words "given for certain services."

The next attempt to regain possession of the villages was in 1901 when the present Plaintiff applied under sec. 34 of Act I of 1879, B. C., to be put into possession on the ground that Dookbhanjan and Balimanjhi were dead, and that no heir had applied to be registered in their place. The application was opposed by Sheoprosad Sahu, Joygobind Sahu and Ramnarain Sahu who maintained that the tenure was not resumable but was granted as a Khutkutti several generations ago. They further alleged that they had acquired the property by purchase and that Dookhbhanjan was not dead. Their opposition prevailed and the application was rejected on the 7th of September 1901. This is treated by the Plaintiff as a cause of action.

An appeal was preferred first to the Commissioner and then to the Board of Revenue, but in each case with no success.

In 1904 the Defendants applied under sec. 36 of Act I of 1879 for an order requiring the Plaintiff to admit them as tenure-holders in the Registry of his sherista. The application was granted and an appeal from this order was dismissed on the 10th of December 1904. This too the Plaintiff describes as a cause of action.

It is worthy of note that in the earlier proceedings instituted by the present Plaintiff and his father neither of them alleges that the villages were held on a service tenure, and yet that would have been a natural allegation to make had there been any foundation for it.

In the judgment of the High Court there is the expression a "*jaigir* for certain services," and considerable reliance seems to have been placed on it by the Plaintiff. But it is obvious that the services to which Markby, J., referred were past and not future services. The actual words

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of the learned Judge are these, "the Defendants alleged that it was a grant in the nature of a *jaigir* given for certain services."

Now, the Defendants did not appear before the High Court so that the allegation must have been that made in the written statement. But the only services mentioned there is the reclamation by clearing jungle and uprooting shrubs, and that reclamation was a past, not a future service. The previous litigation then, so far from helping the Plaintiff's case is really against it, for while it goes to show that there had been a long possession of the property by the Manjhis, there is an absence of any suggestion by the Plaintiff or his father of a service tenure. In contrast with this we have the assertion by those opposing the Plaintiff and his father that the property was Khutkutti and this implies that the tenure was free from any obligation for service. What then is the evidence in this case by which the Plaintiff seeks to prove that the villages were held on service tenure?

First, the Plaintiffs make much of the fact that in a series of documents the villages are described as "my ancestral *jaigirdari* interest" or by some cognate phrase. This, according to the Plaintiff, supports his contention that the villages were held on *jaigir* tenure, and this he maintains, implies that it is a service tenure. But a *jaigir* is not necessarily conditional, it may be unconditional as where it is a grant for services already rendered, and this is apparent from *Dosibai v. Ishwardas* (1). Then witnesses have been called to prove that *jaigirs* in this district are liable to forfeiture on alienation, but the utmost that they go to show according to the learned Subordinate Judge is that the tenures in Palamau which are known as *jaigir* are as a *general rule* conditional on service, inalienable and liable to resumption on alienation or failure of service.

But this class of evidence is of little or no value, for the tenure now in question was created by a document. And where that is so, the terms on which the land is held, its alienability, and its liability to forfeiture must depend on the terms of the particular grant, and not on the terms of grants that may have been made to others.

I now pass to the evidence that has been adduced with a view to showing that service has actually been performed in respect of these two villages. The Plaintiff's version is that originally there was Ghatwali service at Kanda Ghat, but about the year 1886 the Government made arrangements for guarding the ghat by their own police-officers and that the service of the Ghatwals then terminated. The Plaintiff himself does not profess to have seen Ghatwali service on the ghat, and this I can well understand, for he did not take over the management of his Reyasat till 1893, and at that time the Ghatwali service could no longer have been in existence. All he is able to say as to this is that he heard from his uncle that all *jaigirs* were on the condition of service, that when Kanda Ghat was settled by Government the *jaigirdars* of Kanda and Tali served as durwans at his residence at Bisrampore. He deposes that when he began to manage his own affairs Dookhbhanjan was one of the durwans. The Plaintiff's witnesses go further than the Plaintiff: they profess to have seen Ghatwali service rendered by Dookhbhanjan and Balimanjhi at the ghats as well as durwan or sentry duty at Bisram-

(1) I. L. R. 9 Bom. 561 ( ).

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pore. The Subordinate Judge did not credit the evidence as to service at the ghat and Richardson, J., has accepted his view. Doss, J., also agreed with the Subordinate Judge that it was extremely improbable that after the signal success which the Manjhis achieved in the litigation with the Plaintiff's father in the year 1867 they would render any service of a personal nature, but influenced by certain considerations to which he alludes, and the evidence of the Defendants' witness No. 2, Kharag Manjhi, he came to the conclusion that the Ghatwali service must have been discharged by the Manjhis.

But in two important respects the learned Judge was in error: first, he was mistaken in supposing that it had never been suggested by the Manjhis that these mouzahs had been granted to their ancestors as a reward for some past services rendered by them. In their written statement in the litigation of 1867 they distinctly averred that the property in dispute was Khutkutti reclaimed by their ancestor.

Next the learned Judge was mistaken as to the evidence of Kharag Manjhi. We have examined the record and also the Subordinate Judge's notes and I have no doubt that a "never" has dropped out, and that the testimony of the witness was the exact opposite of what the learned Judge supposed.

The Subordinate Judge while unconvinced as to service at the ghats, felt it difficult to believe that a person in the position of the Plaintiff would come to Court and swear that Dookhbhanjan had actually worked as a sepoy at the Gurh at Bisrampur, if there were no foundation for the statement.

Doss, J., thought the story of the Manjhis having served as sentries at the Plaintiff's residence at Bisrampore as devoid of foundation, and Richardson, J., evidently was of the same opinion.

But while the Subordinate Judge was not prepared to disregard the Plaintiff's evidence as to the performance by Dookhbhanjan of sentry duty at Bisrampore Ghur, he clearly did not connect that service with the tenure of Kanda and Tali. This I can well understand, for if, as I think there was not any service after the litigation of 1867—and it is not suggested that there is evidence of any prior to that —it is in a high degree improbable that Dookhbhanjan would have undertaken the performance of sentry service in respect of the villages after the abolition of the Ghatwali in 1886. To begin with, it must be borne in mind that the Manjhis had begun to part with their interest in the villages as far back as 1877, and Dookhbhanjan was party to a *zurpeshgi* mortgage in 1875 and a sale-deed in 1882. Then again we have no explanation as to how the sentry or durwan service at the palace could have been imposed in place of the service at the ghats and the mere fact that Dookhbhanjan may have worked as a durwan at the palace in 1893 falls very far short of proving that this service was an incident of the tenure on which the two villages were held.

The conclusion, then, to which I come is that no Ghatwali service is proved, and that if Dookhbhanjan worked as a sentry or durwan at the palace—a point which I am not prepared to affirm—it was not as an incident of the tenure on which the villages were held, and that the villages in fact were not held on service tenure. In arriving at this conclusion I have not overlooked the Plaintiff's argument that unless the grant was for service to be rendered there was no motive for the grant.

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But future services are not the sole motive for grants of land, and the Defendants' story is at least as probable as the Plaintiff's. But if the villages were not held on a service tenure then it is conceded they are not inalienable, and thus the basis of the Plaintiff's claim fails.

If the tenure in its origin had been conditional on service, then it would have been necessary to consider whether on the determination of the service either by the Government, or by reason of long failure to perform the same, the lands would not have become alienable [*Radhabai* v. *Anantarav* (2)].

But in view of my finding it is unnecessary for me to pursue this enquiry. Nor need I consider how far the payments made by the Defendants and the receipts held by them place an obstacle in the way of the Plaintiff's right to recover possession. It is enough for me to say that, for the reasons I have already indicated, in my opinion the Plaintiff's suit must fail, and this Appeal should be dismissed with costs.

HARINGTON, J.—This case comes before us in consequence of a difference of opinion between Doss and Richardson, JJ.

The suit was for possession of two Mouzahs Kanda and Tali which fall within Tappa Tarria of which the Plaintiff is the proprietor :—

The Defendants, who are in possession of Kanda and 15 annas of Mouzah Tali, acquired these estates by a series of purchases from the Manjhis who previously held them under the Plaintiffs.

The Plaintiffs say the mouzahs in question were a *jaigir*, conditional on the performance of Ghatwali services and that as such they were inalienable, and that the Manjhis having alienated them, the Plaintiffs are entitled to resume possession.

The Defendants on the other hand allege that the tenure in suit is a permanent, hereditary and transferable tenure and they are the transferees.

The Subordinate Judge dismissed the Plaintiff's suit.

The case for the Plaintiff is that the Manjhis performed the service of guarding the passes as a condition of their tenure of the mouzahs in question, up to about 20 years ago when the Government took over that duty : that then the tenant of the mouzahs acted as a guard or sepoy for the Plaintiff as a condition of his tenure in lieu of the services which had been undertaken by the Government.

To show that the tenure of these mouzahs was conditional on the performance of services, evidence was called to prove that *jaigirs* in the District of Palamau are burthened with the performance of services and a large number of leases and deeds of sale were produced covering a period of from 1875 to 1899—in which the Defendants' predecessors had invariably described the mouzahs as forming their *jagirdari* interest. It was argued that it was well known in the district that the *jaigirs* were conditional service tenures and that by thus describing them the persons from whom the Defendants derived their title in effect admitted that the mouzahs were inalienable—and it was contended that the expression *jaigir* for services rendered, which was applied to the mouzahs in question in the judgment of the High Court in 1867, showed that they were held on condition of performing services. But the grant itself was not produc d. It was stated that the document under which the mouzahs were originally granted was destroyed with

(2) I. L. R. 9 Bom. 198 (1885).

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other papers filed in a suit by the Defendants at the time of the Mutiny and the Plaintiffs produced no record from their sherista to show the terms on which the grant was made. In the absence of direct evidence much reliance was placed on the use of the word *jaigir* both in the judgment of the High Court and in the documents. But this expression may quite as well refer to past at to future services, for a *jaigir* is not necessarily a grant conditional on the rendering of services by the grantee nor is it necessarily inalienable.

Wilson in describing a *jaigir* says "the assignment was either conditional or unconditional: in the former case some public service as the levy and maintenance of troops or other specified duty was engaged for, the latter was left at the entire disposal of the grantee."

I do not think that evidence that *jaigirs* in the district were conditional and inalienable would be sufficient to justify the inference that this particular *jaigir* was burthened with these conditions without either evidence to prove the terms of the grant or to establish by credible witnesses that the grantees or their successors had for a number of years performed the services and had not alienated the property. Here, though the Defendant gives a good reason for being unable to give direct evidence, as to the terms of the grant, the Plaintiff gives no explanation of the non-production of any copy or record of its conditions.

Then there is the record of other litigations which tells against the Plaintiff.

In 1867 his predecessors sued the predecessors-in-title of the Defendants for possession of the two mouzahs, which are the subject of the present suit and in the plaint in that suit it was alleged that the lands had been granted to the Defendants for life—on their paying Rs. 19 for rent and carrying out orders according to zemindari practice.

The Plaintiffs were unsuccessful, though they prosecuted their claim up to the High Court, the judgment, dismissing their suit, was affirmed.

It is very significant that in this case the Plaintiffs did not allege an inalienable Ghatwali tenure; the plaint refers to the Defendants "carrying out the orders according to the zemindari practice" and although this might be consistent with the case set up by the Plaintiff as to the state of things after the Government had taken over the duty of guarding the passes, it seems to me quite inconsistent with the Plaintiff's case as to the state of things when it was filed in 1867—*viz.*, that at that time the service of guarding the passes was a condition of the tenure.

And the result of this litigation throws the very gravest doubt on the truth of the oral evidence, that services were actually performed since 1867—for, as the Judge points out, it is very unlikely that having been successful in this litigation, the tenants would burthen themselves with services which they were then held to be not compellable to render.

There is another point which weakens the argument of the Appellant that *jaigir*, in the District of Palamau, were necessarily inalienable and that in the various deeds of sale, which have been produced, the property is described as *jaigir*. I do not believe that persons would have been found to buy if on the face of the sale-deed they were buying what the vendor had no power to sell and were getting nothing by their purchase. It is of

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course possible that a speculator might buy under these conditions but he would give far less than the ordinary market price. I can find no suggestion that the prices given for the *jaigirdari* land were less than the usual prices of ordinary land in the district.

There were other legal proceedings which also tell against the Plaintiff—particularly, proceedings taken by the present Plaintiff under sec. 34, Act I of 1879 (B. C.) to obtain possession of Kanda and Tali on the ground that they had escheated to him through failure of the heirs of the grantee. The objectors while denying that the mouzahs were resumable, set up a title by purchase—and the objectors were successful in defeating the Plaintiff's claim.

In view of the position asserted by the Plaintiff in previous litigations the absence of direct evidence of the terms of the grant—of evidence, which can be believed, that any services had been performed within the 40 years, I do not think it can be said that the Plaintiff has proved his case. In my opinion therefore the suit should be dismissed.

MOOKERJEE, J.—I agree that the claim of the Plaintiff is entirely unfounded.

The Plaintiff seeks to recover possession of two villages Kanda and Tali on the ground that the tenure under which they were held by the predecessors of the Defendants has been forfeited. His allegation is that the tenure was granted to the ancestors of Dookhbhanjan and Balimanjhi on condition that the grantees and their heirs in succession would pay a sum of Rs. 19 as annual rent and also render service to the grantor and his representatives. It is alleged that the service was originally that of a Ghatwal at Kandaghat, and that subsequently when the system of Ghatwals was abolished by Government and police-officers were appointed to guard the mountain passes, the service rendered was that of sentry in the mansion of the Plaintiff. The Plaintiff further asserts that as a service tenure it was liable to be forfeited upon failure to render service as also upon alienation of the lands comprised in the grant. The Plaintiff seeks to eject the Defendants on the ground that performance of service has been discontinued from 1898 and that the lands have also been improperly transferred.

To determine the rights of the parties it is essential to bear in mind that their common case is that the grant was made under a written instrument executed in the beginning of the 19th century. The original deed, however, is not forthcoming; it had been filed in Court in a suit in 1857 and was destroyed along with other records at the time of the Mutiny. The Plaintiff alleges that he cannot trace in his office a copy of the grant. Consequently, we must proceed on the assumption that so far as the precise terms of the original grant are concerned, neither primary nor secondary evidence is available. The Plaintiff has consequently been driven to make an attempt to establish the terms of the grant which he asserts was a *jaigirdari* grant by indirect evidence. A considerable body of evidence has been adduced to prove the terms of *jaigirdari* grants which are said to be common in that part of the country. The earliest of these grants dates back to the 18th November 1800 and is nearly contemporaneous with the last grant. It is fairly clear, however, that evidence of this class, even if it be assumed to be admissible, is necessarily of little value. It was ruled in

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Hollingham v. *Head* (3), that where the question is whether A made a contract with B subject to a certain qualification, evidence of the fact that he made contracts with other persons subject to the same qualification, is inadmissible. Mr. Justice Willes observed as follows:— "Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger." To the same effect are the decisions in *Carter* v. *Pryke* (4), *Spencely* v. *Wilmot* (5), *Smith* v. *Wilkins* (6), *Borden* v. *Keverberge* (7). The case of *Woodward* v. *Buchanan* (8) is clearly distinguishable and is not opposed to this view. But it has been said that the terms on which A let land to tenants other than B may be admissible to show the terms on which he let land to B, if all the lands are subject to the same custom. *Doe* v. *Sisson* (9). Even if it be assumed, therefore, that evidence of this description is not inadmissible, but that, as has been maintained on high authority (Wigmore on Evidence, sec. 377), the question in each instance is merely of the probative value of the particular facts offered in evidence, it is plain that the evidence adduced in the present case is entirely valueless. The element of a different personality is so important in affecting the making of the terms of a contract that the likelihood of making a similar contract with different persons is very much smaller, when a contract is sought to be evidenced by other contracts with different persons, than even in the case where a contract is sought to be evidenced by other contracts with the same person. I hold, therefore, that evidence of this description is of no assistance to the Plaintiff.

(3) 4 C. B. N. S. 388; 114 R. R. 7·0 (1858).
(4) (1792) Peake 95.
(5) (1806) 7 East. 108.
(6) (1833) 6 C. and P. 180.
(7) (1836) 2 M. and W. 61.
(8) (1870) L. R. 5 Q. B. 285.
(9) 12 East 62 (1810).

The Plaintiff then relies upon the fact that in numerous deeds of sale under which the properties in suit have been transferred in part from time to time, the transferors have, with singular uniformity, described the interest they had as their ancestral *jaigirdari* and he contends that the term *jaigir* implies an inalienable service tenure. This contention is clearly unfounded, though it is sought to be supported by a reference to Hunter's Statistical Account of Bengal, Vol. 16, pp. 392, 396. It is well known that the term *jaigir* does not necessarily imply a conditional grant, and it was pointed out by Harrington in his Analysis of the Bengal Regulations, Vol. III, page 405, on the high authority of the Minute by Sir John Shore, dated the 2nd April 1788, that *jaigirs* were of two kinds, conditional and unconditional. This is accepted as an accurate statement by Field in his Introduction to the Bengal Regulations, page 53. This view is also supported by the decision of their Lordships of the Judicial Committee in *Dosibai* v. *Ishwardas* (10), which confirmed the judgment of the Bombay High Court in *Dosibai* v. *Ishwardas* (1). (See also the elaborate note by Wilson in his Glossary, page 224). Consequently, we must take it that the mere fact that the tenure is described as a *jaigir*, is by no means

(1) I. L. R. 9 Bom. 561 (1885).
(10) I. L. R. 18 I. A. 22: s. c. I. L. R. 15 Bom. 222 (1890).

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conclusive, and that its incidents must be determined from other circumstances. One characteristic, however, is beyond the pale of controversy, namely, that the grant was heritable. As was pointed out by Sir Barnes Peacock in the case of *Kooldip Narain Singh* v. *Mahadeo Singh* (11), which was heard by a Full Bench of this Court and ultimately taken before the Judicial Committee of the Privy Council, *Kooldip* v. *Government* (12), if it is proved by long uninterrupted usage that the lands have passed from ancestor to heir, that is, from father to son, for two or three generations without objection, the inference would be that the grant was a grant of inheritance, because the fact of descent from father to son is the strongest possible evidence of its hereditary character. In the present case, the lands have descended from ancestor to heir from generation to generation. We have in addition the significant fact that on the 26th September 1867, the Plaintiff sued in ejectment on the allegation that the grant was for life; this was repudiated by the Defendant in that suit in his written statement, dated the 23rd December 1867, in which he asserted that the lands had been reclaimed by the grantee and that the tenure was a *jaigir ba farzandan*. The primary Court dismissed the suit on the 23rd August 1868, this decree was affirmed on appeal on the 18th March 1869 and ultimately by this Court on the 6th September 1869. The Plaintiff is consequently constrained to accept the position that the grantees hold under a hereditary tenure.

As already stated, the evidence of grants to other persons and the description of the property as *jaigir* are of no assistance to the Plaintiff. He has consequently endeavoured to prove that the grantees have always rendered service to him. The evidence must be examined in relation to three successive periods of time, namely, first, from the date of the origin of the grant to 1867, when the suit for ejectment of the representative of the grantee was commenced; secondly, from 1867 to 1886 when the Ghatwali service was discontinued, and, thirdly, from 1886 to 1898 when, according to the Plaintiff, service was discontinued completely. As regards the first of these periods, there is no evidence that service was rendered at any time prior to 1867. As regards the second period, the Subordinate Judge was not favourably impressed with the evidence of performance of Ghatwali service, and the criticisms advanced on behalf of the Appellants in this Court are not sufficient to show that the Subordinate Judge took an erroneous view of the matter. As regards the third period, the Subordinate Judge was inclined to believe that one of the representatives of the grantees did render service as sentry or gate-keeper in the mansion of the Plaintiff. This evidence, however, has not been accepted by Mr. Justice Doss and Mr. Justice Richardson as trustworthy. On the whole, therefore, the evidence of performance of service at any period is unsatisfactory and the difficulty in the way of the Plaintiff is enhanced by the fact that he must establish not only that service was rendered but also that it was rendered by the predecessor of the Defendants as holders of the *jaigirdari* tenure in question. This part of the case, however, is not free from doubt and the fact of payment of certain assessment to the Government may possibly tend to show that Ghatwali

(11) 6 W. R. 199; B. L. R. Sup. Vol. 559 (1866).

(12) 14 M. I. A. 247 (1871).

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services were at one time annexed to the tenure; but it is clear that even if we hold that services were annexed to the tenure, the case for the Plaintiff is full of difficulties.

In the first place, assuming it to be established that performance of service was annexed to the grant, the Plaintiff has not proved whether the grant was a mere grant in lieu of wages or was a grant subject to a burden of service. This distinction, as pointed out by the Judicial Committee in *Vencata* v. *Sobhanadri* (13), where the view previously taken in *Lilanand* v. *Munoranjan* (14) and *Forbes* v. *Meer Mahomed* (15) was re-affirmed, is of a fundamental character, and if, as there is good reason to hold, the grant was made as a reward for past service, namely, reclamation of the land, the Plaintiff would have to prove that merely because performance of service was annexed to the grant, non-performance thereof entitles him to treat the tenure as forfeited. This he has not done. In the second place, assuming that the original service was Ghatwali, the Plaintiff would have to establish that when such service became unnecessary by reason of the action of the State, he was entitled in lieu thereof to claim the performance of another kind of service, namely, sentry duty at his mansion. This he has not established. In the third place, assuming that performance of service could be claimed and has been improperly refused, the Plaintiff has to establish that where a tenure is held on condition of payment of rent in cash, and the performance of some service, he is entitled to treat the tenure as forfeited because performance of service has been refused though the cash rent has been tendered. This the Plaintiff has not proved. In the fourth place, there is no pretence that the Plaintiff himself has paid the sum annually payable to the State which the grantee had to pay on his behalf: if such payment has been made from year to year by the grantee, the Plaintiff has to prove that notwithstanding such payment, the tenure has been forfeited. This position he has not even attempted to establish. In the fifth place, it is clear that assuming that Ghatwali service was rendered at any time, such service terminated in 1886, and there is no reliable evidence of the performance of service at any subsequent period by the representative of the grantee in his character as holder of the tenure. The surrounding circumstances make it very improbable that such service should have been performed. The holders of the tenure began to transfer the lands as early as the 29th of November 1875, and there were numerous successive transactions from that date to the 16th March 1899. It is extremely improbable, to say the least, that while the tenure-holders were repeatedly acting on the assumption that they held a transferable tenure, they continued to perform service on the theory that they held an inalienable service tenure. We must take it, therefore, that service, if ever rendered, terminated in 1886. If then, the tenure was forfeited on this ground, the forfeiture took place in 1886, while the present suit was not commenced till the 8th December 1905. At the date of institution of the suit, consequently, any possible claim of the Plaintiff to enforce performance of the service or to recover possession on the ground of forfeiture by reason of non-perform-

(13) L. R. 33 I. A. 46: s. c. I. L. R. 29 Mad. 52 (1905).

(14) L. R. I. A. Sup. Vol. 181; 13 B. L. R. 124 (1873).

(15) 13 M. I. A. 438 (1870).

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ance of service was barred by limitation. The question necessarily arises whether the Plaintiff is, notwithstanding this fact, entitled to eject the Defendants on the ground of forfeiture by transfer of an inalienable tenure. The decision of the Full Bench of the Bombay High Court in *Radhabai* v. *Anantarav* (2) militates against the acceptance of the contention of the Plaintiff. On principle, it may well be maintained that when service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated : when an estate is freed from the burden of service, the reason for the preservation of the estate as inalienable disappears : alienation can be prohibited only with a view to prevent the permanent severance of the estate from the services annexed to it. [See also *Vasanji* v. *Lallu* (16) and *Bai Devkore* v. *Amirtram* (17), which are not opposed to this view]. The decision of the Judicial Committee in *Pudapa* v. *Swami Rao* (18), which reversed the decision in *Swami Rao* v. *Padapa* (19), is clearly distinguishable. The question there in controversy related to the status of a person who had acquired good title to a Vatan by adverse possession, and it was ruled that he would *primâ facie* be in the same position as the person lawfully entitled to the Vatan, though it was pointed out that if the adverse possessor were an independent trespasser and did not claim to be a Vatandar, other considerations might arise. In fact, the question before the Judicial Committee was similar to that raised before the Court of Appeal in England in *Tichborne* v. *Weir* (20) and in *O'Connor* v. *Foley* (21), where the question arose as to the liability of a trespasser who had acquired title as against the lessee by adverse possession, for the statutory period, it was ruled that the adverse possessor was not bound by all the terms of the lease. The position, however, is fundamentally different where, as between the grantor and the grantee, the grantee acquires by lapse of time a right to refuse service to the grantor. In a case of this description the view may well be maintained that as the tenure had lost its character of service tenure, the fetter of inalienability had been removed. From every possible point of view, therefore, the claim of the Plaintiff turns out to be unsustainable and must be held to have been rightly dismissed.

Appeal dismissed.

(2) I. L. R. 9 Bom. 198 (1885).
(16) I. L. R. 9 Bom. 285 (1885).
(17) I. L. R. 10 Bom. 372 (1885).
(18) L. R. 27 I. A. 86 : s. c. I. L. R. 24 Bom. 556 ; 4 C. W. N. 517 (1900).
(19) I. L. R. 18 Bom. 22 (1892).
(20) 67 L. T. 735 (1892).
(21) (1905) 1 I. R. 1.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 949 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
1, September.

KALI CHARAN MOOKERJEE, Petitioner,
v.
KING-EMPEROR, Opposite Party.

Bengal Excise Act (VII of 1878), secs. 2, cl. (12), 46, 52, 61—Criminal Procedure Code (Act V of 1898), secs. 236, 237, 439—Bill of lading, possession of, if possession of articles covered by it—Constructive possession—Illicit importation of cocaine—Conviction of offence shown to have been committed though not charged—Evidence, consideration of, in revision.

Where the Petitioner was convicted under secs. 46, 52 of the Bengal Excise Act and the facts found were that the Petitioner was in possession of an Invoice and Bill of Lading which purported to cover old wear-

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ing apparel exported by a firm of London to one R, that this Bill of Lading with an endorsement by the exporters and another purporting to be by R were made over by the Petitioner to a firm of shipping agents in order that the goods might be cleared and passed through the Customs House, that these goods were found to contain a large quantity of cocaine, and that the Petitioner who professed to be acting on behalf of R could not produce R or give information about him ;

Held—*That the Petitioner could not be held to be in possession of cocaine within the meaning of secs. 46, 52 of the Excise Act.*

The doctrine of constructive possession must be very cautiously applied specially in the department of criminal jurisprudence.

Every person who might have possession of a Bill of Lading cannot be held to have been in possession of the exciseable article illicitly exported under cover of that Bill of Lading.

KASHI NATH BANIA *v.* EMPEROR (1) and ASHRUF ALI *v.* EMPEROR (2) *distinguished.*

The High Court in revision entered into the evidence, set aside the conviction and sentence under secs. 46, 52, and convicted the Petitioner under sec. 61 read with sec. 46, cl. (a) and sec. 2, cl. (12) of the Excise Act of attempting to import cocaine in contravention of the Bengal Excise Act, it being clear upon the evidence that he was aware of the character of the contents of the consignment.

This was a Rule granted on the 20th of June 1913 against an order of D. Swinhoe, Esq., Chief Presidency Magistrate of Calcutta, dated the 18th of June 1913, convicting the Petitioner under secs. 46 and 52 of the Excise Act and sentencing him to suffer rigorous imprisonment for three months under sec. 46 of the Act.

(1) I. L. R. 32 Cal. 557 (1905).
(2) I. L. R. 36 Cal. 1016 (1909).

The facts will sufficiently appear from the judgment.

Mr. Jackson, Babus Monmatha Nath Mukherjee and *Jogesh Chandra Bose* for the Petitioner.

Mr. Pugh and *Babu Jotindra Mohan Ghose* for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

The Petitioner, Kali Charan Mukherjee, was charged before the Chief Presidency Magistrate of Calcutta with the commission of offences under secs. 46 and 52 of the Bengal Excise Act, 1909. He was convicted under both these sections, and sentenced to rigorous imprisonment for three months under sec. 46.

The facts which have been indisputably established by the evidence may be briefly stated. On the 4th January 1913, the Petitioner made over a Bill of Lading and Invoice to a firm of shipping agents in this city known as Cox & Co. The Invoice, on the face of it, referred to goods described as six bales of old wearing apparel shipped by C. Porter & Co. of London to Mr. Rasu Prasad at Darjeeling in India ; the goods were described as nine hundred jackets worth £33·5s. The Bill of Lading, on the face of it, described the goods as six packages of old wearing apparel marked R. P. at Darjeeling *viâ* Calcutta. On the back of the Bill of Lading were endorsements which purported to be by C. Porter & Co. and Rasu Prasad. The Petitioner, when he made over the Invoice and Bill of Lading to Cox & Co., paid to the firm Rs. 30 on account of clearing charges. On the 23rd January, while the goods were under clearance from S. S

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Borneo, a Customs preventive officer, who was on board, noticed five packets of cocaine, each of which contained two phials, near or among the bales of old cloths. This aroused his suspicion, and he thereupon seized all the six bales, which, upon examination, were found to contain 731 packets of cocaine, weighing 491 ounces and worth, it is said, at least rupees ten thousand. On that very day, the Petitioner with a view to take delivery presented himself at the office of Cox & Co., who had meanwhile been apprised of what had happened; he attempted to make off and was thereupon taken by one of the assistants of the firm to the Customs House. There he protested that he was not aware of the contents of the bales and had arranged to have them cleared at the request and on behalf of Rasu Prasad. He promised to point out to the Customs Superintendent the man Rasu Prasad for whom he said he was acting. The Petitioner then took one of the Customs officers in a carriage from place to place for about two hours in the streets of Calcutta, but was not able to point out either Rasu Prasad or his place of residence. He was then made over to the Police and prosecuted with the result already stated. The Chief Presidency Magistrate has held that the story of Rasu Prasad is an invention; in support of this view, he has relied upon the circumstance that though the accused was given every opportunity by the Customs Officers and by the Court to produce Rasu Prasad, he had not done so, and that, on the other hand, he had not been able to furnish any clue to the whereabouts of Rasu Prasad or even to give any satisfactory evidence of the existence of such an individual either at Calcutta or at Darjeeling. Much reliance, however, has been placed in this Court on a telegram to the following effect discovered at a search of premises No. 97, Mechua Bazar Street, which is alleged to have been occupied by Rasu Prasad:

"Rasu Prasad, Jubilee Sanitarium, Darjeeling. Borneo shipment, Error. Reship. Porter."

This telegram appears to have been despatched from London on the 6th February 1913, and was received at Darjeeling on the day following. It has been argued, with some plausibility, on the strength of this telegram, that the goods had been shipped by mistake, and that as soon as the mistake was discovered by the exporters, they cabled to the importer to reship the goods. In our opinion, reliance cannot be placed on the genuineness of this telegram, and it is unquestionably within the bounds of possibility that, if the cocaine was sought to be imported into this country in contravention of law, as soon as the discovery had been made on the 23rd January, the importer, whoever he might be, might cable to the exporters in London, using pre-arranged code words, to send a message of this description; it is by no means difficult to adopt such a method deliberately with a view to create evidence. The whole of the evidence has been placed before us, and we have allowed the learned Counsel for the Petitioner to do so in a Revision case, because the matter, in our opinion, requires very careful scrutiny.

The facts unquestionably established may be thus summarised. The Petitioner was in possession of an Invoice and Bill of Lading, which purported to cover old wearing apparel exported by Porter & Co. of London to Rasu Prasad at Darjeeling. This Bill of Lading with endorsements by Porter & Co., and Rasu Prasad were made over by the accused to Cox &

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Co., in order that the goods might be cleared and passed through the Customs House. The goods were found to contain a large quantity of cocaine, which, there can be no room for reasonable doubt, was sought to be illicitly exported in contravention of the provisions of the Excise Act. The accused, when apprised of the discovery, professed to be acting on behalf of Rasu Prasad. He was given every opportunity to produce Rasu Prasad or to give information about him. He has completely failed to give any clue about Rasu Prasad, the alleged importer, although his case is that he had met Rasu Prasad at Darjeeling and had on previous occasions cleared consignments on his account. From these circumstances, the Magistrate had drawn the inference that Rasu Prasad is a myth, and has held that the accused was in possession of the cocaine within the meaning of cl. (a) of sec. 46 as also of sec. 52 of the Bengal Excise Act. We are not prepared to hold that the accused was in "possession" of the cocaine. On behalf of the Crown, reliance has been placed upon the cases of *Kashi Nath Bania* v. *Emperor* (1) and *Ashruf Ali* v. *Emperor* (2) in support of the view that the accused was in possession of the cocaine. The cases mentioned are, in our opinion, distinguishable. In the first of these cases, it was held that possession of a railway receipt, by the production of which the consignee might have obtained delivery and physical possession of the consignment, was possession within the meaning of sec. 9, cl. (c) of the Opium Act, 1878. It was pointed out by the learned Judges that by the possession of the railway receipt, the consignee had dominion or control over the parcel in the sense that he could have passed the right to take delivery thereof to any other person; in other words, that possession need not be actual or physical but might be potential. In the later case, this view was questioned, though reluctantly followed, and it was pointed out that the decision overlooked the distinction between possession and right to possession. It is not necessary for our present purpose to examine the decisions in the two cases mentioned, but we may observe that the doctrine of constructive possession must be very cautiously applied, specially in the department of criminal jurisprudence. In the case before us, it cannot be said that the accused had dominion or control over the goods, unless he was the real consignee, which he is not proved to have been. We cannot hold that every person who might have possession of the Bill of Lading was in possession of the cocaine within the meaning of the Bengal Excise Act, irrespective of all other circumstances. If this view were not maintained, Cox & Co., and all their assistants who had handled the Bill of Lading, might be deemed to be in possession of the cocaine. In this view, the conviction of the Petitioner under secs. 46 and 52 of the Bengal Excise Act cannot be supported. We are clearly of opinion, however, that this is a case to which the provisions of secs. 236 and 237 of the Criminal procedure Code are applicable; on the evidence, there is no doubt as to the facts, although it may be doubtful what precise offence the accused has committed on the facts alleged, he may consequently be convicted of the offence which he is shown to have committed although he was not charged with it. In this case, there is no room for controversy that an attempt has been made by the

(1) I. L. R. 32 Cal. 557 (1905).
(2) I. L. R. 36 Cal. 1016 (1909).

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NOTES.

The Pioneer's Scheme of an Imperial High Court.

The *Pioneer* in an editorial article announces that a Bill will shortly be introduced in Parliament for the consolidation of the statutes relating to the Government of India and it believes that the occasion may be taken for the revision of the Acts and the Letters Patents relating to the High Courts in India. It then proceeds to put forward a scheme for the abolition of the Provincial High Courts and setting up in its place an Imperial Court. The present High Courts are only to be Benches of the Imperial Court. Whether this fanciful scheme has any foundation in fact, is more than we know. But some newspapers in England have also of late given currency to a report that His Excellency the Viceroy has sent to the Secretary of State some recommendations which would require very careful consideration before they can be sanctioned. But we cannot persuade ourselves to believe that His Excellency in Council could have in contemplation any such drastic changes. It is also hardly conceivable that the Government of India would formulate any such scheme without consultation with the High Courts concerned and without consulting public opinion in India and in particular of the Presidencies and Provinces which are to be very materially affected by any such far-reaching changes affecting the jurisdiction and constitution of His Majesty's Courts. But so many changes have come upon us quite unawares in recent years that we cannot ignore and pass unchallenged even an extravagant scheme of the kind without pointing out its utter impracticability and innate absurdity, especially as it finds place in a journal which is sometimes availed of by Government in making official announcements.

If the *Pioneer* of Allahabad has put forward the scheme on its own responsibility for the raising of the Judicial Commissioner's Court at Lucknow and the Chief Court at Karachi to the rank of Benches of the Allahabad High Court and the Bombay High Court, we have no exception to take to its quite legitimate Provincial patriotism in seeking to raise the status of these Courts. But we do not see any reason why the Provinces cannot prosper or the Imperial Government grow except at the expense of Calcutta and the Bengal Presidency. The author of the scheme makes no secret that the condition precedent of its consummation is that the Calcutta High Court should be melted in this hotchpot. The Letters Patent of this Court along with those of the Madras and Bombay High Courts are to be repealed and the "general lines of power and procedure" are to be regulated by one uniform enactment.

The suggestion is evidently directed to the taking away from these Courts the Common Law jurisdiction that they have inherited from the Supreme Courts and their predecessors established by Royal Charter in the Presidency towns. Then again it is proposed that all these Courts are to be placed under an officer to be styled Lord Chief-Justice-General (no doubt a very high sounding title but savouring more of the military than the legal) whose duties, amongst others, will be to advise the Government of India with regard to these Courts. He will also be entitled to transfer any case he pleases from one Court to another (which are to become merely Benches of the Imperial Court) and, we presume, to transfer or move about the Judges and, in order to vary the monotony of his own existence, to preside over any Bench whenever he likes. In other words the Courts are to become so many departments of India Government. This would indeed be carrying the scheme of Provincial autonomy to excelsis.

Nor is this all. With the abrogation of the Letters Patent of the High Courts, it is boldly suggested that the "distribution of judgeships amongst various class of persons" provided for under the Letters Patent is also to be departed from. For example, the following illustrations are

given. (1) In Benches of *three* judges *one* is to be a *barrister*, *one* a member of the *Indian Civil Service* and the *third* to be appointed *at* the *pleasure* of the Government. (2) In a Bench of 9 Judges, *three* are to be *barristers*, *three* members of the *Indian Civil Service*, *one* of the *Provincial Civil Service*, *one vakeel*, and the remaining *one* to be filled *at* the *pleasure* of Government. (3) In a *Bench of fourteen judges* (and here we believe the future of the Calcutta High Court is foretold) *four* are to be *barristers*, *five* to be *members of the Indian Civil Service*, *two* of the *Provincial Civil Service*, *one vakeel* and the remaining *two* to be filled at the *pleasure* of Government. (4) There is also to be a Chief Justice for each of the High Court Benches who will *ordinarily* but *not necessarily* be a barrister. No scheme can obviously be better calculated to goad the educated community of this country into a fresh fit of unrest and agitation. We have been repeatedly urging in these columns that the country is tired of uncalled for changes and what we are pre-eminently in need of at the present moment is peace and stability in our institutions and administration. But even if the articles in question be mere speculations they can only lead to mischief and can be fruitful of no practical good.

There is ample internal evidence in the articles that the scheme is chiefly directed against the Calcutta High Court. It is said that the "chief cause of weakness of this Court consists in its being an Original and also a Court of Appeal." The author of these articles seems to have some very peculiar ideas of his own which have the distinction of ignoring matters of common knowledge. We thought that the chief strength and not weakness of the Calcutta High Court consisted in its being a Court of Original Jurisdiction as well as a Court of Appeal. It is on the Original Side that the Judges have inherited the Common Law Jurisdiction from the Supreme Court and its predecessors. It is by virtue of this jurisdiction that every Judge of this Court, whether he sits on the Original or the Appellate Side of the Court, can exercise the powers of a Court of Record within the limits of the Presidency town. Further he can also exercise the powers of a Common Law Court with regard to British subjects anywhere within the Presidency.

The reckless statements made by the writer are not limited to such well known facts. He seems to be equally anxious to mislead his readers regarding the constitution and the jurisdiction of the High Court of Judicature in England. He contrasts the constitution of the English Court of Appeal with that of the Appellate Side of the Calcutta High Court. But if he had only cared to look at it in the right way he would have discovered more analogy than contrast between the two Courts. It is true that in the English Court of Appeal, as at present constituted, the majority of the Judges are Lords Justices who are not Judges of Original Jurisdiction, but even in this Court the Lord Chief Justice and the President of the Probate Division who are Judges of Original Jurisdiction can sit and very often do sit as *ex-officio* members. The Lord Chancellor himself again is at once the President of the Highest Court of Appeal and of the Chancery Division of the High Court, which it is needless to say is a Court of Original Jurisdiction. Then the Judges of the King's Bench Division of the High Court of England who are all Judges of Original Jurisdiction hear appeals from the County Courts corresponding in some respect to our Mofussil Civil Courts and are also entitled to sit in the Court of Appeal when called upon by the Lord Chancellor to do so.

As for the appeals from the Mofussil, they are heard by Judges of the Calcutta High Court under a jurisdiction which is not inherited from His Majesty's Courts in England but from the Sadar Dewani and Nizamat Adwalats which, at their inception, in fact derived their authority not from the Crown in England but from the Moghul Emperors and their Viceroys in Bengal. It is too late in the day even for the *Pioneer* to call upon us to revert to the days of the Great Moghul rule. If the Common Law Jurisdiction is taken away from the Calcutta High Court and its Letters Patent abrogated, it will be reduced to the position of the Allahabad High Court and that may please the *Pioneer* but all communities in Calcutta and in fact the inhabitants throughout the length and breadth of this Presidency will oppose any such proposal with all their might. Let Allahabad prosper, but we see no sense in taking away from us all our chartered and cherished rights and institutions.

As a necessary adjunct to this drastic scheme it is also proposed to establish Chief Courts on the ashes of the Original Side. As a sop to us, it is suggested that Howrah might be included within the jurisdiction of the Chief Court that is to be. But no self-respecting professional man or citizen of Calcutta will barter away his birth right for this mess of pottage. We are sure that if the scheme is seriously placed before the public it will die of ridicule. The Lord Chief-Justice-General is to be of the rank and is to draw the salary of a Lieutenant-Governor. We presume that he will be a *de facto* Lieutenant-Governor under the Governor-General and his Province will

as the so-called Imperial Court or the High Courts of Judicature (hereafter to be called Benches) in the different Presidencies and Provinces. He will be an Executive Judge and he is to "co-ordinate so far as practicable the work of the different Benches." We are told that the Lord Chief-Justice-General will also be Editor-General of all the Law Reports. We would sympathise with him in this task and also remind our contemporary that the task of editing Law Reports is by no means less arduous than the editing of a daily journal. What would our contemporary think of the Governor-General becoming hereafter the Editor-General to the newspaper press in India?

We are assured by the *Pioneer* that when the Law Reports of the future are issued under this Lord Chief-Justice-Editor-General "the High Courts of India will not be bound by the existing rulings arrived at without sufficient appreciation of the Hindu and Mahomedan texts." The Editor-General is, we presume, "to co-ordinate" the different schools of Hindu Law that have been evolved in the different Provinces and Presidencies by text-writers and commentators for ages in the past. Then again the Hindu and Mahomedan laws as they are administered are the products of the best brains on the English and Indian Benches that have been taxed for nearly a century to evolve order out of chaos. The rules of equity and justice so laboriously built up are also to be abrogated and the Lord Chief-Justice-Editor-General is to conjure up a new school of Hindu and Mahomedan Law from the original texts for the guidance of the Judges of this Imperial Court of the future. A scheme of this kind has not only the merit of being truly Imperial but we are prepared to assign to it a higher place as it may well claim to be Supernatural. To accomplish this task, we are afraid, that the Lord Chief-Justice Editor-General will have to reincarnate himself like *Vishnu* for many ages to come. We expect that the Land Laws in India will be in no less confusion if this new incarnation requisitioned by the *Pioneer* should be given birth to by the British Parliament for the salvation of the Hindus and Mahomedans of India.

Royal Commission and pension of Judges.

We referred in our last issue to the recommendations of the Royal Commission regarding the allowance of pensions on a more liberal scale to the Judges of the High Court of Judicature in England coupled with a scheme for requisitioning the services of those who may retire early to sit on the Bench on full pay when occasion required. The following is an extract from the Report of the Royal Commission.

Judges compelled to retire by ill-health or the age limit should receive pensions after five years' service or less of £1,500; with a further £200 for each completed year beyond five years, with a maximum of £3,500. Judges should be allowed to retire after ten-years' service on a pension of £2,500 with the same increments and maximum for longer service', on the condition that they would serve if called upon in London or on circuit during such a period as would make up fifteen years from the date of their appointment, receiving for this service such a sum as, with the pension, would be at the rate of £5,000 a year during the time of service with remuneration at the rate of £400 a year for a clerk, and the usual circuit allowance if they go on circuit. All retired judges should be supernumerary judges and eligible, on the request of the Lord Chancellor, to sit as such, but should not be obliged to if they have served as judges for fifteen years or had been obliged to retire on the ground of age or ill-health.

CURRENT INDIAN CASES.

(CRIMINAL.)

Indian Penal Code, sec. 471—Using a false document.
Re MUTHIAH CHETTY, I. L. R. 36 Mad. 392.

The production by a party of a document which he is bound by law to produce cannot by itself constitute a user of that document by him.

Criminal Procedure Code, secs. 55, 110.
EMPEROR *v.* NEPAL, I. L. R. 35 All. 407.

An officer in charge of a police station may arrest under sec. 55 without an order from a Magistrate a person against whom the police are about to take proceedings under sec. 110, Cr. P. C.

Sec. 55 is independent of Chap VIII, Cr. P. C., although proceedings under Chap. VIII may follow such arrest as a natural sequence.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE AND BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 3949 OF 1910. MANMATHA NATH MONDAL, Plaintiff-Appellant *v.* KHIRODHAR GHOSH AND OTHERS, Defendants-Respondents. 15th January 1914.

Suit to set aside sale—Sale by mother as natural guardian during the minority of the Plaintiff—Art. 44 of the Limitation Act applicable.

The facts out of which this appeal arises are shortly as follows: The Plaintiff's mother jointly with his uncle sold the lands in dispute to the Defendants by a deed of sale on 30th November 1899, purporting to do so as his natural guardian. The Plaintiff brought this suit on 10th August 1909 to recover possession of the lands on the ground that she had no power to sell and that there was no legal necessity for the sale. The

defence was that the suit was barred by limitation and that there was legal necessity for the sale. The first Court held that there was no legal necessity for the sale such as payment of debts or arrears of revenue but held that the minor was benefited by the sale as the sale was necessary for his maintenance and so decreed the Plaintiff's suit on terms that he should refund the purchase-money to the Defendants. On appeal to the primary Court of Appeal, it held that the suit was instituted more than three years after the attainment of majority by the Plaintiff and that it was consequently barred by limitation under Art. 64 of the Limitation Act. It further held that there was no legal necessity for the sale but it observed that as the minor was benefited by the sale, he should refund the purchase-money in case the sale be set aside.

The Plaintiff then filed this second appeal and it was contended that as the mother was not a guardian appointed by any Court, she had absolutely no right to sell the property. The sale was void and so Art. 44 was not applicable. The suit having been brought within 12 years from the date of sale was not barred by limitation.

Held—Art. 44 of the 1st Schedule to the Limitation Act applies to the facts of the case. The article is not restricted in its application to *de jure* guardians only. It applies also in case of a sale by a natural guardian.

Ghanasambanda v. *Velu Pandaram*, I. L. R. 23 Mad. 271 (P. C.); *Satish Chandra Ghosh* v. *Chunder Kant Pyne*, 3 C. W. N. 278; *Sham Chander Dafadar* v. *Gadadhar Mondal*, 13 C. L. J. 277; *Sivavadadalu* v. *Pounamma!*, 22 M. L. J. 404; *Madugula* v. *Pally Mukhalinga*, I. L. R. 30 Mad. 303, referred to and followed.

Matadin v. *S. K. Ahmad Ali*, I. L. R. 34 All. 213 (P. C.): S. C. 16 C. W. N. 358, and *Ramansar* v. *Raghubar*, I. L. R. 5 All. 490, distinguished.

Babus Provash Chandra Mitra and *Susil Madhub Mullick* for the Appellant.

Babu Atul Krishna Roy for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before TEUNON, J. APPEAL FROM APPELLATE DECREE NO. 2008 OF 1910. GANPATI MALOI AND ANOTHER, Defendants Nos. 5 and 6, Appellants *v.* MOHI NATH GOSWAMI AND OTHERS, Respondents. Heard, 19th November 1913. Judgment, 5th January 1914.

Sufficient cause—Limitation—Appeal filed out of time.

The appeal arose out of a suit brought by the Plaintiff for recovery of possession on establishment of title to certain lands originally the property of one Kameswar Goswami.

Kameswar died some 15 years before suit, leavi[ng] a widow named Bishnu Priya who died in Dece[m]ber 1900. After her death Defendants Nos 8 an[d 9] who said they were Bishnu Priya's adopted so[ns] each propounded a Will in his own favour b[ut] finally agreed to divide the properties, Defenda[nt] No. 8 taking a 7 annas and Defendant No. 9 9 annas share. In 1901 Defendant No. 8 sold [to] Defendants Nos. 1 to 4, and 7, while Defenda[nt] No. 9 sold to Defendants Nos. 5 and 6. Plai[n]tiff's case was that he was the son of Ramesw[ari] and Defendant No. 10, the son of Dhaneswari, t[he] two daughters of Kameswar's uncle, Ram Dutt[a] that on the death of the widow they were t[he] heirs of Kameswar in equal shares, and that b[y] purchase he, Plaintiff, had acquired the share [of] Defendant No. 10. He had thus acquired title [to] the whole of the properties in suit.

Plaintiff having succeeded in the first Cour[t] Defendants Nos. 1 to 4 appealed. At the hearin[g] of their appeal on the 12th July 1909 the learne[d] District Judge held that Plaintiff was not the so[n] of Rameswari and therefore proceeding unde[r] Or. 41, r. 47 of the Code of Civil Procedure, 190[8] dismissed the whole of the Plaintiff's suit. At th[e] hearing, the Plaintiff's title in so far as it wa[s] derived from Defendant No. 10 was not considere[d]. On the application of the Plaintiff the judgmen[t] was accordingly reviewed. At the second hearin[g] the District Judge held that Defendant No. 10 wa[s] not the grandson of Ram Dutta. The result o[f] these findings was that Plaintiff had no title t[o] the lands in suit but by his second judgment, date[d] 5th February 1910, instead of dismissing the Plain[tiff]'s suit *in toto* as he had done on the 12th July 1909, the learned District Judge dismissed the suit only in so far as the Appellants before him, that is, Defendants Nos. 1 to 4 were concerned. Thereupon, on the 26th February 1910, Defendants Nos 5 and 6 appealed against the original Court's decree in so far as it affected them and their 9 anna share. Their appeal was dismissed as being filed out of time.

Held—The anomaly resulting from the fact that a decree reversed on an appeal by one set of judgment-debtors on a ground common to all yet remained good against a second set of judgment-debtors who had not previously chosen to appeal was not *per se* a sufficient cause for extending the period of limitation in the case of an appeal subsequently preferred by the second set.

Tucker v. *Canji* (I. L. R. 14 Bom. 365) and *Esdaile* v. *Payne*, (1889) L. J. R. 265, followed.

Babu Chandra Sekhur Prosad Singh for the Appellants.

Babu Prokash Chandra Mozumdar for the Respondents.

A. T. M. *Appeal dismissed.*

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accused to import cocaine, that is, to bring cocaine into Bengal in contravention of the provisions of the Bengal Excise Act. We feel no doubt whatever upon the evidence that he was aware of the character of the contents of the bales he had undertaken to clear and pass through the Customs House. Consequently, he is liable to be convicted of the offence of attempting to import cocaine in contravention of the Bengal Excise Act, and to be punished under sec. 61 read with sec. 46, cl. (a) and sec. 2, cl. (12). We convict him accordingly and set aside the conviction as made by the Magistrate. There is no question that the sentence is appropriate. The accused must surrender and serve out the remainder of the term of sentence as imposed by the Magistrate.

Conviction altered :
Sentence confirmed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
Heard,
10, November.
Judgment,
25, November.

RAJA THAKUR BARMHA, since deceased (now represented by Jai Barmha and ors.) & ors., Appellants,
v.
JIBAN RAM MARWARI and others, Respondents.

Sale-certificate, if may be amended by inserting property not included in the schedule of attached properties—Case, if one of misdescription and irregularity—Correct description in notification in Government Gazette but differing from that in schedule of attachment, effect of—Wrong property sold, proper remedy—Proof that other property intended to be sold, if relevant—Court's authority to sell, how limited.

That which is sold in a judicial sale of immoveable property in execution of a decree for money can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers.

Where an existing property is accurately described in the schedule, a certificate of sale cannot be issued in respect of a different property, treating the matter as a case of misdescription, and as such to be viewed as a mere irregularity.

If by mistake the wrong property was attached and an order made to sell it, the only course open to the decree-holders on, the discovery of the mistake, was to commence proceedings over again.

Documents in other judicial proceedings tending to show that a mistake had been made in drawing up the schedule and that some property other than that included in the schedule was intended to be inserted in it, were irrelevant.

Although an advertisement in the Calcutta Gazette ***purporting to be a description of the attached property and correctly describing the other property, was relevant, yet since it differed from the description in the schedule it could not be relied on to validate the sale of property which was not the property to which the attachment related.***

This was an Appeal from a Judgment of the Calcutta High Court (Brett and Gupta, JJ.), dated the 26th June 1906, which set out the facts of the case fully and was as follows :—

"It appears that before his death, Raja Thakur Barmha was very heavily indebted and that he mortgaged 8 annas share in Mahal Tappa Patsanda, bearing towzi No. 462 of the Dumka Collectorate, to Anant Ram Marwari, and that on the 8th September 1902 Anant Ram brought

a suit and obtained a mortgage-decree against him. On the 1st May 1903 the sale in execution of that decree was stayed on the condition that the debtor hypothecated an additional two annas share of the property as an additional security.

"Raja Thakur Barhma also borrowed various sums of money from one Gobardhan Das, who on the 24th February 1902 obtained decrees against him for two sums of Rs. 21,702 and 4,512, and in execution of those decrees he attached the 8 annas unencumbered share in Tappa Patsanda. In order to stay the sale the Raja mortgaged three annas out of that property to him on the 13th November 1902.

"Jiban Ram, the third creditor, obtained a money decree against Raja Thakur Barmha on the 23rd October 1903 for Rs. 42,946 and on the 31st October 1903 he applied for execution of that decree.

"The dispute which has given rise to the present case has arisen with regard to the property which he put up for sale in satisfaction of that decree. It is only necessary for the present to say that 6 annas out of the 16 annas of Mahal Tappa Patsanda was brought to sale and on the 27th July it was purchased by the son of Anant Ram Marwari for Rs. 1,12,000.

"On the 1st August 1904, 10 annas share of the same property was brought to sale in satisfaction of Anant Ram Marwari's decree and was purchased by him for Rs. 2,93,000.

"The sale in satisfaction of Jiban Ram Marwari's decree was held by the Subordinate Judge of the Sonthal Pergunnahs and the sale in satisfaction of Anant Ram Marwari's decree was held by the Subordinate Judge of Bhagalpur.

"On the 29th July 1904, the Deputy Commissioner of Sonthal Pergunnahs wrote to the Subordinate Judge to stay the sale in execution of Jiban Ram's decree, but the Subordinate Judge, on the 2nd August, wrote in reply that the sale had been already closed. On the 25th August 1904, the judgment-debtor applied under secs. 311 and 244, C. P. C., to have the sale set aside but on the 18th November 1904 he withdrew that application. On the 20th December 1904, the auction-purchaser at the sale in execution of Jiban Ram's decree applied for the issue of a sale-certificate in his name as purchaser of the six annas share of Mahal Tappa Patsanda which was not encumbered by the mortgage of Anant Ram, and on the same date an order was passed granting the application. That is the order against which the present appeal has been preferred.

"The main question which has been argued before us is whether the property which was sold in execution of Jiban Ram's decree was the 6 annas share of Tappa Patsanda unencumbered by the mortgage of Anant Ram Mar wari, or that share subject to the mortgage. The learned Counsel, who has appeared in support of the appeal and the Rule, has contended that the value of the whole of the property Tappa Patsanda was about Rs. 8,00,000 and if it be supposed that the purchasers at the sale in satisfaction of Jiban Ram and Anant Ram Marwari's decrees have purchased only the 10 annas encumbered share, then they have really obtained a very good value for their money. The purchasers are in fact Anant Ram Marwari and his sons and the amount which they have paid is about Rs. 4,00,000. We have been referred to the application for execution filed in Jiban Ram's case, (this is quoted in the judgment of the Judicial

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Committee) to the order of attachment, and to the sale-proclamation, and the learned Counsel has contended that from the terms of these three documents it is clear that what was offered for sale in execution of Jiban Ram's decree was the 6 annas out of the 16 annas of Mahal Tappa Patsanda subject to the mortgage of Babu Anant Ram Marwari. The wording or description is in itself very clumsy and it does not appear to us that it is only capable of the meaning that the 6 annas referred to are 6 annas subject to the mortgage of Anant Ram Marwari. Had it been the intention of the decree-holders to bring the encumbered 8 annas share to sale, we should have expected that instead of praying for the sale of 6 annas share he would at once have applied for the sale of the whole 8 annas share, and the fact that he applied for the sale of 6 annas share only, which was the balance remaining after deducting the 8 annas and 2 annas shares hypothecated to Babu Anant Ram Marwari, goes to support the case which the Subordinate Judge in the lower Court has accepted, that the intention of the decree-holder was to apply for sale of the 6 annas unencumbered share. There seems also no reason why, if 10 annas share of the property was subject to encumbrance, the decree-holder should apply for execution against the encumbered share and not against the 6 annas unencumbered share. In the copy of the sale-proclamation that was published in the *Calcutta Gazette* the description of the property is different. It is there stated to be the zemindari right, title, and interest, in 6 annas share, Mahal Tappa Patsanda, bearing towzi No. 462 and sudder-jumma Rs. 1,402-9 of the Dumka Collectorate, Thana Mahagama, Sub-Registry Godda, District Sonthal Pergunnahs, which is not covered by the mortgage bond of Babu Anant Ram Marwari and others of Shujaganj, and also another two annas share of the said Tappa which has been tendered as security in execution of the decree of the said Babu Anant Ram and "others." The learned Subordinate Judge, on considering these documents, has come to the conclusion that there was possibly an error in the application for execution and in the sale-proclamation by omitting the word 'not,' which was subsequently included in the copy of the sale-proclamation that was published in the *Calcutta Gazette*. If this view were correct that there has been such a mistake this would be a ground for setting aside the sale on account of irregularity and not a ground for our interfering with the order of the Subordinate Judge passed on the 20th December 1904. The property was brought to sale on the 26th June 1904 and the proceedings show that the property was described as described in the application for sale, but at the time of the sale it appears that a note was entered in the bid-sheet to the following effect :—'Be it known that out of 6 annas of Tappa Patsanda which has heen advertized for sale, three annas has been given in security in Money Execution Cases Nos. 3 and 4 of 1902, Gobardhan Das *v.* Raja Thakur Bramha.' It is suggested that the entry was made in order to indicate that the property that was offered for sale was the 6 annas unencumbered share and not the share which was subject to the mortgage of Babu Anant Ram Marwari. After the sale the sale-certificate was issued to the purchaser at his request and in it it is distinctly stated that the property purchased was the zemindari right in

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6 annas of Tappa Patsanda and that this 6 annas share out of 8 annas is not included in the mortgage bond of Babus Anant Ram Marwari and Har Chand Rai and others, dated the 30th Sawan 1302, F. S.

"The learned Counsel for the Petitioner-Appellant has relied on the remarks made by the learned Judges of the Bombay High Court in the case of *Balvant Babaji Dhondge* v. *Hirachand Gulabchand Gujar* (1). He has contended that the sale-certificate cannot under the present Code of Civil Procedure be accepted as in itself a valid transfer of the property sold. It is argued that what is sold must be the property as described in the application for execution and in the proclamation of sale, and that no statement in the certificate of sale would give the purchaser a title in the property other than that which was advertized for sale by order of the Civil Court.

"The learned pleader on behalf of the Respondents has argued on the authority of the case of *Nanomi Babuasin* v. *Modhun Mohun* (2), that what we have to consider in the case is what was the property which the parties intended to sell or intended to be sold, and what was the property which the Court at the time intended to offer to sale.

"We think that the description given in the application for execution, in the sale-proclamation and order of attachment is not very happily worded, but its meaning need not necessarily be restricted to the 6 annas of Mahal Tappa Patsanda which was subject to Anant Ram's mortgage. The fact that at the time when the sale-proclamation was published on the 27th February 1904 in the *Calcutta Gazette*, a description was given which clearly indicated that the property which it was intended to sell was the unencumbered 6 annas, and the fact that at the time of sale this circumstance was also mentioned to the officer conducting the sale go to support the view that what was intended to be sold was the 6 annas unencumbered share. It is also to be observed that in the 13th paragraph of the petition which the judgment-debtor addressed to the Deputy Commissioner of Sonthal Pergunnahs on the 15th July 1904, that is to say, before the date of sale, he stated that six annas of Tappa Patsanda was under attachment and advertized for sale in execution of certain decrees amounting to Rs 2,00,000 in the Court of the Subordinate Judge of Godda, and that the remaining ten annas share of the said estate was on sale in execution of a decree of Anant Ram Marwari and others of Bhagalpur for Rs. 2,93,000 in the Court of the First Subordinate Judge of Bhagalpur. The letter which the Deputy Commissioner wrote to the Commissioner of the Division on the 29th July 1904 shows that it was then generally understood that the ten annas share had been sold in Bhagalpur and the remaining six annas share was being sold in Godda. The learned Counsel, however, has contended that if the six annas share was offered for sale it was the duty of the decree-holder under sec. 287 to have mentioned that the six annas was subject to the three annas mortgage in favour of Gobardhan Das. That fact, however, was mentioned at the time of sale and was notified to the purchaser and the mere fact that mention of this encumbrance was not made in the application for execution or in the sale-proclamation would not in itself be sufficient to vitiate the sale.

(1) I. L. R. 27 Bom. 334 (1903).
(2) L. R. 13 I. A. 1; S. C. I. L. R. 13 Cal. 21 (1885).

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"In our opinion it is clear that the intention of the par ies was that 6 annas unencumbered share should be sold, and that was the share which was in fact sold and purchased by the auction purchaser, and we think that no sufficient grounds have been made out for our interference with the order passed by the Subordinate Judge on the 20th December 1904 directing the issue of the sale-certificate to the purchaser. The grounds which have been taken against the execution proceedings are such as might have been taken in an application to set aside the sale, but we find that in this case the judgment-debtor, after making an application to set aside the sale, afterwards withdrew it.

"As we find that the main case fails on the merits, it is not necessary for us to deal with the objection which has been taken to the application for substitution. There are no doubt cases in support of the view urged by the learned pleader that where the elder member of a joint Mitakshara family dies, the person who succeeds to the estate by survivorship is not to be regarded as his legal representative and there is also a later case, *Chandra Prosad* v. *Sham Koeri* (3), which supports the view that in certain cases execution proceedings may go on against the person succeeding. But we do not think it necessary to discuss this question in the case, as in our opinion the Appellant or the Petitioner has failed to make out any case, whatever before us for our interference. We may add that no appeal in our opinion lies in this case and no ground for our interference in revision has been made out."

Hence this Appeal.

Mr. A. M. Dunne for the Appellants submitted that the Courts below had no jurisdiction to make the order complained of. What was in fact sold and what could legally be sold was the equity of redemption in the six annas subject to the mor gage of the 30th Sawan 1302. That alone was attached as would appear from the schedule appended to the application for execution and the Court had no jurisdic ion to sell anything more than what was attached. The sale of the excess, any, was absolutely void. It was not a question of intention of the parties, that was immaterial. At a judicial sale nothing more could be sold than what was ordered to be attached in that particular case.

Mr. L. DeGruyther, K. C., and *Mr. E. A. Eddis* for the Respondents submitted that the real question was what was in fact sold at the auction. Both the lower Courts have concurrently found that the unencumbered six annas were sold. Assuming that what had actually been sold ought not to have been sold there was a special procedure to get rid of the sale—Secs. 311 and 312, C. P. C. The Court has no discretion but to confirm the sale of what has actually been sold. The sale was held in execution of other decrees besides that of Jiban Ram. In those proceedings the property was correctly described as the six annas unencumbered. In Jiban Ram's application for execution and the sale-proclamation based upon it there was an accidental omission of the word "not." In order to ascertain what was really attached and sold reference ought to be made to the execution proceedings of the other decrees as well. At best it was a case of misdescription, a mere irregularity and there was no right of appeal to the High Court.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—This is an Appeal

(3) 8 C. L. J. 181 (1905).

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against a Judgment and Decree of the High Court of Judicature at Fort William in Bengal, dated 26th June 1906, affirming an order of the Court of the Subordinate Judge of Godda in the Sonthal Pergunnahs, dated 20th December 1904, granting a certain sale certificate to the second set of Respondents hereto, described as auction-purchasers. The facts of the case so far as is necessary for the decision of this appeal are as follows:—

On the 23rd October 1903 the Respondents, Jiban Ram Marwari and Ishwar Das Marwari (described as the decree-holders), obtained judgment against the original Appellant Rajah Thakur Barmha (now represented by his heirs and legal representatives), for a sum of 42,562 rupees and interest, and on the 31st October 1903 the decree holders applied for execution of the decree by attaching and selling the property mentioned in the application. It is only material to refer to the first item in the schedule specifying that property which reads as follows:—

"The Defendants Zamindari and Milkiat right in the six annas out of 16 annas of Mahal Tappa Patsanda bearing towzi No. 462 and sudder-jumma of Rs. 2,402. 9. 0 (for the 16 annas) payable in Dumka Collectorate This property is mortgaged in the bond of Babu Anant Ram Marwari and others, decree-holders, inhabitants of Bazar Shujaganj in the Town of Bhagalpur, and also a two annas share of the said Mahal, which has been hypothecated as security on behalf of the Defendant in the case of execution of a mortgage decree of the said Babu Anant Ram Marwari and others, decree-holders, against the judgment-debtor, in the First Court of the Subordinate Judge of Bhagalpur, in all, eight annas share of the said Mahal, together with all rights and interests of the judgment-debtor and Kamat land, *nami* and *benami* jalkar, phalkar, bankar, &c., and Kachari House appertaining to the estate. The estimated value is Rs. 50,000."

In the ordinary course an order was made for the sale of the attached property mentioned in the above schedule by public auction, and proclamation of the sale was made in the required manner. The sale commenced on the 16th June 1904, but for a long time the bids were insufficient and the sale was not finally concluded until the 28th day of July 1904.

On the 20th day of December 1904 an application was made on behalf of the auction purchasers to obtain a sale certificate for the six annas share of Tappa Patsanda purchased by them at the auction sale. In making this application they alleged that a mistake had been made in the schedule of the property to be sold, in that the word "not" had been omitted from the description of the six annas in question and that the property should have been described as being six annas not mortgaged under the bond of Babu Anant Ram Marwari. At that date 10 annas of the property were so mortgaged while the remaining six annas were free from any mortgage. They claimed that their certificate should be made out as being a certificate of the purchase by them of the six unencumbered annas instead of (as described in the schedule) six annas subject to the existing mortgage. The Subordinate Judge granted them a certificate in the form which they desired and the High Court sustained his order. It is from this order that the present appeal is brought.

Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers. In the present case that property was six annas subject to an

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existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely the six unencumbered annas,—a property which could not be sold in such proceedings inasmuch as it was not the property attached.

An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with identity and not description. A property fully identified in the schedule may be in some respects misdescribed, but that is not the present case. Here we find an existing property accurately described in the schedule, and the order of the Subordinate Judge grants a sale certificate which states that another and a different property has been purchased at the judicial sale. It was beyond the powers of the Court to make such an order, inasmuch as there was no power to sell in these judicial proceedings the property thus certified to have been purchased.

Counsel for the Respondents sought to support his case by referring to documents in other judicial proceedings tending to support the view that a mistake had been made in drawing up the schedule, and that the property intended to be inserted therein was the unencumbered 6 annas. Their Lordships are of opinion that all such matters are irrelevant. If by a mistake the wrong property was attached and an order made to sell it, the only course open to the decree-holders on the discovery of the mistake was to commence the proceedings over again. They could not turn an authority to sell one property into an authority to sell another and a different one. Moreover it is impossible to attribute to the public to whom the attached property is offered in sale a knowledge of proceedings in other suits which might have led them to suspect that an error had been made. The only relevant document brought to their Lordships' notice in this respect was an advertisement in the *Calcutta Gazette* which, though purporting to be a description of the attached property, differed from the description in the schedule by representing that the property to be sold was free from the mortgage. This want of correspondence between the advertisement in the *Calcutta Gazette* and the schedule of the attached property in the proclamation of sale constitutes an additional irregularity which it might need the assistance of the Court to cure if the sale were regular in other respects, but it cannot validate a sale of property which was not the property to which the attachment related.

Their Lordships therefore will humbly advise His Majesty that this Appeal should be allowed, and that the Order of the Subordinate Judge confirming the sale together with the certificate granted thereunder dated the 20th December 1904 should be set aside. This will of course have the effect of setting aside all subsequent proceedings on the part of the auction purchasers based thereon.

The Respondents will pay the costs of the application to the Subordinate Judge of the 20th December 1904 and of the Appeal to the High Court of Judicature at Fort of William in Bengal, and also the costs of this Appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Theodore Bell & Co.* for the Respondents.

B. D. *Appeal allowed with costs.*

[TESTAMENTARY AND INTESTATE JURISDICTION.]

CHAUDHURI, J. 1913, 2, July.

In the goods of KANAI LAL KHAN, deceased.

Surety for an administrator of estate, if may be discharged or substituted—Surety, creating charge on his immoveable property, release of charge—Surety bond, discharge of and substitution—Administration account, if may be examined by Court.

Letters of Administration were granted to the estate of the deceased K, a Hindu governed by the Dayābhaga law, to R one of his first cousins who for purposes of such administration was also appointed guardian of deceased's infant son, and R's two brothers stood surety for the administrator. The estate being a very large one the Court required the sureties to charge their immoveable properties in the surety bond besides making them personally liable. The infant having died without issue and intestate his paternal grandmother succeeded to the estate as his heir. R thereupon applied to Court stating that he had rendered an account of the estate as administered by him to the lady and that she had the same examined by her constituted attorneys and that they were satisfied with the account and that the residue of the estate had been made over to her and prayed that the sureties be discharged and the charge on their immoveable property be also discharged.

The Court ordered that on the lady's constituted attorneys filing a verified certificate together with the account or abstract thereof stating that they had examined and found it correct and on the administrator filing the receipts for the debts paid to the satisfaction of the Registrar, the surety bond creating a charge on the immoveable properties of the sureties would be discharged, conditional upon the sureties executing a fresh security bond making themselves personally liable for the administration of the estate by the petitioner.

RAJ NARAIN MUKERJEE *v.* FUL KUMARI DEBI (1) *referred to.*

The account of the administrator need not be investigated by the Court, there being no procedure or practice for doing so.

An application in Chambers was made on the 18th April 1913 by the administrator to the estate of the deceased and for the discharge of sureties and for the release of a charge on their immoveable properties.

The facts of the case are as follows :—

The deceased Kanai Lal Khan died on the 19th February 1908 leaving him surviving an infant son, named Shama Das Khan, who was his son by a predeceased wife. He also left his mother Srimuti Luckhymoni Dassee, a widow Srimuti Santosh Kumari Dassee and 3 daughters, one of whom was since married but childless. He was said to have been living jointly with his cousins, Raman Lal Khan, Bunwari Lal Khan and Mani Lal Khan, the sons of his father's brother.

On the 21st April 1908, the Petitioner, Raman Lal Khan, was appointed guardian of Shama Das Khan, for the purpose of taking out Letters of Administration, and on the 6th July 1908 obtained an order for the grant to him of such Letters of Administration, limited until Shama Das Khan attained majority.

The estate was a very large one.

There appears to have been some difficulty about obtaining sureties, and on the 17th July 1908 a special order was made giving the Registrar liberty to accept Bunwari Lal Khan and Mani Lal Khan above-named who were joint with the deceased and the Petitioner in estate, as sureties for the Petitioner, upon their

(1) I. L. R. 29 Cal. 68 (1901).

IN THE GOODS OF KANAI LAL KHAN.

and the Petitioner executing a bond, with a charge upon their immoveable property. This bond was given, and it contained provisions charging the property.

Shama Das Khan died on the 15th December 1912, an infant, unmarried and intestate, and Srimuti Luckhymoni Dassee, his paternal grandmother, became his heiress.

The Petitioner stated that he had rendered proper accounts of his administration of the estate to Srimuti Luckhymoni Dassee, who had satisfied herself of the same by having them examined and scrutinised by her sons-in-law her constituted attorneys, and who were the fathers of nine of the twelve grandsons by daughters who were the revisionary heirs, and the petition prayed that the Petitioner and his sureties might be discharged and their immoveable properties released from the obligation created by the bond.

Babu Lakshmi Narain Khettry, Attorney-at law, who made the application submitted that since the sole infant for whose use and benefit the administration was granted died under age, the grant to the guardian had ceased. Raman Lal Khan therefore was no longer entitled to administer the estate; that the liability of the sureties ceased on the completion of the administration of the original estate. The administration by Raman Lal Khan so far was to be considered as complete as he was no longer entitled to administer the estate and that he having rendered accounts of his dealings to the person now entitled to the estate and making over possession of the estate of the deceased to such person, so far as it was practicable, had complied with the terms of the administration bond and he was entitled to the order asked for.

The Registrar submitted the following note to the Court before an order actually issued :—

Before the order actually issues, I desire to place certain matters for the consideration of the Court. In the first place, I have been unable to find any precedent for such an order, either from the records of this Court, or by looking into Tristram and Coote, or Williams on Executors. The only authority mentioned with regard to discharge of sureties is, that the Court will not discharge the original sureties from an administration Bond and allow other sureties to be substituted for them, *In the goods of Stark* (2).

But assuming that the Court has power to discharge the sureties and their property, has a sufficient case been made out on the petition?

The condition of the Bond in the present case is, that if the administrator causes a full and true inventory of all the estates of the deceased, which has or shall come to his hands, possession or knowledge, or into the hands or possession of any other person or persons and the same so made do exhibit or cause to be exhibited in this Court before the 12th of February 1909, or within such further time, as the Court may from time to time appoint, and the same estate and all other estates of the said deceased at the time of his death or at any time after shall come to the hands or possession of the said administrator, or of any other person or persons for him do administer according to the law, and further do make or cause to be made a true and just account of his said administration at or before the 12th August 1909, or within such further time as may be allowed, and all the rest and residue of the said estate which shall be found remaining upon the said administration account, the same being first examined and allowed by the High Court, shall deliver and pay unto such person or persons respectively as shall be lawfully entitled to such residue, and if it shall thereafter appear that any will was made by the said deceased and the executor or executors do exhibit the same in this Court if the administrator being thereunto required do render and deliver the letters of administration, then his obligation to be void and of none effect else to remain in full virtue.

I find from para. 13 of the present petition that the Petitioner filed an inventory and account of

(2) 1 P. and D. 76 (1866).

IN THE GOODS OF KANAI LAL KHAN.

the estate of the deceased on the 15th of February 1912. It does not appear that any further accounts have been filed.

In the affidavit of Luckymoni Dassee it is stated that she, as heiress of Shamadas Khan deceased and as such entitled to the share and interest, which was of the said deceased in the joint family properties, appointed her 3 sons-in-law by a power of attorney dated the 18th of February 1913 her agents to look after and manage on her behalf the estate of Kanai Lal Khan, which had devolved upon her and to scrutinise and take an account of the dealings of the administrator Raman Lal Khan therewith, and that they had done so and had reported to her that they were satisfied with the correctness of the accounts, and that she has thus satisfied herself that the accounts are correct, and Raman Lal Khan has made over to her all the rests and residue of the estate remaining in his hands

The question is, is that sufficient to justify the discharge of these persons from their Bond? I would point out that, from annexure B to the affidavit of valuation, it appears that there are a number of debts which were due by the deceased Kanai Lal Khan. There are also *inter alia* two very large amounts of Government securities standing in the name of the deceased but stated to have been purchased with the money of the joint family; also very large sums lent out on mortgage in the name of the deceased out of the joint family fund. Supposing that any of the creditors were to come forward hereinafter and to say that they had not been paid, what would be the position of the Court having released the administrator and his sureties from their bond?

With regard to the Government securities and the moneys stated to have been lent on mortgage in the name of the deceased out of the joint family fund, it is pointed out to me by the attorney for the Petitioner that the other members of the joint family are the Petitioner, and the two sureties, whose shares in the joint property are charged. They however have executed no receipt or release in favour of the Petitioner nor does it appear that they have satisfied themselves as to the accounts.

Another point that strikes me is, that Lukhymoni Dassee has a life-interest in the estate; would not the reversioners have a right to question whether the Petitioner has duly administered the estate or not?

The accounts which has been filed in Court has not been examined and though it is not the usual practice for administrator's accounts to be placed before the Court for examination and to be passed, on the other hand it is not usual to ask that the administrator and the sureties should be discharged from the Bond? Can they be discharged, if at all, without clear proof that the administrator has got in all the assets and duly discharged all the liabilities, and made over the balance of the estate, stating what that consists of, to the person entitled to the same?

To meet some of these objections made by the Registrar an additional affidavit of Raman Lal Khan, Bunwari Lal Khan and Mani Lal Khan was affirmed and filed on the 26th May 1913.

Babu Lakshmi Narain Khettry again appeared before Court and submitted that the case of *In re Stark* (2) referred to by the Registrar in his note was not applicable because this was not an application for the discharge of original sureties and substitution of other sureties in their place and that the grandmother as the heiress was quite competent to represent the estate of the deceased and the Registrar's objection on that account was not valid.

As regards the want of precedent, he submitted that neither here nor in England do the sureties in an administration matter ever charge their immoveable properties and therefore there was no necessity for asking for an order for discharge of their immoveable properties from the liability of their bonds and therefore no precedent would be found either in Indian or English law books. In this particular case, a special order was made for charging the immoveable properties of the administrator and his sureties and therefore a special order was

(2) 1 P. and D. 76 (1866).

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necessary to have their immoveable properties discharged after the administration was over, for it would be difficult for those persons to deal with their respective properties if the charge created by the said bond continued for ever. It would be difficult in future to induce the friends and relatives of an intending administrator to come forward and help him by standing sureties for him in matters like these.

He referred to *Raj Narain Mukerjee* v. *Ful Kumari Debi* (1) as showing that the Calcutta High Court had passed an order for the discharge of a surety, in that instance Mr. Justice Chaudhuri thereupon ordered the discharge of the immoveable properties upon certain terms which will appear from the following judgment.

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—Kanai Lal Khan died on the 19th of February 1908 leaving him surviving an infant son, Shama Das Khan, his only son by a pre-deceased wife. He also left his mother Lakhi Mani Dasi and his widow Sreemutty Santosh Kumari Dasi and three daughters. He was living jointly with his cousins, sons of his father's brother. On the 21st April 1908 the Petitioner, Raman Lal Khan, was appointed guardian of Shama Das Khan for the purpose of taking out Letters of Administration. On the 6th of July 1908 he obtained an order for grant to him of such Letters of Administration limited during Shama Das Khan's minority. The estate was a very large one, the gross value appearing from the affidavit of valuation to be over 26 lacs. The debts and trust properties amounted to over 9 lacs. There was considerable difficulty in finding sureties and on the 9th of July Mr. Justice Woodroffe made a special order giving the Registrar leave to accept Bunwari Lal Khan and Mani Lal Khan two of the cousins of the deceased as sureties for the Petitioner upon their executing the usual bond but with a charge upon their immoveable property. Now so far as the charge on their immoveable property is concerned, it was a special order and somewhat unusual. As a rule sureties give their personal bond and their properties are not charged. Shama Das Khan died on the 15th December 1912 an infant, unmarried and intestate. Lukhi Mani, the paternal grandmother, thereupon became his heir. This is an application on behalf of the Petitioner that the sureties might be discharged and the immoveable properties discharged from liability under the obligation of the said bond and that the Registrar do execute and register a release or other proper document discharging their respective shares. I made my order on the petition but before the order was drawn up, the Registrar brought certain facts to my notice and upon a reconsideration of the matter I think the order I originally made should be modified. There is no precedent for discharging sureties or discharging the bond executed by them. There can also be no order for substitution but the facts of this case are somewhat peculiar. There is no precedent for charging the immoveable properties of sureties. These properties are very large. If it be strictly held that "once a surety he is always a surety" these properties would remain charged for an indefinite time much to the prejudice of the person concerned. It it stated upon affidavits that the residue of the property has been made over to Lakhi Mani Dasi the heiress of the infant that she ap-

(1) I. L. R. 29 Cal. 68 (1901).

pointed her sons-in-law to examine the accounts of the administrator and that upon examination they as her attorneys have been satisfied with the accounts.

There is an affidavit by the sons-in-law about this matter and there does not seem to be any reason for doubting that the statements made in their affidavit are not true. Under the original bond an inventory was to have been filed on or before the 12th August 1909. The inventory and accounts were filed on the 16th February 1912. No further accounts have been filed. I think a copy of the account or an abstract thereof which the sons-in-law say they have examined and found correct ought also to be filed in this Court with their certificate that that is the account they have examined and which they have found correct. The account is to be verified by the applicant and the certificate is also to be verified. There was a considerable amount of debts due by the deceased Kanai Lal Khan. The affidavit of the administrator is that these debts have been paid. I think the receipts obtained from these persons ought to be filed. Then, amongst the assets there was a large amount of Government securities which stood in the name of the deceased, but it was stated in the original petition for Letters of Administration that they were purchased with the money of the joint family. So far as these Government securities are concerned there is a statement that the claim of the co-sharers has been released: they do not make any claim as against the estate in respect of them. The administrator says so in his affidavit and I think the affidavit on this point can be accepted. Very large sums were also lent out in mortgages, but now there is only a small sum outstanding. I think that the co-sharers should give a clear receipt to the administrator that they have no claim against the estate of the deceased. I do not think it is necessary to re-examine the account in Court, there is no procedure to examine these accounts. It is never done in practice. I do not want these persons to be put to additional cost and trouble.

I think if the accounts are filed with the certificate such as I have mentioned they may be accepted as correct. So far as this Court is concerned it has been held in the case of *Raj Narain Mukerjee* v. *Ful Kumari Debi* (1) by Sir Francis Maclean and Dr. Banerjee that under the provisions of sec. 130 of the Contract Act the surety of an administrator can come to Court on notice to the other side to ask to be discharged from future administration of estate upon a proper case being made for revocation of a continuing guarantee. Taking all the circumstances into consideration and treating this as a special case I direct that a fresh bond may be taken from the present sureties for their administration of the estate keeping them personally liable to the extent of the original amount of the bond but it is not necessary to keep their properties charged any further, as the debts have been satisfied as also the claims in respect of the Government securities. Therefore the fresh bond will only be a personal bond without in any way affecting their property. The Petitioners will remain liable for their administration of the estate. The immoveable properties only will be considered as released by this order.

Mr. Khettry.—There is a large number of receipts and they are mostly in Bengali.

CHAUDHURI, J.—The Registrar is to satisfy himself about the receipts.

(1) I. L. R. 29 Cal. 68 (1901).

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Mr. Khettry.—And a copy of receipts may be filed.

CHAUDHURI, J.—I give you liberty to satisfy the Registrar about the receipts. He will give such directions about them as he thinks fit.

Messrs. G. C. Chunder & Co., Attorneys for the Petitioner.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 35 OF 1912.

JENKINS, C. J. MOOKERJEE, J. 1913, 9, July.	BENGAL PROVINCIAL RAILWAY, Defendant, Appellant, *v.* GOPI MOHON SINGH, Plaintiff, Respondent.

Negligence—Railway level-crossing, gate at, left open—Contributory negligence.

A gate at a railway level-crossing, left open, is an invitation to all comers to cross the line and an intimation that it could be crossed with safety, and is evidence of negligence for which the Railway Company may be made liable in the absence of contributory negligence on the part of the party injured in consequence of such negligence.

This was an Appeal preferred on the 19th of March 1912 against the decree of Mr. Justice Digambar Chatterjee, dated the 27th of February 1912, in Appeal from of Appellate Decree No. 1868 of 1910.

The Plaintiff sued the Defendant Company for damages for injuries alleged to have been caused to his carriage by a collision with a running train of the Company's at a level-crossing on its line. At the time the collision happened the gate at the crossing was open and there was no gateman present to warn the driver of the carriage. The Plaintiff's case was that the gate having been left open amounted to a statement and a notice to the public that the line at the time was safe for crossing. The Defendant Company in answer averred that the collision was due to the negligence and rashness of the Plaintiff's driver, inasmuch *inter alia* as the Railway line towards the direction from which the train arrived was visible from the gate and the driver would have seen the train approaching if he had looked that way before crossing the line.

The Munsif held that there was contributory negligence on the part of the Plaintiff's coachman, who had deposed that when he came over the line, the train was only 3 cubits off and that he did not try to ascertain before crossing the line whether any train was in sight or not. He accordingly dismissed the suit observing that "the coachman's knowledge that the gateman was absent should have prevented him from taking the fact of the gate being open as an invitation and notice to him to enter, as ordinarily any sensible man would be cautious and circumspect before he attempts to cross any railway line even if there be none to warn him."

On appeal by the Plaintiff before the Subordinate Judge, it was conceded on behalf of the Company that the Company was chargeable with negligence in leaving the gate of the level-crossing open, but it was contended that the Plaintiff's coachman on reaching the gate must have seen the train coming on and that he took the chance of clearing the whole distance over the line before the train arrived and rashly braved the risk of a collision. The Subordinate Judge upon this contention observed that no one but a mad man would endanger his life in that away, but that on the other

hand it appeared that the carriage must have acquired some momentum when it entered the gate and it was probably quite as difficult for the coachman to pull back the horses at a distance of a few feet from the line (from where only the train was visible) as for the driver of the train to bring it to a dead stop as soon as the carriage was sighted, and this happened when the train was about 120 feet off from the spot. He held that "the proximate cause of the accident was the running of the train against the carriage and not the running of the carriage across the line, there being no obstruction at the time it was passing, and that the last opportunity of avoiding the accident was with the Defendant Company." Accordingly he decreed the suit.

The Defendant Company preferred this Second Appeal.

Babu Provash Chandra Mitra for the Appellant.

Babu Heralal Sanyal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is an Appeal under cl. 15 of the Letters Patent from a judgment of Mr. Justice Digambar Chatterjee confirming the decree of the lower Appellate Court.

The suit was one brought by the Plaintiff against a Railway Company for damages. The cause of action alleged was that a train of the Defendant Company ran into and damaged the Plaintiff's carriage as it was crossing the Defendant Company's line. The question therefore turns upon whether or not there was negligence on the part of the Defendant Company, and if so, whether or not there was a contributory negligence on the part of the Plaintiff. As this case comes before the High Court by way of Second Appeal, we cannot disturb any finding of fact, if there was any evidence to support it. The Judge of the lower Appellate Court has come to the conclusion that the proximate cause of the damage to the Plaintiff's carriage was the running of the train against the carriage, and he finds that there was negligence on the part of the Defendant Company. The evidence shows that there was a gate at this level crossing where the accident occurred and that his gate was left open. There was thus an invitation to all comers to cross the line and an intimation that it could be crossed with safety. There is, therefore, ample evidence to support the finding of negligence against the Defendant Company and it cannot be disturbed.

Then, was there contributory negligence on the part of the Plaintiff? There again we have the finding of the lower Appellate Court that there was not, for the learned Judge of that Court excludes the running of the carriage across the line, as he terms it, as being a cause of the accident, and that expression in the context in which it appears amounts to a negation by the Court of any contributory negligence on the part of the Plaintiff.

The result then is that we have negligence proved to the satisfaction of the lower Appellate Court on materials which justify that finding, and contributory negligence on the part of the Plaintiff not proved to the satisfaction of that Court. The result is that the claim in the suit is established.

There remains to be seen whether damages are proved. The evidence in support of those damages has been criticised before us, and it has been suggested

that there has been no damage. We have not gone through the evidence, nor is it necessary that we should do so, because we accept the finding of the lower Appellate Court that Rs. 316 has been proved to have been spent by the Plaintiff, in repairing his carriage. This clearly establishes damages resulting from the tort of the Defendant Company.

This Appeal, therefore, in my opinion must be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 829 OF 1910.

HARINGTON, J. MOOKERJEE, J. 1912, 8, March.

PROSUNNO KUMAR BOSE, Defendant, Appellant,

v.

JAMALUDDIN MAHOMED, Plaintiff, Respondent.

Contract Act (IX of 1872), secs. 69, 70—Contribution, suit for—Co-sharer under-raiyats—Sale by one to the other not recognised by landlord—Decree for rent against both discharged by vendor—Right to recover.

A and B were under-raiyats in respect of a non-transferable holding. B transferred his share to A in 1904. The transfer was not recognised by their landlord. The landlord obtained a decree in a suit for arrears of rent against A and B in respect of the years 1902—05, whereupon A satisfied the decree and brought a suit for contribution against B.

Held—*That sec. 69 of the Contract Act is applicable to the present case and B is bound to make compensation to A.*

Held further—*Even assuming that sec. 69 has no application, sec. 70 undoubtedly covers the case.*

This was an Appeal preferred on the 14th of March 1910 against the decree of Babu Annoda Charan Sen, Subordinate Judge of Zillah Dinajpur, dated the 4th of December 1909, affirming that of Babu Kamini Kumar Mukerjee, Munsif of that place, dated the 31st of March 1909.

The material facts will appear from the judgment.

Babu Mohini Mohan Chucherbutty for the Appellant.

Babu Gour Chandra Pal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal on behalf of the first Defendant in a suit for contribution. The Plaintiff and the second Defendant are under-raiyats and possess their holding in equal halves. In 1904 the second Defendant transferred his half share of the holding to the first Defendant. The superior landlord who was clearly not bound to recognise this transfer, brought a suit for arrears of rent against the Plaintiff and the second Defendant to recover his dues in respect of the years 1902—1905. He obtained a decree and proceeded to execute it by the attachment of the moveables of the Plaintiff. The Plaintiff thereupon satisfied the decree and commenced the present action for contribution. The sole question in controversy is whether the first Defendant can be made liable for any portion of the sum paid by the Plaintiff. It has been argued on his behalf in this Court that he ought not to be made liable because neither under sec. 69 nor under sec. 70 of the Indian Contract Act is any liability imposed on him.

Sec. 69 provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be re-

imbursed by the other. It has been argued that the first Defendant was not bound by law to pay the money which has been paid by the Plaintiff, because the decree satisfied was not against the first Defendant. This contention, upon a superficial view of the matter, may seem to have some force, but upon closer examination, it turns out to be fallacious. The Plaintiff by the payment which he made satisfied the arrears of rent due on account of the holding and that rent was payable unquestionably by the Plaintiff and the first Defendant. We are therefore not prepared to hold that sec. 69 has no application. The view we take is supported by the observations in *Mathoora Nath* v. *Kristo Kumar* (1) and *Swarnomoyee* v. *Hari Das* v. (2), notwithstanding the dictum in *Fateh Ali* v. *Ganga Nath* (3).

But even if it be assumed that sec. 69 has no application, sec. 70 undoubtedly covers the case. That section provides that where a person lawfully does anything for another person not intending to do it gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of the thing so done. There can be no question that the first Defendant has enjoyed the benefit of the payment made by the Plaintiff. If the Plaintiff had not satisfied the decree, the landlord might have proceeded to sell the holding in which the first Defendant was interested. The result of the payment by the Plaintiff, consequently, has been that the property of the first Defendant has been saved, and the act of the Plaintiff cannot be deemed, to use the language in *Damodara* v. *Secy. of State* (4), "an officious interference of one man with the affairs or property of another." In our opinion sec. 70 completely covers the case, *Smith* v. *Dino Nath* (5).

(1) I. L. R. 4 Cal. 369 (1878).
(2) 6 C. W. N. 903 (1902).
(3) I. L. R. 8 Cal. 113 (116) (1881).
(4) I. L. R. 18 Mad. 88, 93 (1894).

The result is that the decree made by the Subordinate Judge must be affirmed and this Appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2118 OF 1909.

N. R. CHATTERJEA, J.
WALMSLEY, J.
1913,
Heard, 17 & 22, July and 4 & 5, August.
Judgment, 4, September.

SREEMUTY BASANTA KUMARI DASSYA, Defendant, Appellant,
v.
MOHESH CHANDRA SHAHA and others, Plaintiffs, Respondents.

Co-sharer, suit by, for joint possession of land and injunction—Injury or likelihood thereof not alleged in plaint—Hostile title not set up by defence—Decree for joint possession if should be given—Ouster, meaning of—Common law action for ejectment and equity suit for injunction, distinction between, if should be introduced in this country—Principle of equity, justice and good conscience.

The Plaintiffs and the Defendant were co-sharers in a mehal. Each co-sharer was in sole occupation of some lands appertaining to the mehal as khamar *lands and the Defendant was in such possession of some lands. On the Defendant commencing some building on portions of the land the Plaintiffs brought a suit for recovery of joint possession of the land in dispute on declaration of their proprietary right to their share in it, for demolition of the building raised, for an injunction restraining the Defendant from building on*

(5) I. L. R. 12 Cal 213 (217) (1885).

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the land. The Defendant did not claim any exclusive title to the land and the Plaintiffs did not allege that they had sustained or were likely to sustain any substantial injury by reason of the sole occupation of the land or building thereon by the Defendant:

Held—*That the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co-sharers nor does it entitle the latter to a decree for joint possession.*

Ouster means 'dispossession' of one co-sharer by another where a hostile title is set up by the latter and when the occupation of the latter is not consistent with joint ownership.

Held—*That there being no assertion of hostile title in the present case there was no ouster of the Plaintiffs by the Defendant.*

That the distinction between a common law action for ejectment and an equity suit for an injunction should not be introduced in this country and questions of joint possession and injunction should be decided on the principles of justice, equity and good conscience.

That in the present case the mere fact that the land in suit adjoined the dwelling-house of the Plaintiffs irrespective of any injury would not be a sufficient ground, consistent with the principles of justice, equity and good conscience, to give joint possession or order the demolition of the buildings already erected or restrain the Defendant from building on it.

This was an Appeal preferred on the 12th of October 1909 against the decree of Babu Kissori Lal Sen, Subordinate Judge, 1st Court of Zillah Dacca, dated the 27th of August 1909, modifying the decree of Babu Gour Krishna Bose, Additional Munsif of that place, dated the 25th of February 1909.

The facts will sufficiently appear from the judgment.

Dr. Rash Behary Ghose, *Babus Dwarka Nath Chuckerbutty* and *Harendra Narain Mitra* for the Appellant.

Messrs. B. Chakravarti, *S. P. Sinha*, *Babus Mahendra Nath Roy* and *Ramani Mohun Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal arises out of a suit for recovery of joint possession of the land in dispute on declaration of Plaintiffs' proprietary right to 19 and odd gundas share in the same, for demolition of the buildings raised on portions of the land by the principal Defendant, and for an injunction restraining her from building on the land.

The Court of first instance merely declared the Plaintiffs' title to the 19 gundas and odd share of the land and rejected the other prayers. On appeal the learned Subordinate Judge held that Plaintiffs were entitled to joint possession of their share with the Defendant No. 1 and to that extent modified the decree of the first Court. The Defendant No. 1 has appealed to this Court against the decree in so far as it gave joint possession and the Plaintiffs have preferred cross-objections in so far as that decree disallowed the prayer for injunction.

It appears that the Plaintiffs, the Defendant No. 1 and the *pro formâ* Defendants, are co-sharers of a mehal within which the land in dispute is situated, the share of the Plaintiffs being 19 gundas and odd and that of the Denfendant No. 1 one-half of the share of the Plaintiffs. The remaining shares belong to other co-sharers.

It appears that each of the co-sharers is in sole occupation of same lands appertaining to the mehal as *khamar* lands. The land in dispute was in the possession of a family of barbers, who held the land at a nominal rent, and used to do service for both the Plaintiffs and the Defendant No. 1, until the Defendant No. 1 purchased it from the barbers. The Defendant No. 1 after her purchase having commenced some buildings on the land, the Plaintiffs instituted the present suit. The land is to the west of and adjoins the dwelling-houses of the Plaintiffs, and the Defendant No. 1. The other co-sharers who have their dwelling-houses elsewhere apparently have no objection to the sole occupation of the land by the Defendant No. 1, and they take no interest in the suit.

The learned Subordinate Judge has held that there was an ouster of the Plaintiffs by the Defendant, and that the injury to the Plaintiffs must be substantial and incapable of being remedied in a suit for partition.

The first portion of the third paragraph of the written statement may, at first sight, be considered to lend some colour to the contention that the Defendant No. 1 set up an exclusive right to the land, but later on it is stated "the Plaintiffs and the other co-sharer maliks according to their own convenience have at different times taken possession of different lands of the joint taluk. This Defendant also took distinctive possession for upwards of 12 years of the land under claim." This shows that the Defendant did not mean to set up any exclusive title to the land, and it appears that the Defendant's case as understood in the Court of first instance really was one of sole occupation as *khamar* land by a co sharer, and not a case of adverse possession as against the other co-sharers, and it was stated in that Court that the plea of limitation although it found place in the written statement had no real foundation.

The questions whether or not the vendors of the Defendants No. 1 had any transferable right and whether in the absence of a right to transfer, the land became *khas* of the co-owners were not gone into, and the case was argued in both the Courts below on the footing that it was joint property and with reference to the rights of co-owners.

That being so, and there being no denial of the Plaintiffs' title, the question is whether sole occupation of the land by the Defendant No. 1 constituted an ouster of the Plaintiffs. We do not think that the mere fact of sole occupation by one co sharer necessarily constitutes an ouster of the other co sharers, nor does it entitle the latter to a decree for joint possession. We need not discuss the various cases cited in argument on both sides, and need only refer to the case of *Watson* v. *Ram Chand* (1), *Dwijendra Narain* v. *Purnendu Narain* (2) and *Anand Chandra* v. *Parbati Nath* (3). The first case dealt with the rights of co sharers in respect to agricultural lands and the last two related to joint lands on which permanent structures had been raised by one co owner. Most of the authorities relied upon, on behalf of the Respondents, were considered in the last two cases.

When a co-sharer is in sole occupation of a portion of the joint property, for instance, by building, or by carrying on cultivation on it, the other co sharers are to that extent excluded from making any use of that particular portion, as it is

(1) L. R. 17 I. A. 110 : s. c. I. L. R. 18 Cal. 10 (1890).
(2) 11 C. L. J. 189 (1910).
(3) 4 J. C. L. 198 (1906).

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difficult to see how two different co-sharers can at the same time build upon or carry on cultivation, on one and the same piece of land. If the sole occupation of one co-owner in this manner constitutes ouster of the other co-owners, then in every case the occupation by the co-owners of the lands in their respective possession would constitute an ouster of each other, and this certainly cannot be held "Ouster" must, therefore, mean dispossession of one co-sharer by another where a hostile title is set up by the latter, and where the occupation of the latter is not consistent with joint ownership. This being so, and there being no assertion of hostile title in the present case, there was no ouster of the Plaintiffs by the Defendant No. 1.

The distinction between a common law action for ejectment and an equity suit for an injunction, as pointed out in the case of *Dwijendra Narain* v. *Purnendu Narain* (2), should not be introduced in this country. The distinction has been uniformly ignored in numerous cases, and the same equitable doctrine has been applied to cases of ejectment by one co-owner against another, as well as to cases of injunction between such co owners. As pointed out by the Judicial Committee in the case of *Watson* v. *Ram Chand* (1), (in which both joint possession and injunction were claimed) the questions should be decided on the principles of justice, equity and good conscience, and we proceed to decide the case upon those 'principles.'

It will appear from the plaint that the Plaintiffs did not allege that they had sustained or were likely to sustain any substantial injury, by reason of the sole occupation of the land or building thereon by the Defendant No. 1. All that they said was that they had a 19 gundas and odd share of the land as co-owners and were entitled to joint possession; but we have already said in the absence of any denial of title or ouster, the mere fact that one co-sharer has taken possession of a portion of joint property, irrespective of any other consideration, does not entitle another co sharer to joint possession. The learned Subordinate Judge says that the land in dispute is apparently the only site where their dwelling-house admits of expansion. It is pointed out on behalf of the Appellant that the dwelling-houses of the parties are surrounded on all sides by *ejmali* lands, as appeared from the Commissioner's report. But apart from that, the mere fact that the disputed land is the only site on which the dwelling houses admit of expansion would not by itself be sufficient to entitle the Plaintiffs to joint possession. No doubt a piece of land adjoining a dwelling house may be, and often is, very valuable for that purpose, and the fact that co-sharers may have other joint lands at a distance might not be a sufficient answer to the Plaintiffs' claiming joint possession, if they sustain substantial injury by reason of the Defendant's alone occupying the entire piece of land. It is unnecessary to consider whether it would be equitable to refuse joint possession to one co sharer and restrain him from making advantageous use of the land by building thereon in the same way as the other co-owner where each of two co-owners wants to make such advantageous use of a piece of land adjoining their dwelling-house when it can be conveniently used by both. The Plaintiffs in the present case never alleged that they

(1) L. R. 17 I. A. 110: s. c. I. L. R. 18 Cal. 10 (1890).

(2) 11 C. L. J. 189 (1910).

were going to expand their dwelling-house on the disputed land or that they even intended to do so or to make any other advantageous use of the land. They merely stood upon their rights as co-owners. Under these circumstances, the mere fact that the land adjoins the dwelling-house of the Plaintiffs, irrespective of any injury, would not, we think, be sufficient ground for giving joint possession to them. The learned Subordinate Judge, no doubt, says that the injury to the Plaintiffs must be substantial. Had there been a finding upon the evidence that the Plaintiffs had sustained or would sustain injury, we could not interfere with it. But no injury, actual or potential, was alleged in the plaint, no issue was raised and no evidence was adduced on the point.

The land was in possession of certain tenants. Had the Defendant No. 1 obtained a transfer of the lands from them, the Plaintiffs could not have claimed *khas* possession. The Defendant No. 1 apparently wanted the land for extension of her dwelling-house and therefore obtained an assignment of the land from the tenants, she peacefully entered into possession, and then built some structures on it. She does not deny the Plaintiffs' title. The Plaintiffs have other lands in their sole occupation and have constructed pucca buildings on those lands without any objection on the part of the Defendant or the other co-sharers. Some of the other co-sharers have similarly constructed pucca structures on the lands in their occupation. The learned Subordinate Judge says that that would not justify new ouster. He assumes that the Plaintiffs' or the other co-sharers' occupation of the other lands constitute ouster, but sole occupation of different parcels of lands by different co-sharers according to their convenience does not constitute ouster of the others, and it would be inequitable to hold that although the Plaintiffs and the other co-sharers are in sole occupation of other *ejmali* lands, this particular land occupied by the Defendant No. 1 should be the subject of joint possession. The disputed land, it is true, adjoins the dwelling-houses of the Plaintiffs and the Defendant No. 1, but we have already pointed out that the Plaintiffs never said that they wanted the lands for building or any other purpose or that they would sustain substantial injury by reason of the Defendant's sole occupation of the land and there is no evidence to show that they would do so. Under these circumstances, we do not think it would be consistent with the principles of justice, equity and good conscience either to give joint possession or order the demolition of the buildings already erected or restrain the Defendant No. 1 from building on it. We do not see why the equities between the parties cannot be worked out in a suit for partition, more specially when the Defendant No. 1 has not built upon the whole of the land.

Then as to compensation. The Subordinate Judge found that if the injury is to be calculated, having reference to the rent that was paid by the tenants, it is *nil*. The rent in the Plaintiffs' share was only half anna a year; that, however, was the rent paid by the tenants who used to do service and we might have directed the Defendant No. 1 to pay compensation to the Plaintiffs for the sole occupation of the land by her according to the proper rent of the land. But the Plaintiffs themselves are in sole occupation of other *ejmali* lands for which they do not pay anything to the Defendant No. 1. Under

the circumstances, the Plaintiffs cannot claim compensation for this piece of land, nor do they seem to care for compensation.

We are, accordingly, of opinion that the decree of the Court of Appeal below should be set aside, and that of the Court of first instance restored. Under the circumstances of the case, however, each party will bear his own costs in all the Courts.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2126 OF 1910.

HOLMWOOD, J.
CHAPMAN, J.
1913,
6, January.

BASKI MAMRIK and others, Defendants, Appellants,
v.
SUPHAL MANJHI and others, Plaintiffs, Respondents.

Sonthal Perganahs Regulation (III of 1872), secs. 10 and 11—Sonthal Perganahs Settlement Rules, No. 27—Succession to jote *held by Hindu* goala*—Local custom if applies to Hindu immigrants—Point incidentally decided in settlement proceeding, if* res judicata.

A finding of the settlement officer in a proceeding under the Sonthal Perganahs Regulation, III of 1872, which was not necessary for the purpose of the proceeding and was arrived at only incidentally does not operate as res judicata.

Rule 27 of the Sonthal Perganahs Settlement Rules under which resident relatives who have taken part in the management of the family jote ***are to be given preference as heirs is only applicable to suits before settlement officers.***

The Rule was intended to meet the peculiar customs of the Sonthals and aborigines in the locality and does not apply to persons governed by the Hindu law, who have settled in the Sonthal Perganahs.

This was an Appeal preferred on the 4th of July 1910 against a decree of Mr. H. W. Scroope, District Judge of Sonthal Pergannahs, dated the 29th of March 1910, reversing a decree of Mr. W. H. Thomson, Subordinate Judge of that place, dated the 16th of May 1909.

The parties in this case were up-country *goalas* who had permanently settled in Sonthal Perganahs. The Plaintiffs were the sons of four brothers, Nabbi, Shyam, Persi and Mathur, and they laid claim to all the property moveable and immoveable left by one Dewli Majhiaine, the younger widow of one Dular Manjhi, who they (the Plaintiffs) averred, was the son of Sanu Manjhi, the brother of their grandfather Nani. Dewli Majhiaine died in Bhado 1904, A. D., at Sahara, in Taluk Sahara Mahara. She was a childless widow and so also was her co-wife Sundri, the elder widow of Dular, who predeceased both of them.

Defendant Maharaji Mamrik was the son of Dewli Majhiaine's sister and his case was (1) that Dular's father and the grandfather Nani of the Plaintiffs were not brothers but came from different stocks, (3) that according to the Sonthal Perganahs *khunapuri* rules, he (Defendant) having lived almost all his life with Dewli and assisted her in her cultivation is entitled to inherit her *jote* lands, (4) that the judgment of the Assistant Settlement Officer in his objection suit No. 116 of 1901, Mohar Manthi *v.* Maharaji Mamrik and Dewli Majhiaine, operated as *res judicata.*

The issues framed *inter alia* were

"*First.*—Are the Plaintiffs the legal heirs of Dular Manjhi?

"*Third.*—Does the decision of the

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Assistant Settlement Officer in his objection suit No. 116 of 1901, act as a bar to this suit?

"*Fourth.*—Are the Plaintiffs even if they be Dular Manjhi's legal heirs, entitled to the properties they sue for?"

The history of the family as stated by the Subordinate Judge was as follows: One Lachhman Manjhi was believed to have been the original settler of the village Sahara and he was probably its first *mustagir*. The oral evidence showed that his grandson Dular was imprisoned for a dacoity during the Mutiny of 1857 and left two wives behind him at home, Sundri and Dewli, and on his death in jail some 10 years later, these ladies were appointed joint *ijaradars* of the village in 1868 by the zemindar and continued as such till Mr. Wood's settlement and were formally confirmed as *mustagirs* on the 3rd December 1873. Long before Mr. Wood's settlement, Dewli Majhiaine, the younger widow, brought and settled her brother Gannesh Mamrik in the village and gave him some lands, and bighas 28-2-6 were recorded in his name during the settlement. Her then *kurpardaz* Plaintiff Mohar Manjhi opposed this on the ground that it was being done to defraud him and his brothers, the reversionary heirs of her husband. His objection was tried by Munshi Isri Prosad, Assistant Settlement Officer (case No. 362 of 1874), who dismissed it on the ground that Gannesh had been 14 years in possession but remarked that Mohar Manjhi could, if so advised, fight out his claim on the death of Dewli Majhiaine. Dewli and Plaintiff Mohar having thus fallen out, she took her brother's son Defendant Maharaji Mamrik under her wings and he became practically an adopted son to her and managed all her affairs till her death and was the *de facto mustagir*, till Mr. McPherson's settlement began in 1900, A. D. Sundri died three years before the second settlement and Dewli bacame sole *mustagir*. At Mr. McPherson's settlement, it was found that the *mustagir-ka-jote*, *i.e.*, the *jote* that Mr. Wood had recorded in the name of Sundri and Dewli had decreased from bighas 68-5-4 to bighas 57-16-18, while that which Defendant Maharaji had inherited from his father Gannesh had increased from bighas 38-2-6 to bighas 73-1-15. Plaintiff Mohar Manjhi again raised his voice in protest, he alleged that the increase was due to Dewli having given Maharaji a portion of her *jote* and to having settled with him *fouti-ferazi* lands instead of adding them to the *mustagir-ka-jote* and he brought a suit in the Settlement Court to cancel Dewli's alienations and illegal settlement and add the lands to the *mustagir-ka-jote* and declare him to be entitled to succeed to the whole of it, on her death. The case was tried by Babu Jotindra Narain Mukerji, Assistant Settlement Officer, who on the 28th June 1901 found that Dewli had of a fact transferred bighas 21-0-10 of her own land to Defendant Maharaji, so he restored it to her *jote* as according to him, she had but a life-interest in it; her recorded *jote* therefore rose from bighas 51-16-18 to bighas 72 17 8 against bighas 68-5-4 the recorded area at Mr. Wood's settlement, while Maharaji's fell from bighas 73-1-15 to bighas 52-1-15 against bighas 38-2-6 the recorded area at Mr. Wood's settlement. The Assistant Settlement Officer did not think the settlement of *fouti-ferazi* lands with Defendant Maharaji Mamrik, illegal, and as he had been long in possession without objection, he was confirmed as raiyat of

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bighas 52-1-15 of land. Incidentally he also framed and tried the issue of Mohar's kinship to Dular, the husband of Dewli, and found against him and immediately after ruled that the investigation was unnecessary as Mohar had no right to have brought his claim to Court during the lifetime of Dewli.

While this suit was in progress Plaintiff, Mohar Manjhi, worked up an agitation against Dewli continuing as *mustagir*, on the ground that she was too old to manage her own affairs and was entirely under the guidance of her nephew Maharaji, so on the 30th March 1900 she was removed and Mohar Manjhi appointed in her place.

Dewli died in August 1904 and Plaintiff Mohar promptly took possession of all her belongings; a possession case under sec. 145, Criminal Procedure Code, followed which ended in everything being handed over to Defendant, Maharaji Mamrik, on the 28th November 1904 and then Mohar, linking his brothers and cousins to himself, brought the present suit.

Upon these facts, the Subordinate Judge held that the decision of the Assistant Settlement Officer of the question as to Mohar's relation with Dular being unnecessary for the purposes of the proceeding before him was not *res judicata*. On the evidence he held that Mohar and his brothers were the great-grandchildren of Dular's grandfather, and that consequently the Plaintiffs were the legal heirs of Dular. He however dismissed the Plaintiffs' suit as, according to him the succession to the *jote* must be governed by the Sonthal Perganahs Settlement Laws and one of these was that resident relatives take precedence over non-resident ones, consequently the claim of Plaintiffs, Kripali, Matuki and Ganu, who were non-residents, to succeed to the *jote*, must be dismissed. As to the other five Plaintiffs, Sufar, Mohar, Dular, Tulsi and Uddan, he held that they were governed by *khanapuri* Rule 27 promulgated by Government, *viz.*, the only persons entitled to succeed to a *jote*, are the relatives who are residents of the village and have taken part in the management of the family *jote*, as these 5 resident Plaintiffs did not even pretend to have assisted Dewli in the management of her *jote*, on the contrary, the chief among them Mohar had been at war with her for 26 years and thwarted her in every ac of her life. In the course of his judgment on this point he observed :—

But I am told that the *khanapuri* rule has not the force of Law and cannot override the personal laws of a Hindu even in the Sonthal Perganahs. I have hunted up old cases and find the *khanapuri* rule under reference does not owe its origin to the idiosyncrasy of a Settlement Officer but is based on the case law of the District and such being the case it is Defendant Maharaji Mamrik whom the fiscal authorities here have to recognise as Dewli's successor in her *jote* and all its appurtenances such as agriculturist's residence, rights to *mahua* fruit, etc., and I must therefore hold that the Plaintiffs though Dular's heirs-at-law are not entitled to the immoveables they have sued for, but only to her moveables.

On appeal to the District Judge the only point considered was whether local custom and the case law of the district should debar the Plaintiffs from succeeding to Dewli's lands.

The District Judge's judgment on this point was as follows :—

"In civil revision case No. 48 of 1907 the Divisional Commissioner who is the higest Appellate Court of those constituted under Act XXXVII of 1855 after referring to the Attestation Rule 27 quoted above, interpreted it as follows :—' In accordance with this recognised and prescribed custom, inheritance has been given to more distant

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relations who fulfilled the above conditions in preference to nearer ones who do not, and it is upon this *dictum* that the Defendant's pleader mainly relies in his argument. But the rule refers to the family *jote* and evidently contemplates a dispute between members of the same family. The Defendant, a sister's son of the deceased Dular's widow, does not belong to Dular's family at all and his case cannot be regarded as falling within the rule quoted.

"Then again I am referred to the Commissioner's order in Settlement Appeal No. 15 of 1909-10 (*Rajkishore Gorai* v. *Gosta Behari Gossain*) in which the Court found the Appellant at the time of his father's death was not living jointly with his father and his three brothers, but in another village where he had acquired a *jote* of his own which he held separately from his brothers and that he had voluntarily ceased to be a resident in the village and to take part in the management of the *jote*. Obviously there were strong reasons in this instance for applying Attestation Rule 25 but the facts are radically different from those of the present case.

"In his Appellate order in Settlement Appeal No 878 of 1905-1906, the Settlement Officers of the Sonthal Perganahs makes the following remarks regarding Attestation Rule 27 and the manner in which it has been applied in the course of the settlement operations: 'Now this (*i e*, Rule 27) means that we are not bound to recognise outside heirs who have never cultivated the family *jote* and come in to claim their share. This rule we have applied with discretion and it is one that is really applicable to Sonthals and the lower castes. It should only be applied with discretion in the case of Dokkus (*i.e.*, non-aboriginals) of the class of the parties.'

"The parties to the present case are not Sonthals and as they are up-country *goalas*, it cannot be said that they belong to the lower caste Hindus. The Settlement Officer's remarks are relevant inasmuch as they show that the rule has not been interpreted as a hard-and-fast one throughout the settlement operations which have been in progress throughout the district for a period of ten years but that it has been administered with discretion.

"The rule is based upon the general principle which is the basis of all Agrarian law in Sonthal Perganahs that the land is for the use of the village community and that a man who had settled down at a distance from his own village ceases to be a member of the village community and forfeits his right to succeed as heir to his ancestral holding to his relations who have remained in the village. But practically none of the conditions which the rule was framed to meet, exist in the present case. The Plaintiffs with the exception of Nos. 6, 7, 8 are all residents of the village in which the disputed land lies and the Plaintiff Mohar is *mustagir* or headman of the village having succeeded Mussammat Dewli in that office. All the Plaintiffs, it may be noted here, are closely related and far from their having ceased to take an interest in the land which they claim, they or their representatives at the time have been striving to get possession of it for nearly forty years. During the widow's lifetime it was obviously impossible for them to assist her in the cultivation of her *jote* for she brought in her own relatives to prevent them from so doing. And I do not for a moment consider that Rule 27 should apply to their case because their efforts to cultivate the *jote* in the widow's lifetime were unsuccessful.

"To me the Subordinate Judge's order dismissing the claim of the Plaintiffs to succeed to the lands of Dewli as lawful heirs, seems tantamount to the sanctioning of an illegal alienation of her *jote* by Dewli in favour of a relation whom she brought in from another village. The Plaintiffs are the sons of four brothers, five of them reside in Mouzah Sahara and three outside the Mouzah and the circumstances of the case point irresistibly to the conclusion that the case as regards all is the same and that none of them can be regarded as having voluntarily ceased to interest himself in these lands. Anyone of them has a better right to succeed to the lands than the Defendant. Holding this view, I modify the decree of the Subordinate Judge and allow a decree in favour of the Plaintiff in respect of all Dewli's immoveable as well as of her moveable property. I do not think it necessary to make any order as to costs."

The Defendant preferred this Second Appeal.

Babu Atul Krishna Roy for the Appellants.

Babu Peary Mohan Shikdar for the Respondents.

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The JUDGMENT OF THE COURT was as follows :—

This Second Appeal arises out of a suit brought by the Plaintiffs for recovery of the moveables and immoveable property of a deceased lady Dewli Majhini, widow of a certain Dular Goala, who died in jail in the year 1867. After his death the zemindars settled the property with his widows and made them *ijaradars*, and *mustagirs* under them. The Plaintiffs are the legal reversionary heirs of Dular Goala, and apart from the question of confiscation which has been raised in this appeal and from certain allegations of *res judicata* which we shall deal with presently, there is no possible reason why they should not succeed as reversioners of Dular Goala. But it is argued in this appeal that Rule 27* framed under sec. 10 of the Sonthal Pergannahs Settlement Regulation, III of 1872, applies to all persons resident and settled in the Sonthal Pergannahs and that under that Rule the Defendants are the preferential heirs to the Plaintiffs.

Dealing first with the question of confiscation we find that in neither of the Courts below was there any finding that the Courts had confiscated the property of Dular Goala on his conviction for dacoity during the Mutiny of 1857. On the contrary the finding of the first Court which has been upheld in appeal in the lower Court clearly shows that during the 10 years which Dular spent in jail before his death he was recognised as the owner of the property. There is therefore nothing in the point.

Then as regards the question of *res judicata* the finding of the Settlement Officer on the 28th June 1901 that Mohar had not the kinship to Dular which he alleged was clearly stated by the Settlement Officer himself to be unnecessary and to be outside the scope of the proceeding then before him, inasmuch as Mohar had no right to the estate of inheritance during the lifetime of the widow Dewli Manjhini. He brought a suit to restrain the widow from waste, and as far as the waste was concerned the suit was decreed in his favour. 21 bighas odd was restored to the estate and the alienations improperly made to the Defendants were cancelled. Now if the Settlement Officer's finding that the Plaintiffs had failed to prove their kinship to Dular had been given effect to no such order could have been passed in that suit, for the Plaintiffs would have been nonsuited and the suit dismissed on the ground that they had no *locus standi*. The Settlement Officer's finding appears to have been not only not *res judicata* but to have been erroneous, and the Court of first instance in this case clearly found that the Plaintiffs were the lawful heirs of Dular and the Defendants had not ventured to appeal against this finding. There is therefore nothing in the second ground.

As regards the third point we think that the learned District Judge has dealt with it in a very satisfactory manner. He has shown what the course of custom and the decision of the Courts has been in the Sonthal Pergannahs, and no instance to the contrary to what he has held has been produced before us. It is perfectly clear that the law governing up-country *goalas*

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* The Rule is as follows :—

"The custom of inheritance in raiyati holdings of the Sonthal Perganahs may be stated thus : The person or persons who have been resident in the village and have taken their part in the management of the family jote are the only persons entitled to succeed to it as heirs on the death of the head of the family."

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who choose to settle in the Sonthal Pergannahs is their own Hindu law. We presume that the Regulations of the Sonthal Pergannahs have never been sought to be imposed upon the very numerous Bengalee gentlemen who have made their domicile within the Sonthal Pergannahs, and there is no reason why the rule which applies to the Kayasthas and Brahmins of Bengal should not equally apply to the *goalas* of the North Western Provinces. The rule was clearly made to meet the peculiar customs of the Sonthals and the aborigines in that portion of the country and can have nothing to do with persons who are governed by the Hindu law. Moreover exceptions have been made even in the case of the Sonthals themselves, and the rule has always been applied with extreme discretion and has clearly never been held to be applicable to every case. It is also clear from secs. 10 and 11 of the Sonthal Pergannahs Regulation that the rule is only applicable to suits before Settlement Officers.

We, therefore, think that the third point in this Appeal also fails and the Appeal must be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3413 OF 1910.

STEPHEN, J.
MULLICK, J.
1913,
Heard,
5, February.
Judgment,
20, February.

SHAIZUDDIN and anr., Defendants, Appellants,
v.
MATHURA MOHAN SAHA and others, Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 195, cl. (e), *11, 12 and 17*—Putni, *sale of, registered under the Act, but not recorded in zemindar's sherista under the Putni Regulation (VIII of 1819), sec. 3—Zemindar if must recognise sale—Inconsistent provisions of statutes.*

The Putni Regulation provides rules for the alienation of the whole or a part of a putni *taluk and these cannot be affected by anything in the Bengal Tenancy Act in view of sec. 195, cl.* (e) *of the latter Act.*

The registration of a sale of the whole or a part of a putni *tenure under sec. 12 of the Bengal Tenancy Act does not give the purchaser an interest in the land by force of secs. 12 and 17 of the Act.*

This was an Appeal preferred on the 21st of November 1910 against a decree of Babu Hari Prosanno Mukerjee, Subordinate Judge of Tipperah, dated the 28th of May 1910, reversing a decree of Moulvie Abdul Rahim, Munsif of Comillah, dated the 24th of September 1909.

The appeal arose out of a suit for rent.

The Plaintiffs, claiming to be the purchasers of the *putni* in which the lands in arrears were situated, at a Court sale for its own arrears of rent, sued the Defendants who held those lands for arrears of rent due by them.

The Defendants denied the relationship of landlord and tenant between the Plaintiffs and themselves, on the allegation that the former had not acquired any title to the *putni* by the sale. They also contended that one of the co-sharer zemindars, Saha Banu, having been born before the decree was made in the zemindar's suit for rent though after the institution of that suit and not having been added as a Plaintiff therein, the sale did not pass the defaulting *putni.*

The lower Court held that the sale passed to the Plaintiffs no more than a 5 gundas share of the *putni* and that such 5 gundas share of the rent was not

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proved to have ever been separately collected and so dismissed the suit. The Plaintiffs appealed.

The *putni* was created in favour of one Shukur Mahmud, who appears to have sold it to one Durga Charan Roy and his six brothers some time in 1276, B. S. Durga Charan Roy and his brothers never took any steps to get themselves or any one of them registered in the *sherista* of the zemindars. Shukur Mahmud was dead.

On 10th Ashar 1306, Purna Chandra Roy, proprietor of a 1½ annas share of the *putni*, executed in favour of the zemindars a *kabuliyat* (Ext. 6) in respect of his 1½ annas share whereupon such share was separated from the original *putni* in the sense that he was recognised as *putnidar* to the extent of that share of which the rent also was apportioned. Thus the remaining 14½ annas share with its proportionate share of rent formed an entire tenure thenceforward.

Shukur Mahmud had ceased to have any share whatever in the *putni* ever since 1278. He also died 20 or 22 years ago. Durga Charan Roy also, in whose name the *kobala* of the purchase from Shukur Mahmud was suggested to have stood, had ceased to have any interest in the *putni* and had also died before the *kabuliyat* by Purna Chandra Roy was executed in 1306.

At the time the *kabuliyat* was executed by Purna Chandra Roy in 1306, the owners of the *putni*, as the evidence showed, were as follows :—Kali Kishore Ray, 5½ annas, Haladhar Chatterjee, 8 annas, Brojo Kishore Ray, 1 anna and Purna Chandra Roy, 13 annas.

Between 1306 and 1308, Kali Kishore Roy parted with 5¼ annas out of his 5½ annas to different persons from time to time and thenceforward the owners of the *putni* began to default in a most systematic manner to pay their rent, while no one beginning with Durga Charan Roy ever took any steps whatever for getting himself registered in the *sherista* of the landlords. The result was that the landlords had to bring four successive suits for rent of the *putni*. But these were brought against Dr. Rahim Buksh and Kali Kishore Ray only. Dr. Rahim Buksh was the eldest son of Shukur Mahmud and the best known amongst his heirs. Kali Kishore Roy was one of the seven brothers who purchased the *putni* from Shukur Mahmud and at the time in question was the eldest member of the family, and immediately before the first suit was brought for rent of the *putni* had been holding the largest extent of share of all the Roys. Decrees were obtained in all the four suits and it was in execution of the latest of these decrees that the Plaintiff purchased the *putni*.

Upon these facts, the Subordinate Judge held that the entire defaulting *putni* consisting of a 14½ as. share of the original *putni* passed to the Plaintiff at the sale.

With regard to the allegation that Saha Banu was not joined as a co-Plaintiff in the zemindar's suits for rent the Subordinate Judge found that she was not born until after the decree in the last rent suit.

He accordingly decreed the suit.

The Defendants preferred this Second Appeal.

Babu Tarak Chandra Chuckerbutty for the Appellants.

Mr. S. P. Sinha and *Babu Sarat Chandra Basak* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is a Second Appeal in three analogous rent suits, in which two points are

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raised before us. The first arises thus. One Shukur Mahmud was the owner of a *putni* which the Plaintiffs-Respondents purchased at an execution sale in execution of a decree for arrears of the rent thereof. He sold the *putni* to Durga Charan Roy who purchased on behalf of himself and his six brothers of whom one was Kali Kishore Roy who parted with all his in'erest in the *putni* except 5 gundas. Subsequently the rent of the *putni* fell into arrear and the landlords brought four suits in respect of it against Rahim Buksh, the son of Shukur Mahmud, who had no interes' in the *putni*, and Kali Kishore. They obtained decrees in execution of one of which a sale of the *putni* took place at which the Plain iff became the purchaser.

Neither Durga Charan Roy nor any of his brothers ever took any steps to have the alienation to them registered in the landlord's *sherista*: but the sales were registered under sec. 12 of the Bengal Tenancy Act. In the first Court the Plaintiff failed to recover from the Defendants though it was held that he was entitled to the five annas share of Kali Kishore. In the lower Appellate Court the suits were decreed in respect of the entire claim.

The first point raised before us, which was not raised in either of the Couris below, is that the registration of the transfer to Durga Charan and his brothers opera ed to give them an in'erest in the land affected by force of secs. 12 and 17 of the Bengal Tenancy Act. We consider that in view of sec. 195 (*e*) of the Bengal Tenancy Act this proposition is unsound.

The Reg. VIII of 1819 enacts (sec. 3) that *putni* taluks are valid, and transferable; in sec. 5 it prevents the zemindar from refusing to register and otherwise give effect to alienations, but it entitles him to exact a fee and demand security from the transferee, and by sec. 6 he may refuse to register a transfer until the fee is paid, and the security registered. This section concludes: "It is hereby provided that the rules of this and of the preceding section shall not be held to apply to transfers of any fractional part of a *putni* taluk, nor to any alienation other than of the entire in'erest: for no apportionment of the zemindar's reserved rent can be allowed to stand good unless made under his special sanction." In terms the proviso of sec. 6 applies only to the zemindar's right to exact a fee and demand security, as the zemindar's right to refuse to register or to give effect to an aliena'ion, seems to be taken away by sec. 3, but it is impossible to read the concluding words of the sec ion as doing less than forbidding alienation of a part of the *putni* without the zemindar's sanction, and the earlier part makes it impossible to force a zemindar to register or give effect to an aliena'ion of a part. The Regulation therefore provides rules for the alienation of the whole or a part of a *putni* taluk, and that cannot be affected by any hing in the Bengal Tenancy Act, by force of sec. 195 (*e*) The Appellants' argument therefore, which is that the Bengal Tenancy Act applies to the alienation of part of a *putni* taluk, because its operation is consistent with the provisions of Reg. VIII must fail, in so far as it is sought to show that alienation of a part of a *putni* is valid without registration with the zemindar.

The second point raised by the Appellauts is that Saha Banu, an infant zemindar, is improperly omitted from the list of Plain'iffs, because she was born

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before the decree in the suit. The findings of fact however only show that she was born before the sale money was withdrawn. This point therefore also fails.

The result is that this Appeal is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES
Nos. 1667 AND 2173 OF 1911.

JENKINS, C. J.
MULLICK, J.
1913,
Heard, 14 &
17, February.
Judgment,
17, February.

BABURAM BAG, Plaintiff, Appellant,
v.
MOHADEB CHANDRA PALLAY, Defendant, Respondent.

Specific Relief Act (I of 1877), sec. 27—Transferee for value from lessor with constructive notice of agreement for renewal in favour of lessee—Constructive notice—Possession of tenant, notice of covenants—Specific performance.

Occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights and if he chooses to make no enquiry of the tenant he cannot claim to be transferee without notice.

Where on 11-7-06, during the currency of a jalkar *lease for seven years executed by the owners in favour of the Defendants on 2-3-1901, the Plaintiffs took a settlement of the* jalkar *from the lessors for a term of seven years from 1-5-08 on payment of a sum of Rs. 600, and on the expiry of the Defendants' term sued them for recovery of possession of the* jalkar.

Held—*That an agreement for renewal of their lease upon certain conditions, made between the Defendants and their lessors on 1-5-01, was specifically enforceable by them against the Plaintiffs who claimed title under the lessors and were affected with notice of the agreement of 1-5-01.*

That Plaintiffs could not consequently recover.

This was an Appeal preferred on the 23rd of May 1910 against the decree of F. Roe, Eq., District Judge of Zillah 24-Pergunnahs, dated the 11th of March 1910, modifying the decree of Babu Mohim Chandra Sarkar, Subordinate Judge of that District, dated the 22nd of June 1909.

The material facts will appear from the judgment.

In S. A. 1667.

Babus Ram Chandra Majumdar and *Atul Chandra Dutt* for the Appellant.

Dr. Rash Behary Ghose, Babus Amarendra Nath Bose, Probodh Chandra Roy and *Hari Charan Ganguly* for the Respondent.

In S. A. 2173.

Babus Mahendra Nath Roy and *Amarendra Nath Bose* for the Appellant.

Babus Ram Chandra Majumdar, Atul Chandra Dutt, Probodh Chandra Roy and *Hari Charan Ganguly* for the Respondent

The JUDGMENT OF THE COURT was as follows :—

No. 1667.

JENKINS, C. J.—This Special Appeal arises out of a suit brought to recover possession of certain *jalkar* rights. This *jalkar* has been leased on the 2nd of March 1901 to the first Defendant for a period of seven years. On the 1st of May 1901, the lessors entered into an agreement with the lessees for renewal under certain conditions, on the determination of this term. On the 11th of July 1906, the lessors purported to settle the *jalkar* with the Plaintiffs for a term of seven years from the 1st of May 1908 and we are told that

the Plaintiffs, in return of this, paid a sum of Rs. 600. The Plaintiffs now seek to recover possession of these *jalkar* rights on the ground that the lease of the 2nd of March 1901 in favour of Defendant No. 1 has come to an end. In the Court of the Subordinate Judge, a decree for possession was passed, but on appeal it was reversed and as against the tenant Defendant the suit was dismissed with costs. The Plaintiffs appeal from this decree.

The position then is this, the Plaintiffs, never having obtained possession, seek to eject the tenant Defendant on the ground that his lease has determined.

The answer made by the tenant Defendant is that though the lease of the 2nd of March 1901 may have come to an end, still he, the Defendant, is in possession of the land and he holds it under the agreement of the 1st of May 1901.

The first question therefore we have to consider is whether the agreement of 1901 is an agreement which can be specifically enforced. It is not suggested before us that it is incapable of enforcement against the lessors; all that can be argued is that the Plaintiffs are persons against whom it cannot be enforced. Sec. 27 of the Specific Relief Act provides that "except as otherwise provided by this chapter specific performance of a contract may be enforced against (*a*) either party thereto: (*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract." The Plaintiffs come within the description of 'any other person claiming under a party by a title arising subsequently to the contract' of the 1st of May 1901, so that *primâ facie* the contract can be specifically enforced against the Plaintiffs. Do the Plaintiffs bring themselves within the exception, that is to say, have they shown that they are transferees for value who have paid their money in good faith and without notice of the original contract? It is shown that they are transferees for value who have paid money. But can it be said that they did it without notice of the original contract? In determining that we must have regard to the fact that the tenant Defendant was, and has throughout remained, in possession and occupation. But the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no enquiry of the tenant, he cannot claim to be a transferee without notice. The Plaintiffs, therefore, are unable to predicate of themselves that they are persons who claim without notice of the contract of the 1st of May 1901. That contract therefore is capable of specific performance against the Plaintiffs and it furnishes a complete answer to their claim for possession.

The only question then is, whether it can fairly be said that the Plaintiffs have been taken by surprise. It is quite true that the contract of 1st May 1901 is not specifically mentioned in the written statement: but it is equally true that the tenant Defendant did plead the relationship of landlord and tenant, and this was referable to that contract. Further than that, we have the fact that this particular agreement was filed prior to the trial, and I cannot read the judgment of the Munsif without feeling that the issue, though in very general terms, was settled in reference to the preceding statement in his judgment where there is an obvious allusion to this contract on which the tenant Defendant now relies.

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Therefore we cannot give effect to the suggestion that the Plaintiffs were taken by surprise. I accordingly think that the decree of the District Judge should be confirmed and this Appeal dismissed with costs, one set, payable to the tenant Defendant.

No. 2173.

We dismiss this Appeal with costs, two sets.

Appeals dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 239 OF 1913.

JENKINS, C. J.
RAY, J.
1913,
18, April.

HARI CHARAN GHOSH, Petitioner,
v.
MONMATHA NATH SEN and others, Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 141, Or. 21, rr. 100, 101, Or. 9, r. 13—Execution case, procedure in—Effect of sec. 141—Order allowing claim case ex parte—*Jurisdiction to set aside such order, for sufficient cause.*

Where the Petitioner put in a claim under r. 100 of Or. 21, C. P. C, and, the decree-holder not appearing, obtained an order in his favour under r. 101 and the Court subsequently on the application of the Opposite Party set aside this order acting under Or. 9, r. 13, C. P. C.:

Held—*That Or. 9, r. 13 is not applicable to a proceeding under rr. 100, 101, Or. 21, C. P. C., and the Court had not the jurisdiction which it purported to exercise.*

Sec. 141, C. P. C., does not make applicable to proceedings in execution all the procedure provided by the Code in regard to civil suits.

This was a Rule granted on the 3rd of March 1913 against the judgment of Babu Khagendra Nath Dutta, Munsif of Barasat, dated the 8th of February 1913.

The Opposite Party obtained two separate decrees for arrears of rent against one Tustu Charan Ghosh in respect of two jamas which they alleged were held under them by the said Tustu. According to the Petitioner's case the said Tustu Charan held only one jama of 6½ bighas of land under the Opposite Party and the Petitioner purchased the said defaulting jama at the sale held in execution of the decree for the arrears of rent due in respect of that jama and obtained possession thereof through the Courts. Subsequently the Opposite Party executed the other decree for the arrears due in respect of the other holding said to belong to the said Tustu Charan and purchased the alleged holding at the sale held in execution of that decree. The Petitioner's case was that the Opposite Party illegally dispossessed the Petitioner from the major portion of the lands purchased by him at the first sale on the allegation that those lands constituted the alleged second holding which they had purchased in the second sale. The Petitioner thereupon applied to the second Court of the Munsif of Barasat complaining of such dispossession under Or. 21, r. 100, C. P. C. Thereupon an objection case was started by the Munsif under Or. 21, r. 100, C. P. C., and this case coming on for hearing the Petitioner adduced evidence in support of his case and the Munsif by his order, dated the 23rd November 1912, allowed the Petitioner's claim. It appears from the order-sheet in the above case that on the day fixed for the hearing the Opposite Party were absent and their pleader stated that he had no instructions but the Munsif holding that the Petitioner had proved his case allowed his claim and in the

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decree prepared by the Court it was stated that the claim case was disposed of in the presence of the pleaders of both parties. On the 14th December 1912, the Opposite Party made an application to the Court below under Or. 9, r. 13, C. P. C., for setting aside the order of the 23rd November 1912 on the ground that the said order was passed *ex parte* and that they could not be present on the 23rd November 1912, as they were told by their pleader that that case would come on for hearing on the 30th November 1912. On the 8th February the Munsif allowed the said application of the Opposite Party under Or. 9, r. 13, C. P. C., and restored the claim case.

Against this order the Petitioner moved the High Court and obtained the present Rule.

Babu Mohini Mohan Chatterjee for the Petitioner submitted that the decision in *Safdar Ali* v. *Kishun Lal* (3) was an authority against him, but in that case the history of sec. 141 was overlooked. Relied on *Asim Mundal* v. *Raj Mohan Das* (2) and referred to *Thakur Prasad* v. *Fakirullah* (1).

Babus Shiva Prosanna Bhattacharjee, *Probodh Chunder Bose* and *Mona Mohan Bose* for the Opposite Party submitted that *Safdar Ali* v. *Kishun Lal* (3) was correctly decided upon the terms of sec. 141. The omission of the explanation to sec. 647 of the old Code points to this as the natural interpretation.

The JUDGMENT OF THE COURT was as follows :—

JENKINS C. J.—This is a Rule obtained at the instance of a claimant under Or. XXI, r. 100, C. P. C., calling upon the Opposite Party, the decree-holder, to show cause why the order of the Munsif should not be set aside on the ground that it was made without jurisdiction.

The claimant applied under r. 100, and the decree-holder not appearing, he obtained an order in his favour under r. 101. R. 103 provides that "Any party not being a judgment-debtor against whom an order is made under r. 98, r. 99 or r. 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be conclusive." The claimant therefore maintains that the order in his favour, though made in the absence of the decree-holder, is conclusive: and his complaint is that notwithstanding the terms of r. 103, the Munsif has set aside the order made under r. 101. The Munsif appears to have acted under Or. IX, r. 13. That rule, as it is expressed, clearly does not apply to a proceeding in execution; but an attempt has been made before us to uphold the Munsif's order on the terms of sec. 141 of the Code which provides that "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction." This section reproduces with modification sec. 647 of the previous Code. But in sec. 647 there was an explanation in these terms; "This section does not apply to applications for the execution of decrees, which are proceedings in suits." That explanation has been omitted, and it has been argued before us that this omission is an indication that the Legislature in passing the present Code intended that sec. 141 should have a wider operation than sec. 647. There is a certain amount

(1) L. R. 22 I. A. 44 : S. C. I. L. R. 17 All. 106 (1894).
(2) 18 C. L. J. 532 (1910).
(3) 12 C. L. J. 6 (1910).

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Contents.

NOTES.

Lord Chief Justice's title.

Sir Rufus Isaacs, the Lord Chief Justice of England, has taken the title of Lord Reading of Early on being raised to the peerage. He was member for Reading in the House of Commons in the Liberal interest for a long time before his elevation to the Bench.

Purdanashin Lady, execution of deed by—Independent advice.

The rule of law which places on the party relying on a deed executed by a *purdanashin* lady, the burden of proving affirmatively that the terms of the document were duly explained to, and were really understood by her, although not of statutory origin, yet having been so held by a long course of judicial decisions and repeatedly affirmed by the Privy Council, is regarded of no less binding force than any statutory rule of law. It is, therefore, of the greatest importance that the limits of the rule should be well understood. *Kali Buksh Singh* v. *Ram Gopal Singh*, reported at p. 282 of the current volume of our reports, the latest of Privy Council decisions on the point, will go a great way towards defining these limits.

The rule in fact raises a general presumption against intelligent execution by *purdanashin* ladies who, it is said, are from the manner of their life specially exposed to undue influence, somewhat in the same way as dealings with "expectant heirs" have been presumed by Courts of Equity in England to be tainted with fraud until the contrary is proved by the person seeking to found upon such dealings. To rebut this presumption, the party relying on the deed has to prove intelligent execution by the lady and her mental capacity. The facts of the deed having been explained to her, and of her having had independent advice, are obviously matters which are relevant to such an enquiry. What weight is to be attached to each or all of these matters would necessarily depend upon the circumstances of each case. But to lay down once for all that the lady must in every case be shown to have possessed marked business capacity or that proof must be given of minute and detailed explanation of the terms of the deed and of its possible consequences to her, or that she must have independent advice from outside, would obviously be going further than the purpose of the rule, *viz.*, proof of intelligent execution, would require. A *purdanashin* lady, like any other free person, must be allowed the liberty to make whatever disposition of her properties she pleases and it would, we think, be wrong (in the absence of special circumstances) to expect that the party claiming under the deed should prove that he took adequate measures to explain to her all the possible consequences of the disposition to her and to others interested in her.

So also with regard to the supposed requirement of independent advice. In English law persons in authority or holding confidential employments such as that of a spiritual, medical or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. Sir Frederick Pollock in summing up the law as above (See Indian Contract Act, p. 77) adds: "In fact their honourable and prudent course is to insist on the other party taking independent advice." It was held in *Libs* v. *Terry*, [1895], 2 Q. B. 679 C. A., to be an essential condition to the validity of a gift by a client to his solicitor that the client should have had independent advice. The tendency in India has been to insist upon the *purdanashin* lady having had independent advice as essential to the validity of her deed. Lord Shaw lays down in the clearest possible terms that this view of the law is erroneous. So to hold, his Lordship said, would be to convert

what is intended to be legal protection into legal disability. Proof of independent advice, his Lordship is careful to indicate, may still be demanded in the special circumstances of a particular case. The same view is expressed by their Lordships the Chief Justice and Woodroffe, J., in a recent Calcutta case (*Keshub Lall Pyne* v. *Radha Raman Nundy*, 17 C. W. N. 991) where his Lordship Jenkins, C. J., observed: "It cannot be accepted as a *formula* conclusive of every case that the absence of advice vitiates the transaction. Advice is not in itself essential; it is merely a means to secure that which is essential, an intelligent apprehension of the transaction."

The lady in the Privy Council case was found to have been a woman of strong will and business capacity, and the gift also did not appear to be unnatural. Under the circumstances any failure to prove independent advice was not considered as of sufficient importance to overweigh other proofs of intelligent execution by the lady.

The requirement that the deed should be read over and explained to the lady, appears, on the face of Lord Shaw's judgment, to be, however, one of the essentials to the validity of the deed. But all *purdanashin* ladies are not illiterate, and many of them are, as the lady in this case was, good business women. The findings of the Courts in India on this point in the case were conflicting. The Subordinate Judge found that the explanation was thorough, the Judicial Commissioner, that it was perfunctory. "Upon this matter," his Lordship said, "much depends upon whether the grantor of the deed was a person accustomed to business or to the management of affairs. It is upon this point that their Lordships find themselves in agreement with the Subordinate Judge." From this observation it is open to us to infer that explanation of the deed to the lady need not be, any more than taking independent advice, an absolutely indispensable condition of the validity of the deed.

In noticing this case we should not omit to refer to another observation in the judgment though it is made somewhat casually. His Lordship remarks on the importance of distinguishing "independent outside advice" from "independent outside control"—a distinction not infrequently overlooked. The protection which the Courts have thought fit to throw around a *purdanashin* lady has from time to time been criticised as being too wide and indiscriminate in its operation. But if the limits indicated in Lord Shaw's judgment are kept in view, the rule will not only not lead to failure of justice, but will have a beneficent operation on the community on the whole, until substantial progress should have been made towards the education and emancipation of *purda* women.

CURRENT INDIAN CASES.

(CRIMINAL.)

Indian Penal Code, secs, 90, 366—Kidnapping—Consent.

Re N. JALADU, I. L. R. 36 Mad. 453.

If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping.

A consent obtained by fraud would not be sufficient to justify the taking of a minor.

The expression "under misconception of fact" in sec. 90 is broad enough to include all cases where the consent is obtained by misrepresentation.

Indian Penal Code—Defamation—Duty of prosecution—Cr. P. C., sec. 428—Additional evidence.

JEREMIAH *v.* VAS, I. L. R. 36 Mad. 457.

In a case of defamation it is incumbent on the prosecution affirmatively to prove that the Defendant published the libel complained of. An admission by the accused made in answer to questions put by the Court under sec. 342, Cr. P. C., cannot be utilised by the prosecution to fill up a gap in its own evidence.

There are no pleadings in a criminal case similar to those in civil proceedings which are conclusive against the party making them. The prosecution has to prove all the facts necessary to constitute the offence charged against the accused.

The lower Court having refused to take evidence of publication offered by the prosecution, the High Court ordered additional evidence to be taken.

Criminal Procedure Code, sec. 349—Case submitted to superior Magistrate, proper order in.

Re N. PONNUSAMY NADAN, I. L. R. 36 Mad. 470.

A Magistrate to whom a case is referred under sec. 349, Cr. P. C., is bound to dispose of the case himself and has no power to send the case back to the subordinate Magistrate for disposal.

Criminal Procedure Code, sec. 195—Conditional sanction if legal.

Re P. MUNEYYA, I. L. R. 36 Mad. 471.

No sanction can be granted of a provisional character in case certain conditions are satisfied in the future. It is the duty of the Court before granting sanction to satisfy himself that there is at the time of the order a *prima facie* case against the accused.

Indian Penal Code, sec 379—Theft of fish from tank.

Re SUBBIAN SERVI, I. L. R. 36 Mad. 472

The capture of fish in an ordinary irrigation tank does not amount to theft but when the water in a tank is so low that the fish cannot escape such fish can be the subject of theft.

Criminal Procedure Code, sec. 107—Detention in custody.

Re NARAYANASAMI NAICKEU, I. L. R. 36 Mad. 474.

The general provision in sec. 496 must be taken to be

subject to the special provision in cl. (4), sec. 107 and a Magistrate before whom a person is sent under sec. 107 may in his discretion detain such person in custody until the completion of the enquiry.

(CIVIL.)

Mortgage.

SANWUL SINGH *v.* GANESHI LAL, I. L. R. 35 All. 441.

If two properties are jointly mortgaged for the same debt each of these properties is liable for the whole debt and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property.

Civil Procedure Code (Act XIV of 1882), sec. 568—Additional evidence.

AUDIAPPA PILLAI *v.* MUTHU KUMARA THEVAN, I. L. R. 36 Mad. 477.

The words "or for any other substantial cause" in sec. 568 should not be construed in the narrow sense suggested by the doctrine of ejusdum generis so as in effect to confine them to causes of the same kind as those stated in the earlier part of the section.

Limitation Act (XV of 1877), sec. 14—Prosecution of suit in wrong Court, effect of.

SESHAGIRI ROW *v.* VAJRA VELAYUDAM SILLAI, I. L. R. 36 Mad 482

Where a plaint returned for presentation to the proper Court on the ground of absence of jurisdiction in the Court to which it was originally presented is again presented to the proper Court the suit cannot be regarded as a continuation of the infructuous suit in the wrong Court.

Sec. 14 of Act, XV of 1877, proceeded on the basis that where a plaint was returned under sec. 20 of the Civil Procedure Code of 1882 and presented again to another Court the suit must be regarded as a new one.

Hindu Law—Woman's estate.

MEDA VENGAMMA *v.* MITTA CHELAMAYVA, I. L. R. 36 Mad. 484.

A woman's estate may be created in favour of a Hindu female by contract, she may also by prescription acquire property impressed with the character of a widow's estate if the title she asserted during the time of prescription was that of a widow holding as representative of her husband.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM ONTARIO.]

LORD ATKINSON.
LORD SHAW.
LORD MOULTON.
1913,
1, August.

MARY JONES
v.
THE CANADIAN PACIFIC RAILWAY COMPANY.

Fatal Accidents Act—Fellow servant charged by employer with work for which he is unfitted—Employment contrary to statutory direction—Liability for injury caused.

The action was brought by the Plaintiff, as administratrix of the estate of Gilbert Jones, deceased, for damages under the Ontario Statute (R S.O. 1897 Ch. 166) corresponding to the Fatal Accidents Act in England, in respect of the death of the said Gilbert Jones, who was on the 14th February 1911 killed in a collision between a snow-plough (which is used to clear the line of snow) belonging to the Defendants and a train belonging to the Defendants which was standing in a siding at the said junction.

The statement of claim based the Plaintiff's right to recover on the violation by the Company of a statutory duty imposed upon them, namely, by putting in charge of this plough one Henry Weymark, who was merely a section foreman, and who had not passed the examination or submitted to the test required by the Orders of the Board of the Railway Commissioners of Canada.

LORD ATKINSON in delivering the judgment of the Judicial Committee observed :—

The Defendant Company in the present case did not rely upon any contributory negligence on Jones's part. And it does not appear to their Lordships that they could, even apart from the above-mentioned provision of the Railway Act, have relied upon the fact that Weymark and Jones were fellow servants, since Weymark was placed in the position he held in breach of the employer's clear statutory duty, and the breach of such a duty by an employer is not one of the risks which a servant can be assumed to undertake to run when he enters that employer's service. Lord Watson in *Johnson* v. *Lindsay*, 1891, A. C. 371, at p. 382, states the general common law principle thus :—

> "The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servent to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master.

It is difficult to see on what principle a servant can be said to be selected with due care by his master when the master, in defiance of a positive statutory prohibition, selects for a particular work a servant whose fitness for that work has never been ascertained in the manner prescribed.

Moreover, there is an entire absence in this case of all evidence to show that Weymark was in fact fitted to discharge the duties he was put to discharge, or was ever considered so to be by any responsible official of the Company. It is not at all the case of a servant of proved and known efficiency for a particular work being selected to do that work without having passed a test which his employers knew, or *bonâ fide*

and reasonably believed, he could pass. Not at all. The Defendant Company abstained from giving any evidence to that effect. They took that course no doubt for good reason, but they must bear the consequence.

The principle upon which the cases of *Groves* v. *Wimborne* (1898) 2 2.B. 402, *David* v. *Britannic Merthyr Coal Company* (1909) 2 K.B 146, and *Butlar* v. *The Fife Coal Company, Ltd.*, 1912 A.C. 149, were decided, applies, in their Lordships' view, to the present case. In the first-mentioned of these cases it was held that the doctrine of common employment does not apply where a statutory duty is violated by the employers. In the second, the Master of the Rolls, at page 152, says :—

"But, on the other hand, a master is liable to his servant for the consequences of an accident caused to that servant by the breach of a statutory duty imposed directly and absolutely upon the master, and the master cannot shelter himself behind another servant to whom he has delegated the performance of the duty. In such a case the negligence is the master's negligence, and the doctrine of common employment has no application."

And at page 157, Moulton, L. J., as he then was, says :—

"The risk of an employer failing to perform a statutory duty incumbent upon him seems to me to be clearly not a risk that can be considered one of those which the workman must be assumed to have accepted. On the contrary, he in his position as a member of the public has a right to assume that his employer will fulfil the duties which the statutes impose upon him. But we are not left to decide this question only as a matter of principle. There is clear authority to the same effect. In the case of *Groves* v. *Lord Wimborne* this Court decided that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of a duty imposed on the master.

And in the last case of the three, Lords Kinnear and Shaw, at pp. 160, 162 and 174 of the reports, expressly approve of the decision in the last-mentioned case, and Lord Loreburn apparently concurred with them. Indeed it appears to their Lordships that the abovementioned decisions on this point are but applications of the principle laid down in 1856 by the then Lord Chancellor and approved of by the other noble lords in the House of Lords in the case of the *Bartonshill Coal Company* v. *Reid*, 3 Macqueen, 266, at p. 276, in these words :—

"With reference to the law of England, I think it has been completely settled that in respect of injuries occasioned to one of several workmen engaged in a common work (and I know of no distinction whether the work be dangerous or not dangerous) the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed."

Applying the principle of these authorities, (*Ayles* v. *South Eastern Railway Coy.*, L. R. 3 Ex. 146 ; *William* v. *The Great Western Railway Coy.* L. R. 9 Ex. 157 ; *McArthur* v. *Dominion Cartridge Coy.*, A. C. (1905) 72 ; *Richard Evans Coy.* v. *Astley* (1911) A. C. (674), which could be multiplied, to the present case) their Lordships think that the reasonable conclusion to draw from the evidence is that the flagrant failure of Weymark to discharge his duty on this occasion was most probably due to his want of skill, knowledge, or experience, or to some physical incapacity or defect which the examination or test prescribed for him would have revealed. If so, this failure was but a natural consequence of the act of the Company in setting him, such as he was, to do the work actually set him to do; and that their action in that respect was either the sole effective cause of the accident or a cause materially contributing to it.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before TEUNON, J. APPEAL FROM APPELLATE DECREE No. 3337 OF 1912. MOHENDRA NARAIN BASU, Plaintiff, Appellant *v.* LALIT KUMAR MUKERJEE AND OTHERS, Defendants, Respondents. 19th January 1914.

Bengal Tenancy Act, secs. 159, 161, 164, 167—Sale subject to registered and notified incumbrances, if sale under the Civil Procedure Code or Bengal Tenancy Act.

This appeal arose out of a suit by a purchaser at a sale of a tenure in execution of a decree for 16 as. rent obtained by the landlord to recover possession of lands held by the Defendants as a Osat or Nimhowla after alleged service of notice under sec. 167 of the Bengal Tenancy Act. The amount of the decree for rent was Rs. 291. The sale was held on the first day fixed without the fresh proclamation provided for by the second part of sub-sec. (1) to sec. 165 of the Act and the tenure was purchased for a sum of Rs. 26 only. The District Judge held that in these circumstances that Plaintiff acquired only the rights of a purchaser under the Civil Procedure Code and without power to avoid any of the incumbrances upon the tenure sold.

Held—That the District Judge had overlooked the provisions of secs. 159 and 161 and sec. 164, sub-sec. (2) of the Act under which the purchaser was authorised to annul any incumbrance other than a registered or notified incumbrance.

Babu Gunada Charan Sen for the Appellant.

Mr. A. K. Fazul Huq for the Respondents.

Case remanded for trial on the merits.

HARI CHARAN GHOSH *v.* MONMATHA NATH SEN.

of force in this argument, but it overlooks the history of this section and the case law. At one time there was a considerable divergence of opinion between various Courts as to whether sec. 647 applied to execution proceedings: and, it was in consequence of this that by Act VI of 1892 this explanation was introduced into the section of the Code of 1882. But after this alteration in the law, the Privy Council in the case of *Thakur Prasad* v. *Fakirullah* (1), decided on sec. 647 as it stood before the explanation was added, that the section did not apply to execution proceedings. The purpose of the Legislature in omitting that explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council. So it was that the explanation came to be omitted. This may have been an unfortunate way of proceeding, because it involves some knowledge of the history of sec. 647 and of the decision on that section to appreciate the effect of this change; but this is how the matter was dealt with by the Legislature. The result is that sec. 141 does not make applicable to proceedings in execution all the procedure provided by the Code, and I think for very good reason; as is indicated by Mr. Justice Mookejee in a decision which has been brought to our notice [*Asim Mundal* v. *Raj Mohan Das* (2)], to hold otherwise would lead to complications and to results which never could have been contemplated. It is not as though there was any necessity in the interest of justice that the provision of r. 13, Or. IX, should be applicable to proceedings in execution, because, the order is not conclusive, but is subject to the right of the person aggrieved to bring a suit. I therefore hold that Or. IX, r. 3 is not applicable to a proceeding under rr. 100 and 101 of Or. XXI, and that the learned Munsif had not the jurisdiction which he purported to exercise.

(1) L. R. 22 I. A. 44: s. c. I. L. R. 17 All. 106 (1894).
(2) 18 C. L. J. 532 (1910).

We must therefore make the Rule absolute.

Having regard to all the circumstances we will not make any order as to costs.

RAY, J.—I agree.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1913.
Heard, 10, November.
Judgment, 1, December.

BARHAMDEO PRASAD, (now represented by RAM SUMIRAN PRASAD) & anr., Appellants,
v.
TARA CHAND and ors., Respondents.

Limitation Act (XV of 1877), Sch. II, Arts. 120, 132—Mortgages, successive—Surplus sale proceeds left after discharge of decree on first mortgage—Suit to enforce second mortgage against third mortgagee who has withdrawn same—Withdrawal with notice of second mortgage, if creates implied trust—Limitation—Civil Procedure Code (Act XIV of 1882), sec. 295.

Where immoveable property subject to three mortgages, of which the first and third were in favour of the Appellants and the intermediate mortgage in favour of the Respondents was sold in a suit on the first mortgage in which the intermediate mortgagees were made parties, and the surplus left after discharge of the decree was subsequently withdrawn by the Appellants in enforcement of a decree obtained by them in a suit on the third mortgage in which

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the Appellants did not make the intermediate mortgagees parties :

Held, *in a suit by the intermediate mortgagees on their mortgage in which they sought a decree against the Appellants for the amount with interest of the surplus sale proceeds withdrawn by the Appellants, that the surplus sale proceeds represented the security which the Respondents had under their mortgage and did not cease to represent that security owing to the Appellants having wrongfully and in fraud of the Respondents withdrawn them from Court, and the suit was governed by Art. 132 of Sch. II of the Limitation Act of 1877.*

That section 295 of the Civil Procedure Code did not apply to the facts of the case.

Held, *per* HENDERSON, J., in the High Court, and not dissented from by the Judicial Committee—*That the Appellants having obtained possession of the surplus proceeds which had been deposited in Court with the knowledge that they were subject to the claim of the Respondents in priority to their own claim, the proceeds in their hands were saddled with a charge in favour of the Respondents to the amount of their charge.*

This was an Appeal from a Judgment of the Calcutta High Court (Sale, Henderson and Geidt, JJ.), reported in I. L. R. 33 Cal. 92: s. c. 9 C. W. N. 989. The facts of the case sufficiently appear from their Lordships' judgment. Henderson, J., held that Art. 132 and not Art. 120 of Act XV of 1877 applied and Sale, J., to whom the case was referred owing to Geidt, J., dissenting, agreed with that view. In the course of his judgment Henderson, J., said:—

"But the Plaintiffs' suit is really a suit brought to enforce his mortgage against all the properties, the subject of that mortgage. Among these properties was Mouzah Chak. It is true that that mouzah has been sold, and that after the sale all that remained of it, to which the Plaintiffs' lien could attach, was the surplus sale proceeds. The contention, as I understood it, was not that the lien did not attach to the surplus proceeds, but that the Plaintiffs' lien had been extinguished in consequence of the Plaintiffs' neglect to take step in time to obtain payment of the amount. In my opinion it cannot be argued with any show of reason that the Plaintiffs' lien did not attach to these surplus sale-proceeds. In the Court of the Subordinate Judge where they were in deposit they continued to be portion of the security to which Plaintiffs were entitled to look for satisfaction of their mortgage. It so happened that the entire Mouzah Chak was sold and that it realized more than was sufficient to discharge the first incumbrance, but suppose that a portion only of the mouzah sufficient to discharge that incumbrance had been sold, there can be no question that the Plaintiffs' lien would still have continued to attach to the remainder, and that the Plaintiffs would have been entitled to enforce their lien against that, and against the other properties covered by their mortgage. I am unable to see any real difference between the two cases. Art. 120 of the Limitation Act applies to suits for which no period of limitation is elsewhere in Schedule II provided. If it applies in the present case, then the suit, not having been brought within 6 years from the time when the right as against the Appellants accrued, that is, from the date of the withdrawal of the money, would no doubt be barred. But in my opinion, Art. 120 does not apply, but Art.

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132 does. The suit was to enforce payment of money charged upon immoveable property. It was a suit upon a mortgage to enforce payment of the money to secure which the mortgage was granted. That money was by the mortgage deed charged upon immoveable property. The suit therefore comes within the precise terms of Art. 132, and the Plaintiffs therefore had 12 years to bring it from the date on which the money became due, that is, in the month of Kartick 1296, and the last day in Kartick in that year corresponds with the 18th November 1888. The suit having been instituted on the 17th November 1900 was therefore not barred. In this view I am to some extent supported by *Jogeshur Bhagat* v. *Ghanasham Das* (1) and *Kamala Kant Sen* v. *Abdul Bakrul* (2), and *Padmanabh* v. *Khemu* (3).

The Plaintiffs' money was undoubtedly charged on a number of immoveable properties, and the fact that one of those properties should subsequently have been converted into money, can in my opinion make no difference to the character of the suit. This suit was not a suit brought under the penultimate clause of sec. 295 of the Civil Procedure Code."

Mr. G. E. A. Ross, *K. C.*, and *Mr. J. M. Parikh* submitted that the suit was barred under Art. 120 of the Limitation Act. It was a suit for money and not to enforce a lien charged upon immoveable property. Reference was made to *Ramdin* v. *Kalka Pershad* (4). Further, the suit came within sec. 295 of the Code of Civil Procedure, 1882, and was barred by time.

Mr. E. U. Eddis, Counsel for the Respondents, was not heard.

(1) 5 C. W. N. 356 (1901).
(2) I. L. R. 27 Cal. 180 (1899).
(3) I L. R. 18 Bom. 684 (1893).
(4) L. R. 12 I. A. 12 (1882).

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This Appeal has arisen in a suit which was brought by the Plaintiffs on the 17th November 1900, in the Court of the Subordinate Judge of Monghyr, to enforce payment of principal moneys and interest which were charged upon immoveable property by a deed, dated the 19th September 1887, by which one Kalu Babu mortgaged to the Plaintiffs Mouzah Chak and other properties. The mortgage money was repayable on the 18th November 1888. By the suit, so far as it concerned the Defendants Barhamdeo Prasad and Ram Sumran Prasad, the Plaintiffs sought a decree against them for Rs. 12,197-8-3, together with interest, on the ground that they were in possession of a sum of Rs. 12,197-8-3, which had been deposited in the Court of the Subordinate Judge of Monghyr, and was the balance remaining over of the purchase money of Mouzah Chak, after satisfying a decree for sale of that Mouzah of the 8th October 1890, such possession having been obtained by them wrongfully with full knowledge that it was affected with a charge to the Plaintiffs under a mortgage of Mouzah Chak. Barhamdeo Prasad, now dead, is represented in this Appeal by his brother, Ram Sumran Prasad. The only question in this Appeal is whether the suit so far as it related to Barhamdeo Prasad and Ram Sumran Prasad was a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 132 of the Second Schedule of the Indian Limitation Act, 1877, or was a suit to which Art. 120 of that Schedule applied.

The facts, briefly stated, are as follows: On the 21st May 1887, Kalu Babu mortgaged Mouzah Chak and other properties

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to Barhamdeo Prasad and Ram Sumran Prasad. On the 19th September 1887, Kalu Babu mortgaged Mouzah Chak and other properties to the Plaintiffs, and on the 19th July 1889, Kalu Babu further mortgaged Mouzah Chak to Barhamdeo Prasad and Ram Sumran Prasad. On the 8th October 1890, Barhamdeo Prasad and Ram Sumran Prasad obtained a decree for sale on their mortgage of the 21st May 1887. To the suit in which that decree was obtained the Plaintiffs in this suit were made parties, but they did not appear. In execution of the decree of the 8th October 1890, Mouzah Chak was sold. After satisfying that decree a balance amounting to Rs. 12,197-8-3 of the moneys which were realised by the sale of Mouzah Chak, remained, and that balance was deposited in the Court of the Subordinate Judge of Monghyr. On the 14th January 1891, Barhamdeo Prasad and Ram Sumran Prasad obtained a decree for sale on their mortgage of the 19th July 1889, and in execution of that decree they, on the 22nd April 1892, drew out of Court the balance of Rs. 12,197-8-3, which had been deposited in Court. Barhamdeo Prasad and Ram Sumran Prasad were well aware of the existence of the Plaintiffs' mortgage and that it had priority to the charge they were seeking to enforce, but they did not make the Plaintiffs parties to the suit, nor did they give them notice that under the decree of the 14th January 1891 they were drawing out of Court the balance of Rs. 12,197-8-3.

On behalf of Barhamdeo Prasad and Ram Sumran Prasad it was contended in the Court of the Subordinate Judge that this suit, so far as it related to the claim of the Plaintiffs against them in respect of the Rs. 12,197-8-3, surplus moneys of the sale of Mouzah Chak, was barred by limitation; their contention on the point of limitation was that Art. 120, and not Art. 132, of the Second Schedule of the Indian Limitation Act, 1877, applied to that claim. They also raised various other contentions in the Court of the Subordinate Judge to which it is not now necessary to refer. The Subordinate Judge held that the surplus sale proceeds of Mouzah Chak were part of the mortgage security to which the Plaintiffs were entitled under their mortgage, and gave the Plaintiffs a decree. From that decree of the Subordinate Judge, Barhamdeo Prasad and Ram Sumran Prasad appealed to the High Court at Calcutta. In that appeal two learned Judges, Sale and Henderson, JJ., held that the surplus sale proceeds of Mouzah Chak were portion of the security to which the Plaintiffs were entitled to look for satisfaction of their mortgage, and that they were entitled to follow that mortgage security in the hands of Barhamdeo Prasad and Sumran Prasad. Mr. Justice Henderson also suggested that Barhamdeo Prasad and Sumran Prasad, having obtained possession of the surplus proceeds which had been deposited in Court with the knowledge that they were subject to the claim of the Plaintiffs in priority to their own claim, and that they had abstained from giving notice of that suit to the Plaintiffs, might be taken to hold the surplus proceeds under an implied trust for the Plaintiffs. The High Court, holding that the suit was a suit to enforce a claim for money charged upon immoveable property and had been brought within time, dismissed the Appeal. From that decree of the High Court this Appeal has been brought.

Before this Board it was contended on behalf of the Appellants that this suit,

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so far as it related to the Appellants, was not a suit to enforce payment of money charged upon immoveable property, and that it was a suit to which Art. 120 of the Second Schedule of the Indian Limitation Act, 1877, applied, and consequently that the suit was not brought within time. It was also contended by one of the Counsel of the Appellants that as the Rs. 12,197-8-3, surplus assets, had been received by Barhamdeo Prasad and Ram Sumran Prasad, who were not entitled to receive such surplus assets, the case came within sec. 295 of the Code of Civil Procedure, 1882, and the remedy of the Plaintiffs by a suit under that section was barred by time. As to the last-mentioned contention, it is sufficient to say that the facts of this case show that sec. 295 of the Code of Civil Procedure, 1882, does not apply.

If Mouzah Chak had not been sold under the decree for sale of the 8th October 1890 it could not be suggested that the Plaintiffs could not by suit, subject to the rights of the prior mortgagees, have enforced payment of the money charged upon that Mouzah by their mortgage of the 19th September 1887. Mouzah Chak was sold under the decree for sale of the 8th October 1890, which Barhamdeo Prasad and Ram Sumran Prasad had obtained on their prior mortgage, and the surplus moneys of that sale represented the security which the Plaintiffs had under their mortgage of the 19th September 1887, and did not cease to represent that security owing to the fact that Barhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the Plaintiffs drawn them out of the Court in which they had been deposited. Their Lordships do not think that it is necessary to decide the point referred to in the judgment of Mr. Justice Henderson, *viz.*, that under the circumstances of this case the money in the hands of the Appellants was saddled with a charge in favour of the Plaintiffs to the amount of their charge, but they do not wish to be understood to express dissent from that view. For the decision of this case, it suffices to say that in their Lordships' opinion this is a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 132 of the Second Schedule of the Indian Limitation Act, 1877, and having been brought within twelve years from the time when the money sued for became due is within time. The Appeal fails.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed. The Appellants must pay the costs of the Appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Theodore, Bell & Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 45 OF 1911.

JENKINS, C. J. MOOKERJEE, J. 1913. 26, May.	BANKO BEHARY DAS and anr., Plaintiffs, Appellants, *v.* KRISHNA CHANDRA BHOWMICK and ors., Defendants, Respondents.

*Bengal Tenancy Act (VIII of 1885), secs. 160 (c), 167—"Protected interest"—"Plantation," meaning of—*Boroj *or betel plantation if "protected interest—" Date of sale," meaning of."*

The word "plantation" is one of wide significance and would include an assemblage of growing plants of any kind that have been planted.

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As to whether or not a particular assemblage of plants comes within the policy of sec. 160, cl. (c) *of the Bengal Tenancy Act must be largely, if not exclusively, a question of fact.*

The lower Appellate Court having held a "boroj" *or betel plantation to be a plantation within the meaning of the section :*

Held—*That it could not be said on the materials on the record that that Court's determination of the question was erroneous.*

This was an Appeal preferred on the 16th of March 1911 against the decree of the Hon'ble Mr. Justice Nalini Ranjan Chatterjea, dated the 13th of February 1911, in Appeal from Appellate Decree No. 537 of 1909.

The Plaintiffs having on 26th April 1905 purchased what they claimed to be an occupancy holding at a rent sale, more than one year after the date of sale but within one year of the confirmation thereof, presented an application to the Collector for service of notices under sec. 167 of the Bengal Tenancy Act on the Defendants for annulment of a holding claimed by the latter to be their *kaimi mourasi* tenancy. The Plaintiffs instituted the present suit for recovery of two plots of land said to have been included in this holding.

The Defendants contested the suit *inter alia* on the grounds (1) that the application to the Collector for service of notices of annulment was not made in time and that the holding alleged to have been purchased by the Plaintiffs was a tenure and that they (the Defendants) had been holding the lands in suit as occupancy raiyats for upwards of 12 years by erecting a betel plantation thereon.

The Munsif found the Plaintiffs to have purchased a tenure, so that the Defendants were occupancy raiyats not liable to ejectment. The Defendants, he further held, were in any event protected by cl. (*c*) of sec. 160 of the Bengal Tenancy Act, the betel plantation erected by them being a "plantation" within the meaning of the section.

On appeal, the Subordinate Judge held that the Plaintiffs' interest was that of occupancy raiyats but he agreed with the Munsif in holding that the Defendants owned a "plantation" which was a "protected interest" within the meaning of the section. In the course of his judgment he observed :

"The Defendant No. 1 and a number of witnesses, examined by the Defendants, prove that there has been a *boroj* or betel-plantation on the land of the Defendants for considerably over 12 years. The Plaintiff No. 1 ignores the fact, but Janu Sirdar, witness No. 8 on the Plaintiff's side, speaks to it. It is a fact of common observation that, whenever (wherever?) there is a *boroj*, there is a *khad* or excavation near it, for the site of such plantations has to be raised in order to make them fit for the purpose, and if the evidence of Plaintiffs' witnessess Nos. 9 and 10 be examined, it seems beyond doubt that the *khad* near the disputed land was excavated by the Defendants years ago for taking earth for the purpose of the *boroj.* I believe upon the evidence on the two sides, that the *boroj* has existed over 12 years and that the Defendants erected it. I have no doubt, that the *dakhilas* adduced by the Defendants, or at least two of them, are unquestionably false, and that the *amalnama*, which the lower Court wrongly admitted to evidence, is a worthless document, but there is no reason to come to the conclusion that the Defendants erected the *boroj* since the taking of symbolical possession by the Plaintiffs. Nor am I prepared to believe

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that the Plaintiffs did not know of the existence of the *boroj* and the right of the Defendants to the lands, till Kartick 1312, B. S. I hold, on the evidence, that the Defendants are tenants of the lands and have held possession of them for the purpose of their *boroj* for upwards of 12 years and that, under cl. (*c*), sec. 160 of the Bengal Tenancy Act, their interest is a protected interest. Assuming, however, that they are trespassers, I must say, that the notice served on them was not valid and that the incumbrance has not been legally annulled. The Plaintiffs presented their application for service of notice before the Collector after one year from the date of sale, and I strongly believe from the evidence and the circumstances of the case, that they knew of the incumbrance before the date of sale. The learned Pleader for the Appellants has argued that the date of sale should be taken to mean the date of confirmation of sale ; but I am unable to accept this contention as sound. For the foregoing reason, I am of opinion, that the appeal must fail and it is, accordingly dismissed with costs."

The Plaintiffs appealed to the High Court. The Appeal was dismissed by N. R. Chatterjea, J., sitting alone. His Lordship's judgment was as follows :—

N. R. CHATTERJEA, J.—Two questions have been raised in this appeal. The *first* is whether a lease of land on which a *boroj* or betel-leaf plantation has been made is a protected interest within the meaning of sec. 160, cl. (*c*) of the Bengal Tenancy Act, and the *second*, whether the words 'date of sale' in sec. 167 of the Act mean the date on which the sale is held or the date on which the sale is confirmed.

With regard to the first question it is urged that the word 'plantations' is governed by the word 'permanent' in sec. 160, cl. (*c*), and that betel-leaf cultivation cannot be called a plantation which implies permanency in the plant and that betel-leaf does not stand on a different footing from other vegetables.

I do not think that the word 'permanent' governs the word 'plantations' in the section. If it applies to 'plantations,' it would equally apply to the words which follow, *viz.*, "tanks, canals, places of worship or burning or burying grounds." But it seems that the word 'permanent' is not used with reference to them because they in themselves imply some sort of permanency.

Nor do I think that the word 'plantation' necessarily means permanency in the plant, though I think it implies permanency in the nature of the work.

The nature of the betel-leaf cultivation in the present case has not been fully gone into by the Courts below, but ordinarily in betel-leaf cultivation, the ground has to be raised and bamboo and reed structures have to be made for protecting the plants, and all this cannot be done at a small cost. It does not stand on the same footing as other vegetable cultivation. The *boroj* in the present case has been found to have been erected, and existing for considerably over 12 years. The word 'plantations' is not defined in the Act.

I think that land on which a *boroj* is made is a protected interest within the meaning of sec. 160 of the Bengal Tenancy Act.

The second contention turns upon the meaning to be attached to the words 'date of sale' in sec. 167 of the Act and the question is whether the words mean the date on which the sale is held or the date on which the sale is confirmed. It

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has been urged on behalf of the Appellant that the former construction would be unreasonable and may cause hardship in many cases. I think there is much force in this contention. An application may be made for setting aside a sale and the proceedings may not be disposed of before the expiry of one year from the date of sale. The purchaser according to the former construction must take steps under sec. 167 within one year from the date of sale while the proceedings for setting aside the sale are pending and though the sale may eventually be set aside. Again, a sale may be set aside before the expiry of one year from the date of sale and an appeal may not be disposed of within one year. In such a case also the purchaser, according to the above construction, must apply under sec. 167 before the order setting aside the sale is reversed and the sale is confirmed on appeal.

Besides the mere filing of an application is not enough. He must pay process fee and request the Collector to serve a notice on the incumbrancer declaring that the incumbrance is annulled. It is not clear how all these proceedings can be taken while the order setting aside the sale itself remains unreversed.

The words 'date of sale' also occurred in sec. 169 of the Act, and it was held in the case of *Matangini Chowdhurani* v. *Sreenath Das* (1), that the said words mean the date of 'confirmation of sale.' That section lays down rules for disposal of sale proceeds and the question to be considered in that case was whether the landlord is entitled to the rent between the date of the suit and that of sale or up to the date of confirmation of sale. Under Act XIV of 1882 title to the property did not vest in the purchaser until the sale was confirmed, and the Court held that having regard to the object of the section, it would be a narrow construction to say that "date of sale" means the actual date of sale as opposed to the date when it becomes absolute.

Sec. 169 was amended by substituting the words 'date of confirmation of sale' in the place of the words 'date of sale' but the same expression in sec. 167 was not amended.

In sec. 65 of the new Civil Procedure Code, Act V of 1908, it is laid down that where a sale has become absolute, the properties sold shall be deemed to have vested in the purchaser from the date when the property is sold and not from the date when the sale becomes absolute.

The present case must however be decided upon the law as it stood in April 1905 when the sale took place. Sec. 169 was amended subsequently by Act I, E. B. and A. C. of 1908.

The words 'date of sale' occurred in both the secs. 167 and 169, and at the time of the sale in the present case the title to the property did not vest in the purchaser until the sale was confirmed, and the words 'date of sale' in sec. 169 was judicially interpreted at that time to mean the date of confirmation of sale and I think that the same construction should be put upon the words 'date of sale' in sec. 167. In the case of *Kesa Sahay Singh* v. *Giani Roy* (2), Maclean, C. J., agreeing with Ghose, J., held that the words 'date of sale' in sec. 310A of the Civil Procedure Code mean the date on which the sale is actually held and not the date on which it is confirmed. But as pointed out by Maclean, C. J., in his referring order in the case of

(1) 7 C. W. N. 652 (1903).

(2) 6 C. W. N. 776 (1902).

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Chundi Charan Mundal v. *Banke Behary Lal* (3), sec. 310A affords a special indulgence to the judgment-debtor. It gives him, so to say, yet one more chance by saving his property. But he can only avail himself of that special indulgence if as a condition precedent he makes the deposit within 30 days.

It is urged that sec. 167, Bengal Tenancy Act, also gives a special indulgence to the purchaser but I do not think that is so. Before the Bengal Tenancy Act, VIII of 1885, the purchaser had not to give any notice for avoiding an incumbrance or do any act before bringing the suit for possession and there was no restriction as to the time within which the suit was to be brought except the period fixed by the Limitation Act, *Unnoda Churn* v. *Mothura Nath* (4), though incumbrances were not *ipso facto* void by the sale but were voidable at the option of the purchaser, see *Titu Bibi* v. *Mohesh Chunder Bagchi* (5). The Bengal Tenancy Act, for the first time, laid down that the purchaser must give notice for annulling the incumbrance and within a limited time. His rights were therefore restricted by the Act.

In view, however, of my finding upon the first question, the Plaintiff cannot succeed in the present case and the appeal is accordingly dismissed with costs.

[On further appeal under the Letters Patent]

Babus Mahendra Nath Roy and *Narendra Nath Bose* for the Appellants.

Babus Kisori Lal Sircar and *Debendra Nath Bagchi* for the Respondents.

(3) 8 C. W. N. 288: S. C. I. L. R. 26 Cal. 449 (1899).

(4) I. L. R. 4 Cal. 860: S. C. 4 C. L R. 6 (1879).

(5) I. L. R. 9 Cal. 683 (1883).

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This litigation turns upon the meaning to be attributed to the word 'plantation' in sec. 160, cl. (*c*) of the Bengal Tenancy Act. The word is one of wide significance and would include an assemblage of growing plants of any kind that have been planted. The policy of the section is obvious and as to whether or not a particular assemblage of plants comes within this must be largely, if not exclusively, a question of fact, and it appears to us that we connot on the materials before us say that the lower Court of Appeal was in error when it determined that that with which we are concerned in this case was a "plantation" within the meaning of sec. 160. We must accordingly dismiss the Appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEAL NO. 29 OF 1911.

JENKINS, C. J.
MOOKERJEE, J.
1911,
11, June.

RUDRA NARAIN MAITY, Plaintiff, Appellant,
v.
NATABAR JANA, Defendant No. 1, Respondent.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Interpretation to be strict—Landlord colluding with third person who purchases holding at a fraudulent rent sale—*Ijaradar's *decree after expiry of* ijara, *if rent decree.*

Where a holding which had been purchased by the Plaintiff at a previous rent sale was fraudulently sold in execution of another rent decree obtained against the the former tenant, and the Plaintiff was dispossessed by the purchaser, but the lower Appellate Court found that the landlord himself had no hand in the ouster but that he was hoodwinked by his gomastha who was colluding with the purchaser :

Held, *on the findings which could not*

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be reversed on second appeal, that there was no dispossession by the landlord and Art. 3 of Sch. III of Bengal Tenancy Act did not apply.

The case of dispossession alleged against a raiyat should be clearly shown to fall within the terms of Art. 3 of Sch. III of the Bengal Tenancy Act before it can be applied in bar of his suit for recovery and the terms of the article should not be extended by use of figures of speech and metaphors.

This was an Appeal preferred on the 7th of March 1911, against a decree of Coxe, J., dated the 16th of February 1911, passed in Second Appeal No. 2597 of 1909.

The Plaintiff having purchased a holding at a sale in execution of a decree for rent obtained against the original tenant by an *ijaradar* sued to recover possession thereof from the Defendant No. 1 who purchased the holding at a later sale held in execution of a rent decree obtained against the original tenant by the zemindar after the expiration of the *ijara*.

The Defendant pleaded *inter alia* that as the Plaintiff purchased only the right, title and interest of the former tenant and not the holding itself, the landlord was not bound to recognise his purchase, and also that the suit was barred by the special rule of limitation laid down in Art. 3 of Sch. III of the Bengal Tenancy Act.

The Munsif dismissed the suit as barred by limitation. On appeal the Subordinate Judge held that the Plaintiff had purchased the holding at a rent sale. On the question of limitation the Subordinate Judge held as follows :—

" It is clear that the Plaintiff was out of possession for over two years. It is therefore that the learned Munsif relying on *Aminuddin Munshi* v. *Ulfatunnessa Bebi* (1) and *Rakhit Mahanta* v. *Puddo Bauri* (2), held that the suit was barred by limitation. In my opinion, the second of the two cases does not apply to the present case. In that case the dispossessor was a tenant settled by the landlord, so the dispossession by that tenant was held to be dispossession by the landlord himself. In the present case, the dispossessor was not a tenant settled by the landlord but an auction-purchaser who dispossessed by his own right of purchase.

In *Brojo Kishore* v. *Saraswati Dassi* (3), *Abhoy Churn Mukerjee* v. *Sheikh Titu* (4) and *Mahomed Khalil* v *Hirendra Nath Bhattacharjee* (5), it has been held that even if a landlord himself purchases a *jote* in execution of a decree for its own rents, and then dispossesses other persons than the judgment-debtor such dispossession is not dispossession by the landlord but dispossession by the auction-purchaser and that therefore two years' rule of limitation would not apply in such cases of dispossession. So the dispossession by the Defendant No. 1 as an auction-purchaser would not render the law of two years' limitation applicable to this case. In *Aminuddin* v. *Ulfatunnessa* (1), the dispossession by the auction-purchaser was held to be dispossession by the landlord simply because " dispossession was made by the landlord through the contesting Defendant who acted in collusion in dispossessing the Plaintiffs." In this case there is nothing to show that the landlord was colluding with the Defendant No. 1. On the other hand, it is

(1) 13 C. W. N. 108 (1908).
(2) 9 C W. N. 64 (1904)
(3) 6 C. W. N. 883 (1901).
(4) 2 C. W. N. 175 (1897).
(5) 5 C. L. J. 650 (1906).

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clear that the Defendant No. 1 is in collusion with the Defendant No. 2 who is not the landlord but who is the landlord's gomastha who hoodwinked the landlord in all respects. In this case the landlord had no hand in dispossessing the Plaintiff, it was simply because a suit had arisen between the Plaintiff and the Defendant No. 2 in 1901 that the Defendant No. 2 obtained the fraudulent decree against Madhu and got the *jote* sold in 1902 to have his revenge on the Plaintiff and cause it to be purchased by his creature, the Defendant No. 1. I hold that *Amin-uddin* v. *Ulfatunnessa* (1) does not apply to this case but tha the rulings cited in the commencement of this paragraph govern this case."

In the result the suit was decreed in Plaintiff's favour.

The Defendant No. 1 preferred a Second Appeal.

COXE, J., before whom the case came on for hearing in Second Appeal, delivered the following judgment.

COXE, J.—The land in suit in this case was originally in the tenancy of one Madhu Bhuinya. It appears that one Tara Prosad Pal who was at one time the *ijaradar* of the mahal in which the land lies brought a suit for rent against Madhu, obtained a decree and sold the holding. At the sale the holding was purchased by the Plaintiff. That was in 1890. Many years after that another suit was brought for rent against the same Madhu Bhuinya and the property was purchased in the execution sale by the first Defendant. The Plaintiff's case was that this second decree and sale were fraudulent and that he was all along the tenant of the land which he had sublet to Defendant No. 3; that he brought a suit against Defendant No. 3 for rent in which Defendant No. 3 repudiated the relationship of landlord and tenant. The suit was therefore dismissed and on enquiry the Plaintiff came to know of this fraudulent decree and sale and that Defendant No. 1 had purchased the holding. Defendant No. 3 claims to hold the land as a sub-tenant under Defendant No. 1. Defendant No. 2 is the *gomasta* of the landlord in collusion which whom the decree is said to have been obtained. The Plaintiff, therefore, alleging that he was dispossessed in January 1905 by reason of this fraudulent suit brought by Defendant No. 2 and the consequent execution purchase by Defendant No. 1, brings this suit for recovery of possession. The suit has been decreed and the Defendant No. 1 appeals to this Court It is first contended on behalf of the Appellant that there is no sufficient legal evidence of the Plaintiff's rights. The Plaintiff's title, as I have said, is based on the purchase in 1890, and the question arose in the Courts below whether that purchase was made in the execution of a decree under the Tenancy Act under which the holding was sold for its own arrears or was made in the execution of a mere money decree under which the tenancy would not pass. The learned Subordinate Judge held that the execution in the course of which the land was purchased was the execution of a rent decree He based this finding on the sale certificate which showed that the execution case was a rent execution case and he inferred from that that the decree executed was also a rent decree under the Tenancy Act. I am not prepared to say that, if this were all, I could interfere with the decision of the learned Subordinate Judge based as it is on evidence, or could say that his finding was not a finding of fact. It is argued, however, that in coming to this conclusion the learned Subordinate Judge has clearly omitted to notice a very important piece of evidence, namely, that the *ejara* of Tara Prosad Pal admittedly came to an end in 1885 many years before the Plaintiff's purchase. And it is argued that if the suit for rent was brought after the expiration of Tara Prosad Pal's *ejara*, the decree obtained by him would not be a rent decree, and the holding would not pass at a sale in execution. Assuming for the purpose of this case that the suit for rent was brought after the expiration of Tara Prosad Pal's *ejara*, I have to decide whether on that account the decree could not possibly be a rent decree under the Tenancy Act, in execution of which the holding itself could be sold. The learned pleader for the Appellant relies on the case of *Srimunt Roy* v. *Mahadeo Mahata* (1).

(1) 18 C. W. N. 108 (1908).

(1) I. L. R. 31 Cal. 550 (1904).

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That case is certainly in his favour. It was held therein that when a *ticcadar* obtained a decree for rent after the expiration of his *ticca* all that he could sell was the right, title and interest of the tenant but that he could not sell the tenure. I am strongly inclined to follow this ruling. It seems to me very doubtful whether when the relationship of landlord and tenant has expired and the former landlord brings a suit against the former tenant for rent which accrued due during the tenancy that money can still be regarded as rent as defined in the Bengal Tenancy Act. At the time the suit is brought the money, it appears to me, can hardly be said to be payable by a tenant to his landlord and I doubt, therefore, whether a suit for that money can be regarded as a suit for rent as defined in the Bengal Tenancy Act. There is, however, authority on the other side, namely, the decision in the case of *Maharaj Bahadur Singh* v. *Forbes* (2). In that case the learned Judges considered that the case of *Srimunt Roy* v. *Mahadeo Mahata* (1), to which I have alluded, was no longer an authority, inasmuch as the case of *Hem Chunder Bhunjo* v *Mon Mohini Dassi* (3), on which it was based had been overruled by a Full Bench The case of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (3), however, is an entirely different case from the case of *Srimunt Roy* v. *Mahadeo Mahata* (1), and I respectfully venture to doubt whether the Full Bench can be regarded as overruling it. There is also the case of *Chhatrapat Singh* v *Gopi Chand Bothra* (4), in which the learned Judges certainly appear to have thought that the termination of the landlord's interest would not prevent his decree for rent or for what had been rent, from being executed under the provisions of the Tenancy Act by the sale of the tenancy in respect of which the rent had been payable, though as pointed out in the case of *Srimunt Roy* v *Mahadeo Mahata* (1), there is no formal decision on this point in the case. It seems therefore that there is a conflict of authority on this point and though I am inclined to follow the case of *Srimunt Roy* v. *Mahadeo Mahata* (1), yet I must admit that the balance of authority is perhaps against the view taken in that case. But in the view that I take in this case it is unnecessary for me to come to a final decision on this point.

(1) I. L. R 31 Cal. 550 (1904).
(2) I. L. R 35 Cal 737 (1908).
(3) 3 C. W. N. 604 (1899).
(4) I. L. R 26 Cal. 750 (1899).

Secondly, it is argued that the learned Subordinate Judge was wrong in holding that the second decree in execution of which Defendant No. 1 purchased the holding was fraudulent. The learned Subordinate Judge relied on certain *dakhilas* produced by the Plaintiff which show that the landlord accepted rent from him as *marfatdars* and held that these *dakhilas* showed that the landlord knew that the Plaintiff was in possession, that consequently the suit against the original tenant was fraudulent. It is argued on the authority of several cases of which the last is *Deb Narain Dutt* v. *Baidyanath Napit* (5), that these *dakhilas* did not show that the landlord had ever recognised the Plaintiff to be the real tenant and that therefore he was entitled to sue the original tenant of the land. This, however, is not all the evidence on which the learned Subordinate Judge relies. He says "the reasons given by the learned Munsif for his coming to the conclusion that the decree was not *bonâ fide* are correct and fully supported by the evidence on the record," and the Munsif refers to the other evidence, such as a certain compromise between the landlord's *gomasta* and the Plaintiff in addition to this evidence with respect to *dakhilas*. The decision of the learned Subordinate Judge, on this point, therefore, appears to me to be a finding of fact based on evidence with which I cannot interfere in Second Appeal.

Thirdly, it is argued that the suit is barred by the law of limitation laid down in Sch. III to the Bengal Tenancy Act. It appears to me that this contention must prevail. The Plaintiff was admittedly dispossessed in January 1905. It is clear that the manner of his dispossession was that the landlord obtained a decree for rent and in execution of that decree sold the holding which was purchased by the first Defendant. It is now settled that when a tenant is dispossessed of his land by another tenant and the landlord has a hand in the ouster the limitation laid down in the schedule applies. It has also been held that when a landlord sells a holding in execution of a decree for rent and the holding is purchased by another raiyat the special limitation will apply. The case of *Aminuddin Munshi* v. *Ulfatunnissa Bibi* (6) seems to me a clear authority for this view. There

(5) 14 C. W. N. 68 (1909).
(6) 13 C. W. N. 108 (1908).

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are several cases in which co-sharer landlords have sold holdings for their shares of the rent due and purchased them themselves. And it has been held that in such cases when they dispossessed the tenants the dispossession was not effected by them *qua* landlord but *qua* auction purchasers. But these decisions appear to me to be wholly dissimilar to the case now before me. If the whole body of landlords bring a suit for rent, obtain a decree, and in execution sell the holding which is purchased by another tenant I do not see how it can be disputed that they have a hand in the ouster. The learned Subordinate Judge holds that the landlord in this case had no hand in the ouster, because every thing was done by his *gomasta*, the Defendant No. 2. He says "In this case there is nothing to show that the landlord was colluding with Defendant No 1 On the other hand it is clear that Defendant No. 1 is in collusion with Defendant No. 2 who is not the landlord but who is landlord's *gomasta* who hoodwinked the landlord in all respects." This finding is totally inconsistent with a finding at which the learned Subordinate Judge arrived a little earlier in his judgment which runs as follows :—"It was in my opinion fraudulent on the part of the zemindar to sue the old tenants instead of the Plaintiff for rent. The *dakhilas* produced by the Plaintiff show that the landlord knew that he was in possession" It is not disputed that the landlord was the Plaintiff in the suit and the holder of the decree in execution of which the first Defendant purchased. It is not suggested that the *gomasta* exceeded his powers in filing the suit for rent. It appears that the landlord lives elsewhere and leaves the whole management of his estate to his *gomasta*. He has no personal knowledge of the circumstances of the case But I am assured by the learned pleader for the Appellant that there is no evidence whatever on the record that the *gomasta* actively and deliberately concealed anything from the landlord in connection with this matter; and the learned pleader for the Respondent to whom I gave an opportunity of looking through the evidence to see if he could question this assurance was unable to show to me anything which would imply that the landlord was in any way misled or deceived by the *gomasta*. A finding of fact which is based on no evidence whatever can be questioned in Second Appeal. And even if the rent suit which resulted ultimately in the dspossession of the Plaintiff was brought by the landlord in ignorance or even by being deceived, that fact does not make it any the less true that the Plaintiff was dispossessed by the action of the landlord.

Under the circumstances it seems to me that the landlord must be regarded as the real Plaintiff in the suit for rent and the real decree-holder in the execution case in the course of which the first Defendant purchased the holding. Therefore it appears to me clear that the landlord had a hand in the ouster of the Plaintiff, and the limitation laid down in Sch III to the Tenancy Act applies. The dispossession took place in January 1905 and the suit was instituted in January 1908. The suit, therefore, appears to me to be barred by limitation. The appeal must be allowed and the suit dismissed with costs of this Court and of the first Appellate Court.

[On further appeal by the Plaintiff under sec. 15 of the Letters Patent]

Babus Sib Chandra Palit and *Kherode Narain Bhuiyan* for the Appellant.

Babu Mohini Mohan Chatterjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The only point that arises on this Appeal is whether the Plaintiff's suit is barred by Art. 3 in the third schedule to the Bengal Tenancy Act. This is an article which after a lapse of certain time deprives the Plaintiff of his right to come to Court for the purpose of vindicating a claim which is his, and therefore it must be clearly made out that any particular case falls within its terms. We recently had occasion to enter a protest against extending the terms of this article by use of figures of speech and metaphors.* What we have to see in each case is whether in fact there has been such dis-

* See *Srimati Basanta Kumary v. Nanda Ram*, 17 C. W. N. 1149 (1913).

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possession as the article requires. That dispossession, it is conceded, must be by the landlord. The Subordinate Judge untrammelled by the various authorities which can be cited one way or the other came to the conclusion on the facts that there had been no dispossession by the landlord. I see no reason why the High Court should interfere with that finding. It is a finding for which there is foundation in the evidence, and, in my opinion, it would be erroneous to interfere with it. Mr. Justice Coxe has interfered with it, and in so doing, we think, he has committed an error. We must, therefore, reverse his judgment and restore the decree of the lower Appellate Court.

The Appellant before us must have the costs of the two appeals in the High Court.

[On 16th July 1913, the Court added :—

JENKINS, C. J.—It has been brought to our notice that Defendant No. 2 was no party to the Letters Patent Appeal. That is doubtless because he was not an Appellant in the appeal to the High Court which was heard by Mr. Justice Coxe. Though Mr. Justice Coxe's judgment is expressed in general terms, where it directs that the suit must be dismissed, we read his judgment as meaning that the suit must be dismissed as against Defendant No. 1 who also was Appellant before him : and, as regards Defendant No. 2 the decree of the lower Appellate Court was left untouched by his judgment. It is therefore unnecessary for us to give any further direction, because we restore the decree of the lower Appellate Court as against Defendant No. 1, that being the only part of the decree that was disturbed.]

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1489 OF 1909.

CARNDUFF, J.
CHAPMAN, J.,
1913,
16, January.

ICHHYAMOYI and others, Plaintiffs, Appellants,
v.
KAILASH CHANDRA MUKHOPADHYA and others, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 19, 21—Person claiming to be raiyat at fixed rates under invalid lease, if may have acquired occupancy right by possession—Permanent lease by Hindu widow, twelve years' occupation under—Right of occupancy acquired before Act, saving of.

BHUT NATH NASKAR *v.* SURENDRA NATH DUTTA (1) *is no authority for holding that a person who claims the higher status of* raiyat *at fixed rates cannot, if the claim is disallowed, fall back upon and establish, if he can, the lower status of an occupancy* raiyat.

A permanent raiyati *lease of land in which the grantor has the qualified interest of a Hindu female heir is invalid. But the lessees would nevertheless acquire occupancy right in the holding after 12 years possession as* raiyat.

Where such lease commenced in March 1873 :

Held—*That irrespective of whether the provisions of the Bengal Tenancy Act operate to prevent the acquisition of occupancy right by a person claiming to be a* raiyat *at fixed rates or not, in this case occupancy right was acquired before the Bengal Tenancy Act came into force and was saved by sec. 19 of that Act.*

This was an Appeal preferred on the 21st of July 1909 against the decree of B. C.

(1) 13 C. W. N. 1025 (1909).

ICHHYAMOYI *v.* KAILASH CHANDRA MUKHOPADHYA.

Mitra, Esq., District Judge of Zillah Murshidabad, dated the 24th of March 1909, reversing the decree of Babu Annada Prosad Mazumdar, Munsif, 2nd Court at Jangipur, dated the 9th of March 1908.

The material facts will appear from the judgment.

Babu Govinda Chandra Dey for the Appellants.

Babu Tarak Chandra Chuckerbutty for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal is preferred against the decision of a suit brought by a Hindu widow for recovery of possession of certain plots of land and for declaration of title thereto. The original Plaintiff is now dead, and the Appellants before us are her sons, who have been substituted in her stead.

It appears that the Defendants were in possession under a permanent lease, which was granted to them in the month of March 1873, by one Bamasundari, the sister of the original Plaintiff. It has been held that Bamasundari had only a life interest in the land, and that the permanent lease granted by her to the Defendants was invalid; and that decision has not been assailed. The lower Appellate Court, however, found that the Defendants had nevertheless acquired an occupancy right, they having been in possession for more than twelve years and that they were, therefore, not liable to be evicted.

The principal point taken before us is that, as the Defendants claimed to be *raiyats* holding at fixed rates, they could not acquire the lower rights of mere occupancy *raiyats*; and, in support of this contention, reliance is placed on the decision of this Court, *Bhutnath Naskar* v. *Surendra Nath Dutt* (1), which was a Letters Patent Appeal, but a reference to that case, and especially to the judgment of the learned Chief Justice in it makes it quite clear that the decision is no authority whatever for the proposition—to our minds, a startling one—that a person who claims the higher status of a *raiyat* at fixed rates cannot, if that claim is disallowed, fall back upon and establish, if he can, the lower status of an occupancy *raiyat*. Moreover, the arguments which were put forward by two of the learned Judges in that case and on which the Appellants rely, proceeded, not upon general principles, so far as we can see, but upon the special provisions and framework of the Bengal Tenancy Act of 1885. But the permanent lease with which we are here concerned, was, as we have observed, granted in March 1873; the Bengal Tenancy Act did not come into force till the 1st November 1885; and thus it would seem that the occupancy right which the Defendants are said to have acquired was acquired under the former law and is saved by the special provisions of sec. 19 of the Act of 1885. That being so, the case is still less an authority on the point now before us, and we have no hesitation in saying that, in our view, the learned District Judge was right.

There remain two smaller points relating to two specific parcels of land included in the land in suit. First, as regards a plot of 6 cottahs, it is contended that, as that was purchased by one of the Defendants from the original Plaintiff, the Appellants are entitled to it as her reversionary heirs. Now, it seems to us quite clear that the Appellants who stand

(1) 13 C. W. N. 1025 (1909).

ICHHYAMOYI *v.* KAILASH CHANDRA MUKHOPADHYA.

in the shoes of the original Plaintiff cannot, in this suit, set up any such right. Their cross-appeal in respect of this plot of land was, therefore, rightly dismissed as being without substance.

The second plot referred to is one of 11 cottahs and it is contended that, as this plot was purchased by one of the Defendants from Rajabullav, a *lakheraidar*, and the Plaintiffs do not question the *lakheraj* right of Rajabullav and his transferee, they ought to be given a declaration as to their tenant right in the plot. As regards this, all we need say is that this was not the case set up by them in their cross-appeals in which the *lakheraj* right of Rajabullav was expressly denied. We cannot, therefore, listen to this contention now.

The result is that this Appeal is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 61 OF 1912.

JENKINS, C. J.
WOODROFFE, J.

1913, Heard, 22 & 28, August, 25 & 26, November. Judgment, 28, November.

BHUPENDRA K. GHOSH
v.
AMARENDRA NATH DEY and another.

Will by Hindu, construction of—Hindu testator, bequest by, to nephews, contingent upon the death of son directed to be adopted without issue and after the life of widow—Conditional bequest—Beneficial interest—Estate, if in abeyance—Bequest by implication—Contingent bequest—Annuity by Will—Succession Act (X of 1865), sec. 107, illustrations.

Where a Hindu testator by his Will authorised his widow to adopt a son and provided that if she died without adopting a son or if the son adopted predeceased her without leaving any male issue, in such event his estate, after the death of his wife, who was also appointed sole executrix, should pass to testator's sister's sons who might be living at his death:

Held—*That the widow and the adopted son took a qualified interest and on the death of the adopted son without issue and of the testator's widow thereafter, the property passed on to the nephews as directed in the Will.*

An estate on a future contingent event would be within the meaning of sec. 107 of the Succession Act (X of 1865) as contemplated in the illustrations thereof.

SOORJEEMONEY DOSSEE *v.* DINOBUNDHOO MULLICK (2) *referred to.*

The question in this case was as to who is entitled under the Will of a Hindu named Herambo Chandra Ghose who had himself been adopted by the widow of another deceased Hindu of the name of Girindra Chandra Ghose. Herambo died on the 10th of November 1907 leaving a Will. The question in this case depended on the construction of this Will of which the material part was as follows:—

"This is the last Will and Testament of the Herambo Nath Ghose of No. 45, Pathuriaghata Street, Calcutta, son of Girindra Chandra Ghose, deceased zemindar—I revoke all prior testamentary writings and appoint my wife Srimuti Paritoshini Dasi to be the sole executrix of this my Will—I hereby authorise my said wife to adopt *dattaka putra.* In case of

(2) 9 M. I. A. at p. 135 (1862).

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death of an adopted son my said wife shall adopt one after another 5 five sons in succession. If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my wife shall pass to the sons of my sister Sreemutty Benodini Dasi who may be living at the time of my death. My said wife shall during her life receive from my estate Rs. 300 a month in lieu of her maintenance and she shall be at liberty to reside in my family dwelling-house No. 45, Pathuriaghata Street aforesaid. I hereby direct my executrix to pay the following annuities out of the income of my estate, *viz.*, to my said sister Srimutty Benodini Dasi Rs. 50 a month, and to each of her sons who may survive me Rs. 100 a month, and to each of her daughters who may survive me Rs. 10 a month during their respective lives."

It was alleged by the Plaintiff that the widow of Herambo only adopted Hem Chandra Ghose on the 3rd of August 1909 and that thereupon the whole estate of Herambo vested in Hem Chandra. Upon Hem Chandra's death on the 11th of March 1910 the estate devolved upon Poritosini, the adoptive mother of Hem Chandra, as his heiress and upon the death of Poritosini it came to Kisori Moni, the paternal grandmother of Hem Chandra. On Kisori Moni's death the estate devolved on Tarilakya Nath Ghose, the reversioner, and the present Appellants were the legal representatives of Trailakya who had died pending the appeal.

The fact of the adoption of Hem Chandra by Herambo's widow was denied by the Defendants in the Court of the first instance but the same was allowed to be proved by consent of parties by an affidavit in the Court of Appeal.

The suit was originally heard by Fletcher, J., who dismissed it with costs. Against that order the Plaintiffs preferred this appeal.

Mr. B. Chakravarti (with him *Messrs. C. R. Das*, *B. K. Lahiri*, *N. Ghatak* and *K. C. Bose*) for the Appellant contended that there is no prior gift but there is a mere contingent gift to come into operation after the widow's death. On the death of Hem Chandra there would be intestacy and the estate will come to the widow and after her by a course of succession to me. The Will merely provides for the adoption of a boy who however does not take under the Will. Once the adoption takes place, the ordinary law of inheritance comes into operation. In *Soorjeemoney's* case (2), there was a prior gift, upon a certain contingency happening there was a defeasance. Here, in the event of an adoption taking place there is no gift to the adopted son or to the widow. A Hindu testator cannot make a disposition of the character the Defendants claim to be entitled to. Until adoption the widow takes it but immediately there is the adoption the adopted son takes it by inheritance and once the law of inheritance comes into operation the testator can no further control the devolution. Sec. 111 of the Succession Act cannot apply.

[JENKINS, C. J.—What is the rule of Hindu law that prevents it?]

Mr. Chakravarti.—(1) The donor must divest the whole of his interest in favour of the person or persons capable of taking. (2) The only estate which after being vested can be divested is the estate of a Hindu widow who has got the authority

(2) 9 M. I. A. 135 (1862).

to adopt and has adopted in pursuance of such authority. The present estate once having vested in the adopted son cannot afterwards be divested.

[JENKINS, C. J.—Refers to illustration (a), sec. 107. What is the difficulty?]

Mr. Chakravarti.—In that case the whole estate is dealt with by the testator. Here, he is to take the whole of the estate on adoption.

[JENKINS, C. J.—Isn't there a falacy? The whole estate is not disposed of but only a portion of it—so much is therefore subtracted.]

Mr. Chakravarti.—If there was a vested interest in anybody then the law of inheritance would be with regard to the remainder.

[JENKINS, C. J.—Supposing the wife predeceased the testator?]

Mr. Chakravarti.—Then the contingency would arise. There is no vested interest in anybody to take effect from the death of the testator.

[JENKINS, C. J.—Is the whole interest vested then?]

Mr. Chakravarti.—Yes, that is so and so the law of inheritance must apply.

[JENKINS, C. J.—Do you maintain that a future legacy can't be given?]

Mr. Chakravarti.—It can't be, if there is no body in the meantime to take it.

[JENKINS, C. J.—In that case an annuity by Will would be bad?]

Mr. Chakravarti.—The corpus would vest in somebody and there must be a trust. You cannot have the estate in abeyance, for if you do, the law of intestate succession comes in. Whatever may be done under any other system of law, it cannot be done under the Hindu Law. If before the passing of the Hindu Wills Act the Hindu testator was incompetent to do so he cannot do it after the passing of the Act. (Sec. 3, Hindu Wills Act, last paragraph). What the testator does is a contingency which may or may not happen. [*Raneemoney* v. *Premmoney* (3)], [*Bramamoyi* v. *Joges Chandra* (4)]. Refers to the judgment of Norman, J., at bottom of page 408.

[JENKINS, C. J.—That doctrine does not apply.]

Mr. Chakravarti.—That is to say, there it would be an attempt to leave the estate undisposed of and the ordinary law of inheritance comes in. You cannot keep the estate in suspense by any testamentary disposition. The estate tried to be created by the Will is futile. (At this stage the hearing was adjourned till after the long vacation and on the 25th of November Mr. Chakravarti continuing his argument said:) Annuities under Hindu Law stand on a separate footing. They are recognised by the Hindu Law and also by the Hindu custom and usage. See *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (5) and *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (6). Adoption or no adoption, we are entitled to succeed. Refers to *Bhoobun Moyee* v. *Ram Kishore Acharya* (7). Adopts the judgment in *Gordhan Das* v. *Ram Coover* (8) as part of his argument. Refers to *Nil Komul* v. *Jotindra Mohan* (9). Relies upon p. 188, also on *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (5), also Mayne's Hindu Law, 7th Edn., p. 571, end of para. 427 and pp. 567, 721, 813, *Kalidas* v. *Krishan Chandra* (10), *Kally*

(3) 9 C. W. N. 1033 (1905).
(4) 8 B. L. R. 400 at p. 408 (1871).
(5) 4 B. L. R. 103 (165) (1869).
(6) 9 B. L. R. P. C. 377 (399-402) (1872).
(7) 10 M. I. A. 279 at p. 311 (1865)
(8) I. L. R. 26 Bom. 449 at p. 457 (1901).
(9) I. L. R. 7 Cal. 178 (1881).
(10) 2 B. L. R. F. B. 103 (1869).

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Prosonno v. *Gocool Chunder* (11), *Manikyamala* v. *Nund Kumar* (12), *Alangamonjori* v. *Sonamani* (13).

Mr. S. P. Sinha (with him *Messrs. B. C. Mitter*, *A. N. Chaudhuri* and *N. Sarkar*).—The intention of the testator is clear from the Will and there is nothing in the Hindu Law to prevent giving effect to that intention. It is not absolutely necessary that the bequest should be in express words though this bequest is in express words. The word "pass" in the Will assumes that it is in somebody from whom it is to pass. When there is no effectual adoption my wife gets it and on her death my nephews. There is a gift over by implication. The provision of Rs. 300 a month contemplates that if the adopted son had lived she would get maintenance only.

[JENKINS, C. J.—Is it not an essence of implication that without it the particular individual would not take?]

Mr. Sinha.—Of course these persons take under the law of inheritance.

[JENKINS, C. J.—Is there anything in the Succession Act about a gift by implication?]

Mr. Sinha.—There is no section. It is possible to say that the testator wanted to leave his property to the adopted son and, if he died without leaving male issue, to the widow and after her to the nephews. The other side relies upon an occult doctrine of Hindu Law. One can understand about the estate lying in abeyance. Their fallacy lies in the fact that when they talk of the estate they talk as if it were so many rupees or so much land but not as a whole *hereditus* or *universitas*.

[JENKINS, C. J.—An executory gift is said to be good when there is no particular gift to support it.]

Mr. Sinha.—There must be some reason or principle which is contrary to such gift. Refers to sec. 4 of the Probate Act which applies to a Hindu Will. Apart from the gift by implication the property would be held by the executor for the wife until adoption and after adoption for the adopted son; then the widow again as heir of the adopted son; then after the widow for the nephews. The whole estate vested in the widow. There is no authority for the proposition that a gift is bad if it is not to take effect immediately on the death of the testator. The cases go no further than this that an estate under the Hindu Law cannot be in abeyance. Contingent executory bequest is good and the other side has not shown it to be bad. There is nothing in Hindu Law which prevents a contingent executory bequest being given effect to. [*Soorjeemoney* v. *Dinobundhoo* (2)]. Under the Hindu Law you could make a gift *inter vivos*. There is no reason why one could not make a direct gift *inter vivos* to A for life and then to B. It is the normal kind of disposition. Both secs. 113 and 114 of the Succession Act which relate to executory bequests apply to Hindu Wills. There is no case to the effect that a legacy in the way suggested is bad—*i.e.*, a gift *in future*. If the doctrine of trust can be invoked then that doctrine can be extended further for the purpose of the kind. Estate vested in the executor by virtue of the Hindu Wills Act and not of the Probate and Administration Act, (Mayne, 7th Edn., 578). A testamentary

(11) I. L. R. 2 Cal. 295 (1877).
(12) I. L. R. 33 Cal. 1306 (1906).
(13) I. L. R. 8 Cal. 637 at p. 648 (1882).

(2) 9 M. I. A. 135 (1862).

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bequest need not follow the rule of gift. Nothing in Hindu Law that a gift *in presenti* is bad. A mere promise to give is not a gift. Essentials of a valid gift being (1) giver must divest himself, (2) property must vest in taker. As long as donor does not retain the property himself, he can give it to A for life and then to B. *Re* Wills, the death of the testator is the extinction of his right and the gift to donor need not be *in presenti* and possession may be given at a future time. *Soorjeemoney's* case (2) shows that possession *in presenti* is not necessary. If the property is to be given to anybody *in presenti* to which he is not admitted, the appointment of executors satisfied it. *Nafar Chandra* v. *Ratan Mala* (14). Where there was no gift of the estate beneficially for 10 years still it was held valid. The whole argument on the other side is based not on Hindu Law but on a fundamental principle of a prior estate to support a gift over. The estate is in the executors who can deal with it. No question of abeyance arises. The heir takes only that which has not been disposed of by the testator. Since 1870 the estate is vested in the executor.

[WOODROFFE, J.—You say (1) implied gift to wife until adoption; (2) implied gift to son after adoption; (3) implied gift to wife after death of adopted son without male issue.]

Mr. Sinha.—In the alternative I may assume there is no implied gift. Then the question of resulting trust comes in. Reason, convenience and public policy are in favour of a gift of this character. He further referred to sec. 107 of the Succession Act.

Mr. B. C. Mitter dealt with the cases cited by Mr. Chakravarti and referred to Trevelyan's Hindu Law, p. 501. *Bishen Chand* v. *Asmaida Koer* (15), *Lakshman* v. *Ram Chandra* (16). Jarman on Wills, Vol. II, p. 1433. *Dharmadas* v. *Nistarini* (17), *Bhupati Nath* v. *Ram Lal* (18).

Mr. Chakravarti.—Replied.

C. A. V.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The determination of this suit turns on the validity of a bequest contained in the Will of Herambo Nath Ghosh in favour of the Defendants.

The original Petitioner was Kishori Mohini Dasi, the testator's mother; on her death the suit was continued by Troylukho Nath Ghose, the next reversioner, and when he died, by his executor, the present Appellant. It is not disputed that if the bequest in favour of the Defendants fails, the Petitioner is entitled to the estate.

The Will, after appointing the testator's wife, Poritoshini Dasi, sole executrix and authorising her to adopt proceeds as follows: "If my said wife dies without adopting a son, or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimuti Binodini Dasi who may be living at the time of my death." There then follow provisions for the maintenance and residence of his widow and for certain annuities.

Herambo Nath Ghosh died on the 10th

(2) 9 M. I. A. 135 (1862).
(14) 15 C. W. N. 66 at p. 70 (1910).
(15) L. R. 11 I. A. 164 (177) (1887).
(16) L. R. 7 I. A. 194 (1880).
(17) I. L. R. 14 Cal. 446 (1887).
(18) 14 C. W. N. 18: s. c. I. L. R. 37 Cal. 149 (1909).

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November 1907, and was survived by his wife Poritoshini Dasi.

She adopted Hem Chandra Ghosh under the authority vested in her, but the adopted son died on the 11th March 1910 unmarried.

Poritoshini died on the 16th March 1910. The Defendants are the sons of the sister Benodini Dasi, and were both alive at the testator's death. It is in these circumstances that the present rival claims to Herambo Nath Ghosh's estate are made.

If, as Fletcher, J., has held, the gift in favour of the Defendants is good, the suit must fail. The Petitioner however maintains that the bequest is bad, and so has appealed from the judgment of dismissal pronounced by Fletcher, J.

The Appellant based his contention on two grounds :—

First, he argued, that if property vests in a full owner under the ordinary Hindu Law of inheritance, then the future devolution of the property from him cannot be disturbed except by a restriction imposed from the beginning.

Next, he maintained that if effect were given to the bequest in favour of the sons, there would be such an uncertainty as to who would take, that the property would be in abeyance, and this would contravene a fundamental rule of Hindu Law.

I am not much impressed by either of these contentions.

The first is founded on a fallacy, for it assumes that the complete interest in the property has devolved on the full owner. But that is the very point in dispute, for if the bequest is operative, there would be merely a partial intestacy and a qualified interest would vest in the widow or adopted son as the case might be. The conditional bequest would not be an attempt to give an unauthorised direction to property vested in a full owner, but simply the curtailment of the interest in that property. Nor do I think the second line of argument possesses any greater merit, for I see no ground for saying that the property would be in abeyance, or that there was any more uncertainty as to the destination of the property than is the necessary consequence of every contingent bequest.

The testator's scheme is, I think, clear from the terms of his Will. First, he contemplated that he would be survived by his wife, to whom he gave a power to adopt a son. By appointing her his sole executrix, he provided that she should be his legal representative, and that on his death all his property should vest in her as such. It thus became her duty to carry out, as far as the law would permit, the testator's directions as to the property so vested in her.

Though it is not expressly so stated, still it must have been the testator's intention that his estate should be beneficially enjoyed by his wife or adopted son until the death of his wife without male issue.

If there was no adopted son or male issue of an adopted son then living, he expressly provided that the estate should pass to the Defendants.

It has been argued that the interests preceding this bequest to the Defendants arose by implication under the Will: but whether this be the true view or not, I think the bequest is good.

It does not infringe any rule against remoteness, nor are the legatees incapable of taking.

It is true that the bequest is contingent, but that does not avoid it. (sec. 107 and Part XV of the Succession Act). Nor was it fatal to the bequest that it was to

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take effect, not necessarily at the testator's death, but possibly at a future date. This view is sanctioned by the illustrations to sec. 107.

It has never been suggested that an annuity cannot be created by a Hindu Will, and yet according to Lord Cottenham an annuity of £100 is the gift of as many sums of £100 as the donee shall live years [*Blewitt* v. *Roberts* (1)].

And so a bequest of a legacy, or of an estate on a future contingent event, would be good within the meaning of sec. 107 of the Succession Act [see the illustrations to that section and *Soorjeemoney Dossee* v. *Dinobundhoo Mullick* (2).]

But if the future contingent bequest of a sum of money, or an estate, or a farm or a fund, all of which are mentioned in the illustrations to sec. 107, be sanctioned, why is the bequest in this Will bad? It was conceded by Counsel for the Petitioner that if the bequest had been of a sum of money it would have been good, unless it was a sum of money that exhausted the whole estate: this, it was argued, would have been a fraud on the law. In other words, according to the Petitioner the validity of the legacy is dependent upon its amount. I am unable to perceive any sound principle in this.

Fletcher, J., (in my opinion) rightly held the bequest to be good, and the Appeal should therefore be dismissed with costs.

WOODROFFE, J.—I agree.

Mr. N. C. Bose, Attorney for the Appellant.

Messrs. G. N. Dutt & Co., Attorneys for the Respondents.

A. K. G. *Appeal dismissed.*

(1) Cr. and Ph. 274, 280 (1841).
(2) 9 M. I. A. 135 (1862).

[CIVIL REVISIONAL JURISDICTION.]

RULES NOS. 24 AND 25 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
23, May.

HANSESHUR GHOSH, Petitioner, Appellant,
v.
RAKHAL DAS GHOSH and others, Respondents, Opposite Party.

Provincial Insolvency Act (III of 1907), sec. 22—Receiver of adjudicated insolvent's estate, issue of sale proclamation by—Property belonging to stranger included in sale—Right of stranger to move Court—Stranger, if a person "aggrieved"—Limitation—Inherent power of Court to restrain its officer from acting in excess of authority.

When during the pendency of insolvency proceedings against his judgment-debtor, the decree-holder executed his decree which was a mortgage decree and in execution purchased the mortgaged properties, and the judgment-debtor was subsequently adjudicated an insolvent and a Receiver was appointed who sent to Court a sale proclamation which included the properties purchased by the mortgagee, and more than 21 days after the sale proclamation was served the mortgagee presented a petition in Court urging that the Receiver had no authority to sell the properties purchased by him:

Held—*That the mortgagee was not a person "aggrieved" by the Receiver's act within the meaning of sec. 22 of the Insolvency Act and his objection was not subject to the limitation provided in that section.*

That the Court was competent to deal with the objection, as the Court has inherent authority to review the conduct of a Receiver appointed by it and to make an appropriate order so that a stranger may not be prejudiced by any act of the Receiver in excess of his authority.

That it was competent to such stranger to bring any such act of the Receiver to

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the notice of the Court and it was the duty of the Court to inquire into it.

"*A person aggrieved*" *is a person who has suffered a legal grievance—a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to something, and does not mean a person who has lost a benefit which he might have obtained if an order had been made.*

EX PARTE SIDEBOTHAM (1) *referred to.*

This was a Rule granted on the 6th of January 1913 against an order of M. Yusuf, Esq., District Judge of Zillah Burdwan, dated the 28th of August 1912.

The facts of the case will sufficiently appear from the judgment.

Babu Bepin Chandra Mullik for the Petitioner.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

We are invited in this Rule to set aside an order by which the Court below has refused an application ostensibly made under sec. 22 of the Provincial Insolvency Act of 1907. The Petitioner alleges that he obtained a mortgage decree against one Rakhal Das Ghosh on the 20th March 1908. That decree was made absolute on the 7th December 1909. Before the decree could be executed, the mortgagor made an application in insolvency on the 31st May 1910. During the pendency of the proceedings under the Insolvency Act, the decree was executed and the mortgagee purchased the properties at the execution sale, on the 24th November 1910. The mortgagor was subsequently adjudged an insolvent on the 31st May 1911, and a Receiver was appointed on that date with direction to act in accordance with law. On the 25th July 1911, the Receiver sent to the Court a sale proclamation in which he included the properties purchased by the Petitioner. The sale proclamation was served on the 1st August 1911. On the 28th August 1911, the mortgagee purchaser appeared in Court and presented a petition of objection in which he stated that the Receiver had no authority to sell the properties purchased by him. His application was based on the allegation that the properties in question had ceased to be part of the estate of the insolvent long before the Receiver had been appointed: and that the Receiver was not competent to sell properties which did not in reality belong to the insolvent. The Court summarily overruled the objection on the ground that it had been made after the expiry of 21 days from the date of the order of the Receiver. The propriety of this order is assailed before us, and the question in controversy is whether sec. 22 has any application to the matter.

Sec. 22 provides that if the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Receiver, he may apply to the Court, and the Court may affirm, reverse or modify the act or decision complained of, and make such order as it thinks fit. The Petitioner is not the insolvent, nor is he one of the creditors, because his case is that he ceased to be a creditor when the execution sale took place. Is he, then, a person aggrieved by any act of the Receiver? The act of the Receiver which he challenges is the issue of the sale proclamation: and the question arises, whether he can be said to be aggrieved by that act of the Receiver. Now, it was pointed out by Mr. Justice James in *Ex*

(1) 14 Ch. D. 458 (1878).

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parte Sidebotham (1) that a person aggrieved means a person who has suffered a legal grievance: a man against whom a decision has been pronounced which wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something: and does not mean a person who has lost a benefit which he might have obtained, if an order had been made. If the allegations of the Petitioner are well-founded on fact the intended sale by the Receiver cannot affect his title, because the properties in question are no longer the properties of the insolvent. Consequently, he cannot be deemed to be a person aggrieved by the act of the Receiver. Sec. 22 of the Provincial Insolvency Act has consequently no application to the case before us.

But it does not follow that the Court is not competent to deal with the objection taken by the Petitioner. When a Receiver has been appointed, he becomes an officer of the Court, and if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the Court, which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer: and for this purpose the Court may hold a summary enquiry. This view is in accord with that taken in the cases of *Ex parte Cochrane* (2), *Searle* v. *Choat* (3) and *In re Rasul Hasi Cassum* (4). The inference follows that the application made by the Petitioner to the Court below must be entertained and an enquiry held into the truth or otherwise of his allegations; but the application is not one under sec. 22 of the Provincial Insolvency Act, and is consequently not subject to the period of limitation prescribed by the proviso to that section.

The result is that this Rule is made absolute, the order of the Court below set aside and the case sent back to that Court for enquiry whether or not the allegations of the Petitioner are well-founded. If it is found as a fact that the Petitioner has acquired a valid title to the properties by his purchase at the mortgage sale on the 24th March 1910, the Receiver plainly cannot proceed to sell them as the properties of the insolvent. As the application has not been opposed, we make no order as to costs.

It is conceded that this order will govern the other Rule (25 of 1913).

The Appeals (Mis. Appeals Nos. 567 and 568 of 1912) are dismissed under Or. 41, r. 11, C. P. C.

Rule made absolute.

(1) 14 Ch D. 458 (1875).

(2) L. R. 20 Eq. 282 (1875).

(3) 25 Ch. D. 723 (1884).

(4) 13 Bom L. R. 18 (1910).

THE

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Contents.

NOTES.

Criminal Sessions.

The first Calcutta Criminal Sessions will commence its sittings from Wednesday, the 11th February, Mr. Justice Stephen presiding.

Indian Copyright Bill.

We have before us a copy of the Draft Bill for the adaptation of the English Copyright Act of 1911 (1 & 2 Geo. V, Ch. 46) to the special conditions of India. Before we come to consider the special provisions of the Government of India Bill we shall briefly notice the circumstances under which the English Act of 1911 came to be passed and was extended by proclamation in the *Gazette of India* to be in operation throughout British India on and from the 31st of October 1912. At the Berlin Conference and Convention held in 1908, to which Great Britain was a party, it was decided to bring about an international uniformity in the copyright law which necessitated certain changes in the English law of copyright. One of the important changes was the abolition of the formality of registration of copyright and extension of its scope to musical and artistic works, photographic negatives, phonograph records etc., and designs which may be patented. By sec. 37 (2) (d) of the Imperial Act, which is the concluding section, the Chief Executive (the Governor) in British possessions is empowered to extend the operation of the Act to such possessions. The English Act in its entirety was extended to British India by proclamation in the *Gazette of India* as referred to above. But at the same time it should be noted that power was given under sec. 27 of this Parliamentary statute to the Legislature in the British possessions to add to or alter the statute in respect of procedure and remedies and also to modify it in respect of works composed or published in such possessions. Sec. 27 is in the following terms.

> The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of the Act in its application to the possession, but, except so far as such modifications or additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

Amongst the most important changes that are proposed to be made in respect of "procedure and remedies" is, we note, that in cl. 13 of the Bill it is provided that all "civil proceedings regarding infringement of copyright shall be instituted in the High Court." Surely "in the High Court" is an error in drafting. In the first place, it does not specify which High Court or High Courts are meant. In the next place, the draftsman of the Bill has evidently overlooked the fact that the Allahabad High Court, the Judicial Commissioners' Courts, and the Chief Courts in other provinces (except in Lower Burmah) are not Courts of Original Jurisdiction. We are sure this obvious error will be remedied in the Select Committee. But we think that the provision in sec. 7 of the Act of 1847 to the effect that such suits shall lie "in the highest local Court exercising Original Civil Jurisdiction" was both comprehensive and appropriate. If it was felt desirable that only the Court exercising the highest Original Civil Jurisdiction, should entertain such suits all that was necessary was to omit the word "local" before "Court" and add at the end "in the Province." But we doubt whether even

such a change would meet with public approval. It would indeed be a great hardship to authors, who are as a rule not rich men, to come from the Mofussil to institute a suit in the High Court. For instance, it would be unreasonable to require people from distant parts of Bengal or Assam, such as Sylhet, Chittagong, Mymensingh or Dacca to come to Calcutta and institute suits in the Original Side of the High Court and bring witnesses from there even if the infringement took place at Dacca or any of the other places mentioned. It would, therefore, be preferable, to give the aggrieved party an option to bring the suit either in the local or in the highest Court of Original Jurisdiction in the Province.

But another change is proposed in the substantive law which would affect Indian authors very prejudicially as compared to British or continental authors. Under secs. 1—3 of the English Act of 1911, the term for which copyright subsists in translations is the life of the author and a period of fifty years after subject to the right of republication by others by the payment of royalties on a specified scale as provided for in the English Statute. It is however proposed by the Indian Legislature that translations of works first published in British India should be permitted after expiry of five years from the date of first publication, provided that two years' notice of the intention to publish a translation has been given to the author. In justification of this drastic change it is said that "vernacular translations from English and from one vernacular to another are not only common but serve the useful purpose of disseminating knowledge." But we are sure that "dissemination of knowledge" would gain immensely if the same liberty were given to Indian authors to publish translations in India of works of European authors published in Great Britain or abroad under similar conditions. Such rights of translation of European works, of course, the Indian Legislature has no authority to provide for by legislation. We see, therefore, no reason why it should go out of its way to curtail the rights of Indian authors in respect of translations of their works. This will enable European authors to exploit the best works of Indian authors and publish translations and trade in the fruits of their labour after five years without any payment to them but by only paying something to a mere translator.

Such a disparity in the law in respect of copyright in translations in England and India will land the Indian authors and publishers into anomalies and complications. It would be putting a premium in the hands of English publishers to the great prejudice of publishers in India. For, Indian authors who may be anxious to protect the right of translation of their work written in English will have to send their manuscripts to be published in England. Besides affecting the printing and publication trade in India, it is also likely to retard the growth and development of the Indian Vernaculars. Original researches by Indian authors will in self-protection henceforth be largely written in foreign tongue and published abroad. So this will have the effect of retarding rather than advancing the "dissemination of knowledge" as intended by the Indian Legislature. Then, again, with regard to literary works written in the Vernacular it would put the authors not unoften in an embarrassing position which will be further complicated by the law Courts in this country being landed into conflict of laws which the Judges would find it hard to reconcile.

Let us take the specific instance of "The Gitanjali" which was written originally in an Indian Vernacular. The author translated it into English himself and published the English translation in London. He secures a copyright in the translation for his life and for fifty years after under the law as it is in England. But a piratic publisher or translator in India after giving notice to the author may publish another version of it, which may or may not be colourably altered. The author, or his English publisher who may have bought up the copyright in the author's translation, will be powerless to obtain any protection against the right vested in him by the English Statute being nullified by conflicting legislation in India. Should the Indian Legislature pass cl. 4 of the Bill into law, it would not only deprive Indian authors of repute of a valuable right but also greatly inperil the rights of English or Continental publishers in translations of the works of Indian authors. In view of the instance given above we are not sure whether cl. 4 of the Bill, if passed into law, would not be *ultra vires*.

It should also be noted by our Legislature that the Protocol of the European Powers accepting the principle that translations should be placed on the same footing as the original work was signed by the Ambassador of His Britanic Majesty. Should any English or continental publisher acquire translation right in any work published in India and choose to question the competency of the Indian Legislature to modify the law with regard to such rights, we apprehend that the High Court in England or any of the High Courts in this country might declare the change in the provisions of the English Statute in this respect as *ultra vires*. Under the English Statute as we have pointed out above, the right would b

vested in him for the lifetime of the author and fifty years on the one hand which would be nullified by the Indian law on the other. It would therefore be desirable to avoid such complications.

Then, again, there is another very large and industrious class of authors, who will be very hard hit by the proposed law. For instance, a writer of an educational work in Vernacular may after years of hard labour compose a work on arithmetic, physical or natural science or chemistry or history, geography or grammar or of translations or commentaries of classical literature. Under the proposed law any one in India will be at liberty to take away the fruits of the life-long labour of an author written in Bengalee, Urdu, Hindi, Maharattee, or Guzrati or any other Indian language and even in English by translations which will in most of such cases involve not much more labour than transliteration. We think this is drastic and decidedly hard upon Indian authors and is also contrary to the general policy of the copyright law. We are, therefore, of opinion that cl. 4 of the Bill should not be passed into law before public opinion in India has been more carefully ascertained with regard to it. It is private rights that would be placed in jeopardy if cl. 4 were to become law. It is therefore not enough to obtain the opinion of the Local Governments or a Select Committee, but the opinion of the educated community should be specially obtained by Government with regard to the matter.

A further, though by no means a less serious, anomaly would be that the English Act in its entirety has been in force in India since the 31st of October 1912 and should the law be changed now, the translation rights in works published in India during the interval will be governed by the English law and, five years after, will be governed by the modification introduced by the Indian Legislature. What complication this alone will give rise to it is not easy to foresee.

In conclusion, we would make a suggestion with regard to the substitution of "the Government of India" in the place of "the Judicial Committee of the Privy Council" in sec. 4 of the English Act. We think it would be preferable to give jurisdiction to the High Courts to hear complaints with regard to non-publication of works of deceased authors and the grant of license, as judicial adjudication may be necessary for passing orders with regard to such applications. It is however quite appropriate for the Indian Legislature to substitute the words "Government of India" wherever the words "Board of Trade" occur in the English Act.

Since the above was in type we have received a copy of the Report of the Select Committee on the Indian Copyright Bill. We welcome the option given to the party to bring his suit before the District Judges or in the High Courts. But, we would have preferred if the highest local Court of Original Civil Jurisdiction as in the Act of 1847 had been substituted for the District Judge. The Select Committee have recommended that complaints regarding non-publication of works of deceased authors and for the grant of license for publication of the same should be made to the Judicial Committee of the Privy Council from all parts of the Empire. This seems to be an impracticable suggestion so far as India is concerned. So we adhere to our opinion that it would have been preferable if jurisdiction had been given to the High Courts in India to entertain such applications. An appeal by special leave in suitable cases would always lie to the Judicial Committee and it would without prejudice to any one add considerably to public convenience to adopt our suggestion. We are glad to note that the limit of time with regard to copyright in translations has been extended to ten years and still more that a proviso has been added to the effect that this limitation will not apply to cases where the author or his legal representative has translated the work himself or granted permission to translate to others within the period. This will no doubt protect authors' rights. But we are not sure whether the prescribing of a different period of limitation from that of the English Statute may not still give rise to complications and conflicts as indicated above.

Chief Judge of the Calcutta Small Cause Court.

Rumours are rife as to the possible incumbent in the place of Dr. Thornhill, who, we understand, is going to be appointed the Land Acquisition Judge in connection with the Calcutta Improvement Trust. If any well-qualified energetic barrister who has seen a fair amount of practice in our law Courts is appointed to be the Chief Judge of the Presidency Court of Small Causes in Calcutta, confidence in that Court will surely increase. Should, however, any temporary arrangement be made, we think Nawab Abdur Rahman, the Second Judge, is entitled to officiate in the place of Dr. Thornhill. No doubt the Second Judge's term of office is up and now he is working under an extension of service but it would be doing him and the Indian community a grievous wrong if he is superseded from below. When senior Puisne Judges in the Calcutta High Court are allowed to officiate in the place of the Chief Justice during his absence on leave or deputation irrespective of nationality or creed, we see no reason why the seniormost Judge of the Presidency Small Cause

Court cannot officiate in the place of the Chief Judge.

Report of the Calcutta Incorporated Law Society.

We have received a copy of the Report of the Incorporated Law Society of Calcutta for the year 1913. The Society has decidedly increased its sphere of useful work during the year under review. The Society on a representation from a member of the Bar appointed a Sub-Committee to enquire into the operation of r. 32 of the Taxation Rules regarding counsel's fees. Opinion seems to be divided as to the practical utility of the Rule. We shall await the report of the Sub-Committee with interest. Another matter which engaged the attention of the Society was the limited operation of Rule 297 of Civil Service Regulations so far as the Registrar of the High Court is concerned. It surely seems invidious that the special leave rules in respect of the Registrar on the Original Side of the High Court have been declared to be inapplicable if he be a Solicitor. We are at one with the Society that the Rule should be applicable to the office irrespective of the fact whether the Registrar was a Solicitor or a Barrister before he was appointed. We thoroughly endorse the appreciative notice of the late Mr. Robert Belchambers in the Society's Report and the very useful and practical method it has adopted to perpetuate his memory by the award of a gold medal annually to the articled clerk who secures the highest marks in the final examination.

The decision of the Society to institute a course of lectures to the articled clerks is also a very wise one. The Society also notices the correspondence between its Secretary and the Collector of Calcutta regarding his requisition that "Powers of Attorney should be filed in the Collector's Office by Solicitors applying for the validation of documents, for the stamp to be certified or for adjudication or other similar purposes on behalf of their clients." We published the correspondence and were of opinion that the view taken by the Secretary of the Society was right and that of the Collector untenable and we are glad to find that the Collector has yielded to the representation and not made any innovation on the practice which has prevailed in the profession as also in his office for a long time past. It is also very creditable to the Society that it can be quite candid in its criticism, as in the case of congestion in the Taxing Office, when the Solicitors and not public officers are at fault. The Society also assisted the Court in matters of professional misconduct. Altogether the Report of the Society is very encouraging.

CURRENT INDIAN CASES.

(CIVIL.)

Civil Procedure Code (Act V of 1908), Or. XLI, r. 23—Remand.

JAMBULAYYA *v.* RAJAMMA, I. L. R. 36 Mad. 492.

Where there was no regular hearing of the case and the evidence on which the disposal was made was not placed on the record:

Held—That the order of the lower Appellate Court remanding the case to the Court of first instance was proper although the disposal was not on a point which could strictly be called a preliminary point.

Co-owner, discharge by, of common burden—Decree against co-owner for contribution, nature of.

P. AMMAN PARIYAYI v. M. P. PAKRAN HOJI, I. L. R. 36 Mad. 493.

Where several shares in the same land or where several lands are liable under a common burden the discharge of the whole burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums they were equitably liable for, the limitation to enforce such a charge being 12 years, but it is not equitable to give a personal decree against the co-owner for the contribution required may be larger than the value of the property.

Civil Procedure Code (Act V of 1908), sec. 110—Appeal to the King in Council.

SRIKISHAN LAL *v.* KASHMIRO, I. L. R. 35 All. 445.

Where the value of the suit exceeded rupees ten thousand but that of the proposed appeal to the King in Council against the decree of the High Court which reversed the decree of the lower Court was below that amount. The question in the case was whether an arbitration award was binding upon one of the Respondents to the proposed appeal. Admittedly the award related to property far exceeding rupees ten thousand in value.

Held—That as the decree involved a question respecting property of value exceeding Rs. 10,000 and as the decision of the lower Court was reversed by the High Court the case fulfilled the requirements of sec. 110, C. P. C.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*Charrington & Co. "Ld."* v. *Wooder.* Before THE LORD CHANCELLOR AND LORDS DUNEDIN, KINNEAR AND ATKINSON. 11th December 1913.

"Fair market price" in a covenant ought to be construed in view of the facts and circumstances surrounding the covenant.

This was an appeal from a decision of the Court of Appeal. By the terms of the lease the Respondent covenanted that he would deal exclusively with the Appellants, and would not during the tenancy buy or dispose of any beer or other malt liquor other than such as should have been

bonâ fide purchased from the Appellants, provided that they were willing to supply the same to him "at the fair market price."

In his judgment the Lord Chancellor said :

The real point to be determined was whether the language of the covenant meant that the fair market price was the price to be paid by a tenant of a tied house as distinguished from the price at which beer could be bought in an altogether open market.

It was evident that the Court of Appeal and the Lord Chief Justice himself were much influenced by the previous decision of the Court of Appeal in *Russell* v. *Crawford* (unreported), a decision to which the Lord Chief Justice was a party. There it had been held that in an analogous covenant the words "fair current market price" meant the market price between people unrestricted in their right of bargaining.

Their Lordships had to construe the covenant in the present case not abstractly but in the light of the circumstances to which it applied. If the language of a written contract had a definite and unambiguous meaning, parol evidence was not admissible to show that the parties meant something different from what they had said. But if the description of the subject matter was susceptible of more than one interpretation, evidence was admissible to show what were the facts to which the contract related. If there were circumstances which the parties must be taken to have had in view in entering into the contract it was necessary that the Court which construed the contract should have these circumstances before it. The covenant in the present case was directed to the circumstances of the land brewers' trade. There was evidence as to these circumstances of a kind which did not appear in *Russell* v. *Crawford*, and which ought, he thought, to have made the Court of Appeal hesitate before treating that case as governing the present one.

What was the fair market price must depend on what was meant by the market, and this must be ascertained by reference to the facts proved. The great bulk of the business of the London brewers was transacted with the tenants of their tied houses. These tenants bid for these houses, and they knew that the terms on which they got the right to be supplied with malt liquor were that they should take it exclusively from the owning brewer at the standard price less certain discounts, the variation of which was to be limited by the prevailing practice. That seemed to his Lordship to be the well-understood meaning of the term "market" in this connexion, and he did not believe that the Respondent when he entered into his contract understood it in any other sense. "Market" was a word covering a variety of possible forms, and the evidence appeared to him to establish that it had a special significance in the trade done in tied houses with the London brewers. The fallacy in the view taken by the Court of Appeal appeared to him to have been that they endeavoured to interpret the covenant without reference to the circumstances of the particular trade and of the situation of the parties who entered into the contracts contained in the leases.

Sir R. Finlay, K. C., Mr. Gregory, K. C., and *Mr. McCardie* for the Appellants.

Messrs. Rawlinson, K. C., and Hogg for the Respondent.

B. D.

KING'S BENCH DIVISION.—*Crumplin* v. *London Joint Stock Bank, Ld.* Before MR. JUSTICE PICKFORD. 19th November 1912.

Cheques crossed and endorsed "not negotiable" and signed "per pro," paid into the account at a Bank of a person other than the payee—If the Bank collecting for such constituent liable for negligence in not making enquiry about such cheques.

The Plaintiff drew cheques in favour of Davies crossed and endorsed "not negotiable" and signed by the Plaintiff or by Spencer "per pro," and handed them over to his manager Rands to deliver them to Davies. Instead of so doing Rands paid the cheques into his bank (the Defendants) which collected the moneys and credited Rands with the proceeds. The Plaintiff now claimed that the Defendants had wrongfully converted the cheques, which were his property or that they received the proceeds of the cheques to his use. Defendants claimed protection under sec. 82 of the Bills of Exchange Act, 1882.

Evidence was given by managers of other banks on behalf of the Defendants that it was very common for cheques marked "not negotiable" to be paid into the accoun of a person other than the person in whose favour they were drawn, and that that fact was not sufficient to put a bank upon inquiry, and further the fact that the cheque was drawn "per pro" would also not put a bank upon inquiry.

The learned Judge dismissed the claim. He said :—

The question came to this—whether the Defendants were negligent in this case in not making inquiries. If they had made inquiries of Rands they might or might not have been satisfied with his answer, but there was no doubt that if they had made inquiries of the Plaintiff the whole matter would have come out. Were they negligent in not doing that ? It was said on behalf of the Plaintiff that the mere fact that the cheques were crossed "not negotiable" made it negligence in the Defendants to take them without inquiry. A dictum of Lord Brampton in *Great Western Railway* v. *London & County Banking Company*

([1901] A. C., 414) was cited in support of that contention. But that fact certainly was not conclusive evidence of negligence. It would be remarkable if, while the section provided that bankers were protected if they took a crossed cheque in good faith and without negligence, that it should be possible to hold that the bankers were negligent merely from the fact that they took such a cheque, unless they gave rebutting evidence that they had made proper inquiries before taking it. It was a matter which ought to be taken into consideration together with all the other matters, and that it did not go higher than that. In the present case evidence was given by persons of importance in the banking world, who said that transactions of this kind were not uncommon. One witness said that 20 to 25 per cent. of the cheques paid into his bank were cheques of this description, although that was probably due to a special reason. At any rate, it was quite clear from that evidence that the practice for cheques of this description to be paid in was so common as not to raise suspicion. It came down to a mere question whether, looking at the total number of the payment in, the number of these cheques that were paid in, their amount, and the period over which they were paid in, those circumstances were sufficient to put the Defendants upon inquiry. Some of the witnesses thought that the case was near the line. He thought that if the account had been opened with a small sum, followed by a succession of large cheques similar to Davies's cheques, he would have no difficulty in holding that they ought to have put the bank upon inquiry. But when, as in this case, the cheques were for small amounts, and when they were paid in at such long intervals, it was not negligence in the bank not to have made inquiry, and therefore as regards the cheques which were not signed "per pro." the Defendants were entitled to judgment.

Two of the cheques were signed "per pro.". Mr. Justice Coleridge had held in *Morison* v. *London County & Westminister Bank* (29 T. L. R. 342) that the fact that cheques were signed "per pro." ought to put a bank upon inquiry. His Lordship did not think that Mr. Justice Coleridge meant to hold that whenever cheques were drawn "per pro." that fact was enough to put the bank upon inquiry. He thought that that decision must have been intended to apply only to the facts of that particular case. In the present case he did not think that the fact that two of the cheques were signed "per pro." was an intimation that there was probably or possibly anything wrong in the transaction. But it was an intimation that Spencer had only a limited authority to sign the cheques, and the bank took the chance whether or not the cheques were within that authority. He did not think that the Defendants were put upon inquiry by the fact that the cheques were signed "per pro." and therefore he did not think they had been guilty of negligence.

Messrs. Roche, K. C., and Neilson for the Plaintiffs.

Messrs. Schiller, K. C., and Hogg for the Defendants.

B. D.

PRIVY COUNCIL.

[APPEAL FROM QUEBEC.]

THE LORD CHANCELLOR. LORD DUNEDIN. LORD ATKINSON. LORD MOULTON. 1913, 15, July.	THE GRAND TRUNK RAILWAY COMPANY OF CANADA, *v.* WILLIAM H. MCALPINE, since deceased, and others.

Negligence—Contributory negligence—Person crossing railway line, injury to.

This was an Appeal from a Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side), whereby a judgment of Mr. Justice Demers in favour of William H. McAlpine, deceased, for a sum of $6,500 and costs was affirmed. This sum was the amount of the damages awarded to McAlpine by the verdict of the Jury in an action instituted by him against the Appellants in respect of injuries he sustained by being knocked and injured by one of their locomotive engines.

The action was founded on the negligence of the Company's servants.

One morning an engine and tender belonging to the Company was engaged in shunting operations in connection with the work being done in a yard also belonging to them, and for that purpose was running backwards and forwards on the northern siding track. The morning was fine, and there was nothing abnormal in the state of the atmosphere. McAlpine, who lived in the vicinity on the southern side of the line, and was well acquainted with the place where the accident was alleged to have occurred, was about 9 A.M. in the act of walking up Guy Street and crossing the tracks from south to north, on his way to his employment, when he was struck by the tender of this engine then being driven backwards and proceeding eastwards.

LORD ATKINSON in delivering the Judgment of the Court observed: Whether in a case of this character, the Plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence are questions of fact to be decided in each case on the facts proved in that case. There is no such rule of law in England as that if a person about to cross a line or lines of railway looks both ways on approaching the track, he need necessarily not look again just before crossing it. Neither is it true,

as the learned Judge apparently supposes, that according to the law of England a Plaintiff who is guilty of negligence cannot recover damages. On the contrary a Plaintiff whose negligence has directly contributed to the accident, that is that his action formed a material part of the cause of it, can recover, provided it be shown that the Defendant could by the exercise of ordinary care and caution on his part have avoided the consequence of the Plaintiff's negligence.

Where a statutory duty is imposed upon a Railway Company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the Company or its servants. If, as in the example taken by Lord Cairns in *The Dublin, Wicklow and Wexford Railway* v. *Slattery* (3 A. C. 1—155, 1166), the folly and recklessness of the Plaintiff, and not the admitted negligence of the Company be the cause of the injury to the Plaintiff then the negligence of the servants of the Company in omitting to whistle, for instance, as the train approached a station or level crossing, would be an "*incuria*," but not an '*incuria dans locum injuriæ*." In *Davey* v. *The London and South Western Railway Company* (12 Q. B. D., 70) this principle was applied.

B. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CARNDUFF AND RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 3163 OF 1911. PISER *alias* BABU GOMEZ, Plaintiff-Appellant *v.* MOHAMED IDOO MIAH, Defendant-Respondent. Heard, 23rd January. Judgment, 26th January 1914.

Admissibility in evidence—Certificate if may be proved without examining writer—Evidence Act (I of 1872), sec. 167—Improper admission.

The question raised in second appeal was as to the effect of the improper reception of inadmissible matter in evidence.

The Plaintiff suing on a bond, endeavoured to save the bar of limitation by proving payment of interest by the Defendant in Faridpur on the 15th December 1907. The Defendant in reply produced a certificate which he swore he had received from the hands of the manager of the Pegu Club, and which apparently showed that he was in the service of that club in Rangoon on the date mentioned. The Court of First Instance beleived the Plaintiff's witnesses, and, holding that the certificate was not duly proved, refused to attach any importance to it. The suit was accordingly decreed. The lower Appellate Court, on the contrary, considered the Plaintiff's evidence discrepant and not at all very satisfactory, and held, referring to sec. 67 of the Indian Evidence Act, that there was sufficient proof of the certificate. In this view the lower Appellate Court reversed the decree and ordered the dismissal of the suit.

Held, that the certificate could not be admitted in lieu of the evidence of the writer himself and that the provisions of sec. 167 of the Evidence Act could not be applied to such a case.

Dr. Rash Behary Ghose, *Babus Jyotis Chandra Hazra* and *Debendra Nath Kumar* for the Appellant.

Babus Charu Chunder Biswas (for *Babu Surendra Nath Guha*) and *Charu Chunder Bose* for the Respondent.

A. T. M. *Appeal allowed: Case remanded.*

CIVIL REVISIONAL JURISDICTION. Before MOOKERJEE AND BEACHCROFT, JJ. CIVIL RULE No. 1200 OF 1913. BRAHMANANDA DEB SARKAR, Decree-holder, Petitioner *v.* HEM CHANDRA MITRA AND OTHERS, Defendants, Opposite Party. 30th January 1914.

Usufructuary mortgagee of 4 as. interest of a landlord—Suit for rent—Whether tenure liable to sale under secs. 148A and 158B of the Bengal Tenancy Act—Power of revision by High Court.

The facts out of which this Rule arises are that the Petitioner took a usufructuary mortgage of a 4 as. share of one Mohim Chandra Mitter, Opposite Party, in the disputed *jote* and that he has been in possession by receiving rent from the tenants. The rent in the Petitioner's share having fallen into arrears he brought a suit for rent making the remaining 12 as. landlords *pro formâ* Defendants, for his share of the rent due. He stated in his plaint that the co-sharer landlords refused to join with him in the suit and to state what amount was due to them from the said tenants. He further stated that if they be willing to join with him as co-Plaintiffs and to state the amount due to them, he would pay the *ad valorem* fees on their dues also. Neither the tenants nor the *pro formâ* Defendants appeared in the rent-suit which was decreed *ex parte*. Then the Petitioner applied for execution of his decree by sale of the tenure in arrears under sec. 158B of the Bengal Tenancy Act. The co-sharer landlords raised various objections which were disallowed by the Munsif on

the ground that they should have been raised in the rent-suit. On appeal to the District Judge, he held that as the Petitioner did not sue for the full rent due to all the co-sharer landlords, the tenure cannot pass by the sale but the right, title and interests only of the tenant Defendants can pass by the sale. The Petitioner thereupon moved the High Court and obtained the above Rule.

For the Opposite Party it was contended that as a usufructuary mortgagee is not a landlord within the meaning of the Bengal Tenancy Act, the privileges conferred upon the landlords by the Tenancy Act cannot be enjoyed by him. His decree is but a money decree and he cannot sell the tenure of the tenant. It was also contended that a usufructuary mortgagee as such is not a "co sharer landlord" within the meaning of secs. 148A and 158B of the Bengal Tenancy Act and so he cannot proceed to sell the tenure. Then the provisions of sec. 148A having not been complied with strictly, sec. 158B cannot apply. Rent due to all the co-sharers means rent payable to all of them. The suit being not for the entire rent due to all the landlords, the tenure cannot pass in execution of a decree passed in the suit, but the right, title and interest only of the judgment-debtors will pass. It was also urged that as there was no second appeal, the suit having been valued at an amount less than one hundred rupees, the High Court could not interfere in its Revisional Jurisdiction, inasmuch as the mistake which the learned District Judge had made, if any, was only a mistake of law and he had jurisdiction to decide rightly or wrongly.

Held—That the Bengal Tenancy Act applied to the facts of the case. Secs. 148A and 158B were complied with in the case and the High Court could interfere in such cases.

Babu Prokash Chandra Mozumdar for the Petitioner.

Babu Atul Krishna Roy for the Opposite Party.

A. T. M. *Rule made absolute.*

CIVIL REVISIONAL JURISDICTION. Before MOOKERJEE AND BEACHCROFT, JJ. RULE No. 861 OF 1913. ABDUL AZIZ AND OTHERS, Petitioners *v.* TAFAJUDDIN SHEIKH, Opposite Party. 2nd February 1914.

Civil Procedure Code, Or. 21, r. 90—Application to set aside rent sale—Transferee of a portion of a nontransferable occupancy holding, if has locus standi.

The Petitioners were transferees, under a *kobala* and a mortgage deed of portions of a nontransferable occupancy holding owned by one Kapiluddin and another, the tenant judgment-debtors. The holding was sold in execution of a rent decree obtained by the landlord against the recorded tenants and was purchased by a third party, namely, the Opposite Party in this Rule. The Petitioners were neither made parties to the execution proceedings nor were apprised of any notice of the same. The Petitioners within 30 days of the sale applied before the Munsif of Bagerhat to set aside the sale under sec. 47 and Or. 21, r. 90 of the Civil Procedure Code on the ground of material irregularity in publishing and conducting the sale and substantial injury in consequence.

The Munsif held that the Petitioners had no *locus standi* to make the application and therefore without going into the merits of the case rejected the application. On appeal the Subordinate Judge of Khulna affirmed the decision of the Munsif and he observed "it seems there is a conflict of authority on this point; the decisions reported in 9 C. W. N 134, 7 C. L. J 282 and 16 C. L. J. 139 and 141 are in favour of the Appellants and the decisions in 11 C. W. N 312, 13 C W. N. 652 and 16 C. W. N 421 are in favour of the Respondents. The decision reported in 7 C. L. J. 282 was considered in the decision reported in 16 C W. N. 421 and was dissented from. I think I am bound to follow the latest decision reported in 16 C W. N. 421. R. 90, Or. 21 allows only such persons to come under that section as have acquired some interest in the property. The landlord is the decree-holder and the purchaser or mortgagee of a nontransferable right of occupancy acquires no interest as against him."

Against the decision of the Subordinate Judge the Petitioners made an application to the High Court under sec. 115 of the Civil Procedure Code.

Held, that the transferee of a portion of a nontransferable occupancy holding can come in under Or. 21, r. 90 to set aside a sale by the landlord in pursuance of a rent decree against the recorded tenant.

Held, further, that the words "whose interests are affected by the sale" in r. 90 are much wider than the language used in sec. 311 of the old Code and in r. 89, Or. 21 of the new Code.

The cases reported in 8 C. W. N. 55 and 132, 12 C. L. J. 609, 17 C. W. N. 163, 16 C. L. J. 139 and 141 and the decisions cited above were reviewed and discussed.

Babu Haripada Chatterji for the Petitioners.

Babu Braja Lal Chuckerbutty for the Opposite Party.

H. C. S. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
Heard, 31, October and 3, November.
Judgment, 10, December.

ARUN CHANDRA SINGH and anr., Appellants,
v.
KAMINI KUMAR and ors., Respondents.

Permanent tenure, land of, washed away—Abatement of rent—Reformation in situ—*Title to land whether landlord's or tenant's—Reg. XI of 1825, if applies—Right of landlord to enhance rents.*

Where the Plaintiffs, owners of a zemindari, claimed to recover khas *possession of certain diluviated lands on their reformation* in situ *against the holders of a* putni *tenure within the zemindari, who claimed the lands as accretions to their tenure,*

Held, *(agreeing with the High Court) that the lands did not come within the provisions of sec. 4 of Reg. XI of 1825 and could not be claimed by either party as accretions to their respective property.*

Held, further *(reversing the decision of the High Court) that the diluviated lands being part of a permanent, heritable, and transferable tenure, until it could be established that the holder of the tenure had abandoned his right to the submerged lands, the tenure remained intact; and that the tenure-holders, by claiming or accepting remission of rent in respect of lands washed away from time to time by the action of the river, did not abandon or agree to abandon their rights to such lands on their reformation* in situ.

Held, *further, that the dismissal of the suit for* khas *possession would be no bar to any proceeding on the part of the Plaintiffs authorised by law to recover proper rent in respect of the reformed lands.*

HEMNATH DUTT *v.* ASHGHAR SINDAR (1) *overruled.*

MAZHAR RAI *v.* RAMGAT SINGH (2) *approved.*

This is an Appeal from a judgment, dated the 29th June 1909, of the Calcutta High Court (Sharfuddin and Coxe, JJ.).

The facts of the case sufficiently appear from their Lordships' judgment. In the course of his judgment Sharfuddin, J., said :—

"The Plaintiff (Administrator-General of Bengal) has brought this suit as executor of the Will of Kumar Indra Chandra Singh Bahadur, Zemindar of Pergunnah Bhulua. The suit is for declaration of the Plaintiff's zemindari right to, and for *khas* possession of, certain *char* lands by ejecting the Defendants from the possession thereof.

"The Defendant No. 1, Ashutosh Roy, is the owner of the Patni Taluk No. 3034, which is known by the name of Taluk Ramsaran Pal. Part of this taluk is Kismat Algi, which forms part of the zemindari of Pergunnah Bhulua. The Plaintiff's allegation is that the Defendant No. 1 and, before him, his predecessors-in-interest had, in three successive suits, obtained abatement of rent in respect of a diluviated portion of the taluk. The last of these three suits for abatement was Suit No. 470 of 1888. According to the plaint the total quantity of land of all descriptions, found to be existing then, was four drones and odd. It is next alleged that from 1296 (1899), a *char* began to form gradually on the old diluviated site of the mouzah, and that the Plaintiff was in *khas* possession of the *char* up to 1308 by receipt of grazing

(1) I. L. R. 4 Cal. 894 (1879).
(2) I. L. R. 18 All. 290 (1896).

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rent. The plaint then goes on to say that the *char* having become fit for cultivation, the Plaintiff attempted to grant agricultural leases to some tenants but he was unable to do so, as in 1309, Defendants Nos. 2 to 45 trespassed on the land, on the strength of their having been let in by Defendant No. 1 who claimed the *char* to be reformation of or accretion to his Patni Taluk mentioned above. The Plaintiff in his plaint contends that since the Defendant No. 1 had obtained successive abatements of rent in respect of the gradual diluviation as observed before, the *char* in dispute could not be regarded either as reformation or accretion, and on the above ground the Plaintiff lays claim to this *char* as appertaining to his zemindari and prays for *khas* possession by evicting all the Defendants. He also claims mesne profits. But as regards Defendants Nos. 2 to 45, there is an alternative prayer for declaration of Plaintiff's title to recover fair and equitable rent from them, if they be not found liable to be ejected. It is important to note here that no such alternative prayer is made with respect to Defendant No. 1.

"We have it that soon after the execution of the *kabuliyat*, Ex. 53, the river began to recede which brought more lands into the possession of the talukdar and that the zemindar twice obtained rent decrees for the excess lands; and on no occasion did she ever claim these lands as her *khas* zemindari land. From her conduct, I gather that she allowed the talukdar to hold possession of those lands as a part of his taluk, while she claimed to be entitled to receive rent from him.

"I have already observed that latterly the talukdar obtained abatement decrees in three successive suits for the diluviated lands. These lands having been washed away by the river were thus thrown into the category of unassessable lands. When these lands again reformed on their old sites or became accretions to the lands already in possession of the talukdar, I do not see why the representatives-in-interest of the zemindar who created the taluk should not follow the procedure that was followed by her in the two suits for rent of excess lands. On the construction of the *kabuliyat* coupled with the conduct of the original grantor of the mokurari in bringing enhancement suits instead of suits for ejectment, I am of opinion that the intention of the parties at the time of the creation of the taluk was that with the increase or decrease of area the rents would enhance or abate and that if the talukdar was dispossessed by the action of the river of any portion of the taluk, he would be entitled to take into his possession the lands that might be thrown up by the river but that he would be bound to pay rents at the stipulated rates."

In the course of his judgment Coxe, J. said :—

"Now in the present suit it is the case of both sides that the disputed land is a reformation *in situ*. This will be apparent from a reference to paragraph 3 of the plaint and paragraph 9 of the written statement. Nor is it alleged that any remission of Government revenue has ever been asked for or given with respect to the land washed away from the estate in which the taluk Ram Saran Pal is situated. So far as the estate is concerned, he land cannot be regarded as an accretion or as coming within the scope of sec. 4 of the Regulation. That being so, it seems hardly possible to me that it can be regarded as an accretion to the

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subordinate taluk. It would be anomalous that land which cannot be lawfully regarded as 'gained' from the river by the estate could be regarded as 'gained' from the river by the subordinate taluk. If it is 'gained' at all by the taluk, it must be gained from the estate, to which, on the hypothesis it belongs. It may be that this view is opposed to that taken in *Bhuggobut Pershad* v. *Doorg Bijoy* (3), but that decision seems to have proceeded on an unquestioned finding of fact that the land was an accretion, and does not bind us, in my opinion, to hold that land which is not an accretion to an estate, may be an accretion to a tenure included in that estate.

"I think therefore that the Appellant cannot claim the land as an accretion to his tenure, nor can he, I think, claim it as a reformation *in situ* under the general law, inasmuch as he has thrice applied for and obtained remission of rent for diluviations. This view is warranted by the decisions quoted above as well as by that in *Saligram Singh* v. *Puluk Pandey* (4). To succeed therefore he must show that he is entitled to the land by virtue of his contract with the Plaintiff.

"The terms of the *kabuliyat* creating the taluk taken with the evidence of the subsequent conduct of the parties leaves no doubt in my mind that the Appellant is entitled to the land in suit as part of his taluk. The history of the dealings between the parties must be discussed in some little detail. They begin with the *kabuliyat* itself, dated 1837. This shows that the taluk consisted of two villages, Algi and Paniar Tek. In this case we are concerned only with Algi. The nett area of the taluk was stated to be about 2¾ drones and the rate of rent fixed at Rs. 51-odd a drone. Then come the stipulations that follow: 'I shall not be entitled to raise any plea on the ground of Uthit, Patit, inundation, drought etc. If the land be found to be more on measurement by Nal prevalent according to the custom of the pergunnah, I shall separately pay the rent thereof at this rate. If it be less I shall get remission therefor.'

"Now these words may, of course, be differently construed by different persons. But reading them with the evidence of what the parties did under the *kabuliyat* I am satisfied that by that instrument the whole of Algi was let to the Defendant's predecessor; that it was recognised that the area would probably vary from time to time, inasmuch as, to quote the written statement, a strong tidal navigable river was situate near the boundaries; that therefore a rate of rent per drone was fixed and provision made both for enhancement and reduction of rent; and finally that it was understood that no allowance would be made for temporary fluctuations of cultivation, due to causes not of a permanent nature such as inundation, drought, etc."

Hence this Appeal.

Mr. L. DeGruyther, *K. C.*, and *Mr. A. M. Dunne* for the Appellant submitted that the *char* in dispute on its re-appearance formed part of the *khas* lands of the Appellant's zemindari and that the *putnidar* had no title thereto. The terms of the *kabuliyat* on which the High Court relied had no application to the question at issue. The intention of the parties at the time of the execution of the lease was immaterial. The re-formed lands could not be an accretion to the *putni*. If the *putnidar* was entitled to retain

(3) 16 W. R. 95 (1871).
(4) 6 C. L. J. 149 (1907).

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possession of the re-formed lands he was bound to pay rent for them. He had previously been granted abatement of rent in consequence of the diluvion of the lands. Mere non-payment of rent during the period of submersion did not terminate the tenancy. *Hemnath Dutt* v. *Ashghar Sindar* (1) is not sound. Reliance was placed on *Mazhar Rai* v. *Ramgat Singh* (2), *Saligram Singh* v. *Puluk Pandey* (4). There being no abandonment of the tenancy the Appellants were entitled to proper rent.

Mr. Kenworthy Brown for the Respondents submitted that the Plaintiff's suit was a suit in ejectment. It was based on the allegation that the Plaintiff had been unlawfully dispossessed by the Defendants. That claim had failed as the Defendants were tenants of the Plaintiff. If the Plaintiff wished to recover rent from the Respondents, he must seek his remedy in the proper Court.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The sole question involved in this Appeal, which is from a Judgment and Decree of the High Court of Bengal, relates to the title to certain lands that had been washed away some years ago by the river Siddhi in the Noakhali district and have since reformed in consequence of a change in the course of the stream.

The Plaintiffs, Appellants, are the owners of a *zemindari* called Pergunnah Bhulua, situated in that district. Within this *zemindari* lies a *Patni* tenure called *Taluk Ram Saran Pal*, created so long ago as 1837 by one of the predecessors in title of the present zemindars. The Taluk is now owned by the first and second Defendants, Respondents in this Appeal. The remaining numerous Defendants are raiyats placed on the land, by the Patnidars, since its reformation.

(1) I. L. R. 4 Cal. 894 (1879).
(2) I. L. R. 18 All. 290 (1896).
(4) 6 C. L. J. 149 (1907).

The *Dowl Kabuliyat* executed by the Patnidar in respect of the tenure shows that it comprises parts of two *Kismats* or subdivisions of villages, named respectively *Kismat Paniartek* and *Kismat Algi*; and the area included in the Taluk was evidently given approximately, for the lease contains the following covenant—

If the land be found to be more on measurement by Nal prevalent according to the custom of the pergunnah, I shall separately pay the rent thereof at this rate; if it be found to be less, I shall get remission therefor.

Their Lordships have little doubt that the reason for the approximate statement of the area and the particular provision regarding the variation of the rent in certain probable contingencies was due to the fact, which has not been seriously controverted, that a strong tidal river flowed close to the boundaries of the Taluk in question.

It is in evidence that in 1843 the Plaintiffs obtained a Decree in the Revenue Courts for increased rent on the ground that additional land was found upon measurement to be in the Patnidar's possession.

Later, considerable parts of the Algi lands having been washed away by the action of the river, the Defendants obtained, under the provisions of sec. 19 of the Bengal Council Act VIII of 1869, a proportionate remission of rent. The last proceeding in this respect was in 1889.

Since then the diluviated lands have reappeared and admittedly reformed *in situ*. With their re-appearance disputes arose between the parties; the Plaintiffs

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claimed that the lands in question formed part of their *zemindari*, whilst the Defendants contended that they were accretions to the Taluk Each party attempted to exercise rights of ownership in order to create evidence of adverse possession against the other side. Their Lordships agree with the High Court that the evidence on this point is wholly inconclusive.

The suit was brought by the Plaintiffs, the Zemindars, in June 1906 to obtain *Khas* or direct and exclusive possession of the lands in question by a declaration of their title, the usual form of relief asked for in the Indian Courts in these cases. In the alternative they urged that if their claim to *Khas* possession failed, it might be declared that the Defendants were entitled to hold the land subject to the payment of proper rent for the same. The Defendants, besides pleading that the lands in suit were accretions to their Taluk, urged that the Zemindars were only entitled to rent, but not to *Khas* possession.

The District Judge made a Decree in the Plaintiffs' favour, substantially on the ground that as the Defendants had obtained abatement of rent in respect of the lands that had been washed away by the river, they had lost all title to the reformed lands. On appeal the High Court has taken a different view. It has held in substance that having regard to the terms of the contract and the conduct of the parties, the Plaintiffs had no right to eject the Defendants from lands which originally formed part of Kismat Algi and had been washed away by the river. They accordingly dismissed the Plaintiffs' suit. In their Lordships' opinion the learned Judges are right in holding that the lands do not come within the provisions of sec. 4 of Regulation XI of 1825, and cannot be claimed by either party as accretions to their respective property. The learned Judges of the High Court appear, however, to have laid too much stress on the terms of the *Kabuliyat* and the evidence of intention deducible from the various proceedings in respect of additional rent and abatement of rent. They evidently felt pressed by an older ruling of the Calcutta High Court in *Hemnath* v. *Ashghar Sindar* (1). Their Lordships, however, do not find themselves in accord with the rule of law expressed in that case. They think that the principle applicable to this class of cases is correctly enunciated in *Mazhar Rai* v. *Ramgat Singh* (2).

In the present case there is nothing to show that, by claiming or accepting remission of rent in respect of lands washed away from time to time by an action of the river, the Defendants abandoned, or agreed to abandon, their rights to such lands on their reformation *in situ*, as is admittedly the case here. The diluviated lands formed part of a permanent, heritable, and transferable tenure ; until it can be established that the holder of the tenure has abandoned his right to the submerged lands it remains intact.

In the result, their Lordships are of opinion that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

This decree, however, will be no bar to any proceeding on the part of the Plaintiffs authorised by law to recover proper rent in respect of the reformed lands.

Solicitors : *Messrs. Morgan, Price & Co.* for the Appellants.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

(1) I. L. R. 4 Cal. 894 (1879).
(2) I. L. R. 18 All. 290 (1896).

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

THE LORD CHANCELLOR.
LORD MOULTON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

1913,
17, November.

CLIFFORD and ors., Petitioners,
v.
THE KING-EMPEROR, Respondent.

Special leave to appeal—Criminal case—Interference with verdict of jury—Fraudulently issuing false balance-sheet and inducing different depositors to deposit money, if separate offences in the case of each person so induced.

The function of the Privy Council in dealing with a petition for special leave to appeal in a criminal case is not that of a Court of Criminal Appeal, being limited by the principle laid down in IN RE DILLET (1). *If the Board finds that what has been done has been grossly contrary to the forms of justice, or violates fundamental principles then they have power to interfere.*

So where there was evidence to go to the jury on all the matters which had been dealt with,

Held—*That it would be contrary to the constitutional duty of the Board to express any opinion as to whether, in that state of things, the verdict found by the jury was a right one or the summing up a perfect one.*

Where the Petitioners who were two of them the directors and a third the general manager of a banking concern were charged with and convicted of the offence of having by means of a false balance-sheet and false advertisements induced three persons on three different dates to deposit moneys in the Bank:

Held—*That technically there were three separate offences.*

This was an application for special leave to appeal against a conviction of the Petitioners on a charge of issuing a false balance-sheet passed by the Chief Court of Lower Burma. Two of the Petitioners were the Directors and the other Petitioner was the General Manager of the Bank of Burma, Limited. The balance-sheet of the Bank which was for the six months ending on the 30th June 1911 was issued on or about the 18th August 1911 after which date there was a continuous and heavy fall in the value of the securities held by the Bank. An order was subsequently made by the Chief Court of Lower Burma for the winding up of the Company by the Court and an Official Liquidator was appointed. The Official Liquidator filed a complaint in the Court of the District Magistrate of Rangoon alleging that the Petitioners had, by knowingly issuing a false balance-sheet for the half year ending on the 30th June 1911 and by continuing to advertise the Bank as a prosperous and going concern up to the time of its close, dishonestly induced certain persons to deposit moneys with the Bank. He further alleged that the Petitioners had committed the offence of criminal breach of trust by paying dividends out of capital. The District Magistrate held an enquiry under Chap. XVIII of the Code of Criminal Procedure, and at the conclusion of the case for the prosecution the Government Advocate stated that he did not ask the Magistrate to charge the Petitioners with criminal breach of trust and the Petitioners were committed for trial by the Court of Sessions on a charge with three heads framed against each of the Petitioners of having by means of a false and fraudulent balance-sheet and by false advertisements

(1) 12 App. Cases 459 (1887).

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falsely and fraudulently induced three persons on three dates to deposit moneys with the Bank. The Petitioners were tried before Mr. Justice Twomey and a jury and during the trial the Judge amended the charge by adding the words "and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent." The Judge in the course of his summing up directed the jury that the fundamental issue in the case was whether the balance-sheet was false in taking as good assets a large amount of debts which could not honestly be considered as good debts and in crediting to profit and loss and treating as earned income a large amount of interest on these doubtful and bad debts, which interest was unpaid and which there was no reasonable prospect of recovering. The Judge further stated that the prosecution case really amounted to a case of paying dividends out of the moneys of depositors. The jury returned a verdict of guilty against each of the Petitioners on all the charges and the Judge sentenced two of the Petitioners to eight months' rigorous imprisonment on each charge and the other Petitioner to six months' rigorous imprisonment on each charge, the sentences running consecutively. On the application of the Petitioners, certain questions of law were reserved by the Judge under sec. 434, Cr. P. C., and a Bench of three Judges decided all the questions against the Petitioners.

Sir Robert Finlay, K. C., (with *Mr. F. J. Coltman*) for the Petitioners, submitted that leave to appeal should be granted.

[THE LORD CHANCELLOR.—You say the case comes within the rule in *In re Dillet* (1)?]

I should submit it does. The charge was that of issuing a false balance-sheet and the first and one of the most serious grounds on which I shall ask leave to appeal is this, that, at the trial, the learned Judge admitted as a substantive charge against the Defendants that the balance-sheet was false in respect of its including as good debts owing to the Bank certain debts which were not good.

[LORD MOULTON.—Is there no colouring word importing the *mens rea* ?]

Yes, my Lord, I do not complain of that, but what I say is that that had not formed part of the charge before the Magistrate, and that it was really inconsistent with the nature of the charge which the Liquidator had put forward before the Magistrate, and which was put forward in the first instance at the trial, and that the addition ought not to have been made.

[THE LORD CHANCELLOR.—Taking that first charge, it is a question of fact, is it not, whether you could properly pay dividends when certain debts had not yet been realised ?]

Certainly, and the particular charge here was based on the fact that certain interest had been carried in to swell the profits when the interest was so uncertain that it ought really, as it was said by the prosecution, to have been carried to an Interest Suspense Account.

[THE LORD CHANCELLOR.—That is a question of fact, surely.]

Yes.

[THE LORD CHANCELLOR.—That is nowhere near *In re Dillet* (1).]

What I complain of is that the question of the goodness of the debts was left to the jury.

[THE LORD CHANCELLOR.—The point you complain of was contained in the charges ?]

(1) 12 App. Cases 459 (1887).

(1) 12 App. Cases 459 (1887).

CLIFFORD *v.* THE KING-EMPEROR.

It is covered by the charges, it would be covered by the Indictment charging generally that this was a false and fraudulent balance-sheet, but at the same time it would be necessary that particulars should be supplied. What I complain of is that the charge being that the interest had been improperly carried to Profit and Loss Account, to that was added what was indeed treated ultimately in the summing-up as the chief charge, that debts had been treated as good which were of no value.

[LORD SUMNER.—Is the point of your complaint that what took the place of an Information or Indictment stated a general attack on a balance-sheet in respect of which some debts had been treated wrongly as secured, and at the trial you found you had to deal with another matter of fact ?]

Yes, I may say this, that certain evidence was given attacking the carrying interest to profit which involved an attack on the debts themselves. It was said the interest should not have been carried to profit because the debt itself was not a good one, and you could not expect to get the unpaid interest really paid. In that way there was evidence, but there was no charge, that the debt itself was a bad debt, and what I complain of is that the prosecution was allowed to shift their ground, and to make the main head of the claim his allegation that bad debts had been treated as good.

[THE LORD CHANCELLOR.—What was in fact the complaint we are not primarily concerned with ; what we are concerned with are these charges, and it is equally plain to see that what happened was that the charges were generally drawn wide enough to cover this.]

Yes.

[THE LORD CHANCELLOR.—You are not complaining of the procedure at the trial ?]

I am not complaining of the procedure at the trial.

[THE LORD CHANCELLOR.—Just look at this case. Here is a particular debt at any rate, as to which there was evidence. We are not a Court of Criminal Appeal sitting here trying matters as to whether the case was properly tried in every detail ; we are only here to exercise in a criminal case the prerogative in an extreme instance, that of there having been a disregard of the form of legal process, or some violation of the principles of natural justice or something *ejusdem generis.*]

I quite agree.

What I do complain of is this, that the charge upon the fraudulent nature of the balance-sheets must depend on treating debts as good which were bad, which not only were never treated by the prosecution before as bad but which was inconsistent with their case.

[LORD MOULTON.—It really is not near *In re Dillet* (1). Suppose you make out a case for a Court of Criminal Appeal, that is not enough, as the Lord Chancellor says.]

I perfectly agree, I must go a great deal further than that. My case here substantially depends on this point being left to the jury which was really inconsistent with all the earlier proceedings.

[THE LORD CHANCELLOR.—It is not inconsistent with the charges formulated. I may tell you what strikes me so strongly is this : this is a case which may have been improperly tried, but it went to the Court of Criminal Appeal in Burma. They investigated the charges, and they came to the conclusion that there was a mass of

(1) 12 App. Cases 459 (1887).

evidence about these debts which the jury was entitled to take into account. They pointed out that, so far as the charges at any rate which took the place of the indictment were concerned, these matters were within it, and they said there was a mass of evidence upon which they could not say that the learned Judge was not entitled to direct the jury, and they dismissed the appeal. Now you come to us, not as a Court of Criminal Appeal, because it cannot be too emphatically stated that this Board does not advise His Majesty as to criminal cases on that footing, but you come to us and ask us to say that there has been a disregard of the forms of legal process or some violation of the principles of natural justice.]

What I submit is that not only was the charge not put forward but that all the documents were inconsistent with that being part of a charge which the liquidator was making.

[LORD PARKER.—Is there any one of these Directors who have been convicted as to whom you could say there was no evidence that they knew, that ought to go to the jury, and that the whole thing depended on presumption ?]

Submits that it was put by the learned Judge as a case of presumption, and that there was no actual evidence. As regards Mower the case was a very cruel one, because Mr. Mower had been away from April until the 1st of August. He came back actually on the 1st of August, and because there are a few hours in which he might have got information, it was held that he might be convicted of fraud.

[THE LORD CHANCELLOR.—You have another point ?]

Yes, it is with regard to the sentence.

[LORD MOULTON.—Was this question of the sentence brought up before the Court of Appeal ?]

Yes, it was.

[LORD MOULTON.—Are they charged for the same thing ?]

Yes, I was going to submit to your Lordships that these consecutive sentences to rigorous imprisonment in Burma was contrary to sec. 71 of the Penal Code. The 71st section of the Penal Code contains provisions which I submit ought to have excluded passing consecutive sentences ; it amounts to a sentence of 24 months' rigorous imprisonment in Burma in the case of two of the Defendants.

[LORD MOULTON.—You say it is one and the same offence ?]

Yes, my Lord, and I submit it is quite wrong. It is only one matter, and what they have been convicted of is issuing this balance-sheet. Reads sec. 71 of the Penal Code and the explanation which is given in the note in Stokes' edition of the Indian Code, quoting from Mr. Justice Straight in *Empress* v. *Ram Partab* (2).

It would have been all very well if the man had been charged with three acts of false pretences whereby he got money from three individuals but that is not the case at all. This is one offence, namely, the false balance-sheet, and I submit it cannot be said there is a separate offence in respect of each of them. As my friend says, after they have come out of prison, they may be charged in respect of other deposits. I submit, it is really one offence.

Their LORDSHIPS' JUDGMENT was delivered by

THE LORD CHANCELLOR.—Their Lord-

(2) I. L. R. 6 All. 124 & 125 (1883).

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ships do not propose in this case to recommend that leave to appeal be given. Their functions are not to sit as a Court of Criminal Appeal, and it would be contrary to their constitutional duty to assume that position. A Court of Criminal Appeal can go into questions of evidence and into questions of procedure, and can deal with the case on the same footing as as ordinary Court of Appeal. Their Lordships' functions on the other hand are limited by the principle laid down in *In re Dillet* (1) to something much more narrow, namely, this: that if they find that what has been done has been grossly contrary to the forms of justice, or violates fundamental principles, then they have power to interfere. But in the present case they think there was evidence to go to the jury on all the matters which have been dealt with, and it would be contrary to their duty to express any opinion as to whether in that state of things the verdict found by the jury was a right one, or the summing up a perfect one. As regards the sentences, it is obvious that the question is one of form only. The learned Judge has given three periods of eight months in one case and three periods of six months in another, taking each offence as a separate offence. Technically, their Lordships think that these were separate offences, and moreover it would have been possible to give a longer term upon any one or the whole of the charges in question. The analogy between this case and other cases which constantly occur in criminal jurisprudence is a perfect one, and their Lordships see no difficulty in treating these as separate offences. Their Lordships will humbly advise His Majesty that the petition ought to be dismissed.

(1) 12 App. Cases. 459 (1887).

Solicitors: *Messrs. Arnould & Son* for the Petitioners.

B. D. *Leave refused.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 805 OF 1913.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 6 and 7, May. Judgment, 8, May.

KAILASH CHUNDRA NANDY and others, Defendants, Appellants, *v.* SURENDRO NATH SAMANTA, Plaintiff, Respondent.

Easement—Right to discharge surplus water across a public way, if may be acquired by prescription—Right acquired before dedication of way to public.

A person cannot by prescription aquire a right of easement to discharge surplus water from his own to another tenement through a channel across a public way intervening between the two tenements. To establish such a right he must prove that the public way was formerly private property, and the easement claimed had been acquired while it was still private property.

This was an Appeal preferred on the 24th of February 1913 against a decree of Babu Bejoy Gopal Basu, Subordinate Judge of Zillah Burdwan, dated the 21st of December 1912, reversing a decree of Babu Rash Behary Mukerjee, Munsif at that place, dated the 27th of July 1911.

The material facts will appear from the judgment.

Babus Mahendra Nath Roy, Surendra Chandra Sen and *Trailokhya Nath Ghose* for the Appellants.

Babus Ram Chandra Majumdar, Naresh Chandra Sen-Gupta and *Kailash Chandra Biswas* for the Respondent.

KAILASH CHUNDRA NANDY *v.* SURENDRO NATH SAMANTA.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Defendants in a suit for declaration that the Plaintiff has acquired a prescriptive right to discharge the surplus water of his land and tank on the land and tank of the Defendants through a channel across a public road. The properties owned by the parties are not contiguous and are separated by a public road. The case for the Plaintiff is that the surplus water of his tenement flows into his tank, and when there is an overflow, the water is discharged into a channel across the public road and then enters into the Defendants' land where it finds its way into a tank. The question in controversy is, whether a prescriptive right of easement of this discription can be acquired. If the tenements had been contiguous, there is no doubt that the Plaintiff might by prescription have acquired a right to discharge the surplus water of his land through a channel into the land of the Defendants. But in the case before us, a public way intervenes between the two tenements. It cannot be disputed that the Plaintiff cannot possibly have acquired a right of easement in so far as passage of his water through the channel across the public way is concerned. If any authority is needed for this proposition, reference may be made to the cases of *Fowler* v. *Sanders* (1) and *Dowell* v. *Sanders* (2), where it was laid down that there can be no prescription to make a common nuisance which is prejudicial to all people because it cannot have a legal beginning by license or otherwise, being against the common law. [Comyn, Dig. Pres. F. 2, Viner. Abridg. Pres. E.] Consequently the Plaintiff has not acquired a right under the law to discharge the water from his land into the channel in the public road. How can it be contended then, that he has acquired a right to discharge water from his premises into the servient tenement of the Defendants? He is bound to show that he has acquired a right to carry water by lawful means to the boundary of the land of the Defendants before be can claim to have acquired a right to discharge that water into the Defendants' tank through a channel on another's land. It has been argued, however, that although the way is a public way, it is possible that the Plaintiff has a prescriptive right of easement to discharge his water through the channel across that road. In support of this proposition, reliance has been placed upon the well-known principle that a private right of way and a highway may exist over the same road, and the acquisition by the public of a highway over a road in respect of which private individuals enjoy a right of way does not necessarily destroy the right of the latter. This proposition need not be disputed and is supported by the cases on which reliance has been placed on behalf of the Respondent, namely, *Brownlow* v. *Tomlinson* (3), *Duncan* v. *Louch* (4), *R.* v. *Chorley* (5) and *Attorney-General* v. *Esher Lenoleum Co.* (6). As was pointed out by Lord Denman, C. J., in *R.* v *Chorley* (5), it is conceivable that a man may have acquired a right of easement over property while it is still private property : if subsequently the owner has dedicated the property to the public, the public have a right subject to the pre-

(1) Cro. Jac. 446.
(2) Cro. Jac. 490.

(3) 1 Man. & Gr. 484 (1840).
(4) 6 Q. B. 904, 915 (1845).
(5) 12 Q. B. 515, 520 (1848).
(6) [1901] 2 Ch. 647.

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existing easement; in this sense, a private person may have a right of easement over property dedicated to the public. The case before us, however, is not of this description. There is no evidence to show that the land now described as a public road was at any time private property or that before it was dedicated to the public, the Plaintiff had acquired a prescriptive right of easement to discharge the water of his tenement across it. We must consequently hold that the Plaintiff has failed to establish a right to take the surplus water of his tenement by lawful means across the public road up to the boundary of the tenement of the Defendants: it follows that the Plaintiff has no prescriptive right to discharge the water of his tenement into the land of the Defendants.

The result is that this Appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed. As the ground upon which the suit fails does not appear to have been taken in the Courts below, each party will pay his costs throughout the litigation.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4168 OF 1912.

HOLMWOOD, J.
CHATTERJEE, J.
1912,
2, September.

CHANDERBODAN KOER, Petitioner,
v.
SHEODHOR PURSHAD, Opposite Party.

Provincial Small Cause Courts Act (IX of 1887), sec. 23—Plaint in suit of Small Cause Court nature involving question of title, returned by Small Cause Court for presentation in Civil Court—Refusal of latter to receive plaint—Remedy if by appeal or revision—Civil Procedure Code (Act V of 1908), Or. 7, r. 10, Or. 43, r. 1 (a).

When a plaint originally presented in the Small Cause Court is under an order under sec. 23 of the Provincial Small Cause Courts Act presented in the ordinary Civil Court, the latter has no authority to refuse to entertain the suit.

An order by the latter Court returning the plaint for presentation to the Small Cause Court, was not an order under Or. 7, r. 10 of the Civil Procedure Code as the plaint had not been originally filed in that Court, and such an order did not require to be set aside by an appeal under Or. 43, r. 1 (a).

The High Court in revision set aside the order as one made in violation of the provisions of sec. 23 of the Provincial Small Cause Courts Act.

This was a Rule granted on the 1st of July 1912 against the order of Babu Lal Behary Bhaduri, Small Cause Court Judge of Mozufferpur, dated the 30th of March 1912.

The Petitioner in this case brought a suit in the Subordinate Judge's Court with powers of a Court of Small Causes for recovery of 169 rupees on account of rent due under a ticca pattah which the Defendant as joint lessor was alleged to have realised from the lessee.

The Subordinate Judge (holding that the right of the Plaintiff depended upon proof or disproof of a title to immoveable property), returned the plaint for presentation to the proper Court. The plaint thereupon was filed in the Munsif's Court. The Munsif, however, held that the suit was cognisable only by a Small Cause Court, and in this view returned the plaint for presentation in the proper Court.

The Petitioner thereupon again filed his plaint in the Subordinate Judge's Court. A preliminary objection was taken by the

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Defendant that the suit did not lie in his Court in the face of his predecessor's order and this objection was upheld by the Subordinate Judge.

The Plaintiff thereupon moved the High Court and obtained the present Rule.

Babu Lakhi Narayan Singh for the Petitioner.

Babu Gour Chandra Paul for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

It is perfectly clear that this Rule must be made absolute and the Munsif must be directed to admit and hear this suit. The Subordinate Judge passed an order under sec. 23, which order is open only to revision in this Court and that order was a final order. The Small Cause Court has jurisdiction to refer such a case to the regular Civil Court, and the Munsif had no jurisdiction to refuse to entertain the plaint. It is not a case of a plaint originally presented before the Munsif and refused by him which would be open to appeal to the District Judge. It is a case where a case was directly referred to him under the special provision of the law which empowers Small Cause Court Judges to refer such cases when proof or disproof of title to any immoveable property is in their opinion necessary; and looking at the case in that light we do not think that it is at all necessary to direct the Petitioner to file an appeal before the District Judge against the Munsif's order. The Munsif's order is incompetent and must be set aside.

The Rule is made absolute and the case remanded to the file of the Munsif for retrial according to law. The plaint filed in this Court will be sent along with the record to the Munsif.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 884 OF 1913.

N. R. CHATTERJEA, J. TEUNON, J. 1913, Heard, 12, December. 1914, Judgment, 13, January.	KHETTRA NATH GANGOPADHYAY and another, Petitioners, *v.* USHABALA DASI, Opposite Party.

Arbitration without intervention of Court—Award—Order filing award, if appealable after decree in accordance with award—Civil Procedure Code (Act V of 1908), sec. 104, cl. (f). Sch. II, sec. 21.

An Appeal lies against an order filing an award made upon an arbitration without the intervention of the Court even after a decree is passed upon the award.

The decree based upon the award is no doubt final if it is in accordance with the award, but the validity of the decree depends upon the validity of the order directing the award to be filed and if the latter is set aside the decree must be declared inoperative.

This was a Rule granted on the 23rd of June 1913 against an order of Babu Bijoy Gopal Basu, Subordinate Judge of Burdwan, dated the 28th of February 1913, affirming that of Babu Achinta Nath Mitra, Munsif, first Court, Burdwan, dated the 28th of July 1911.

The material facts are shortly as follows :—The Plaintiff, Opposite Party, applied under Sch. II, para. 20, C. P. C., for filing an award made upon an arbitration without the intervention of the Court. The Court of first instance ordered that the award be filed in Court. There was an appeal against the order filing the award, which was dismissed on the ground that no appeal lay against the order filing the award.

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Babu Bepin Behary Ghose, for the Petitioners, submitted that the lower Court failed to exercise a jurisdiction vested in it by law in refusing to hear the appeal on its merits. Under sec. 104, cl. (*f*), C. P. C., an appeal lies against an order filing an award. The appeal was filed against the order filing the award and the fact that a decree was drawn up in accordance with the award cannot take away any right of appeal. The following cases were cited: *Ganesh Narayan Sing* v. *Malida Koer* (3), *Sabitri* v. *Promoda Prosad Chatterjee* (4).

Babu Ram Chandra Majumdar (with him *Babu Lalit Mohan Ghose*), for the Opposite Party, submitted that no appeal lay after a decree was prepared and signed. As there was no appeal against the decree passed in accordance with the award the decree could not be set aside and therefore there cannot be any appeal against the order filing the award. Sec. 104, cl. (*f*) merely codifies the law enunciated in the Full Bench case of *Janoky Nath Guha* v. *Brojo Lal Guha* (1). The order filing the award is a preliminary order and the judgment and decree in accordance with the award is the final order. You cannot prefer an appeal against the preliminary order when the final order is passed, in the same way as you cannot file an appeal against the preliminary decree.

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

The question involved in this Rule is whether an appeal lies against an order filing an award in an arbitration without the intervention of the Court after a decree is made upon the award. That an appeal lies against an order filing the award is not, and cannot be, disputed having regard to the express terms of cl. (*f*) of sec. 104 of the Civil Procedure Code. It is contended, however, on behalf of the Opposite Party that an appeal lies only so long as no decree is passed upon the award, but that where the order is followed by a decree before the appeal is filed, the appeal is incompetent, and reliance is placed upon the provisions of sec. 21, cl. 2, of the Second Schedule, and upon certain decisions of this Court.

Now, sec. 21 of the Second Schedule provides that when the Court is satisfied as to the matters stated in that section it shall order the award to be filed and shall proceed to pronounce judgment according to the award, that a decree shall follow upon the judgment, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

The section does not deal with the right of appeal from an order filing an award which is provided for by sec. 104, cl. (*f*), but it is contended that because a decree, if made in accordance with the award, is final, no appeal lies against the order filing the award if the appeal is not filed before the decree is made. But if the argument of the Opposite Party is well-founded, it would be in the power of the Court making the order filing the award to deprive the complaining party of his right of appeal against the order, by making a decree promptly, although the party may have thirty days or ninety days (as the case may be) within which to file his appeal against the order. It is suggested that the party against whom the order is made should ask the Court not to make

(1) I. L. R. 33 Cal. 757 ; s. c. 10 C. W. N. 609 (1906).

(3) 13 C. L. J. 399 (1911).

(4) App. from Or. No. 96 of 1913, decided by Mookerjee and Beachcroft, JJ., on the 21st April (1913).

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the decree until he prefers his appeal against the order. But the section directs the Court to proceed to pronounce its judgment according to the award after ordering the award to be filed and lays down that a decree shall follow the judgment. The Court thus has no option but to pronounce judgment and make a decree and we do not think the Legislature intended to make the right of appeal against an order filing the award, expressly given by sec. 104, cl. (*f*), depend upon the fact whether a decree is or is not made upon the award before the appeal against the order is filed.

The argument based upon the finality of the decree may equally apply to a case where a decree upon the award is made, subsequent to the filing of an appeal, against the order directing the award to be filed and we are of opinion that the argument is not well-founded.

Reliance is placed, however, on certain observations made by some of the learned Judges in the Full Bench case of *Janoky Nath* v. *Brojo Lal* (1). The Full Bench had to consider the question whether an appeal lay from an order passed under sec. 526 of the old Code (Act XIV of 1882) directing the filing of an award and Maclean, C. J., and Ghose, J., were of opinion that a bare order passed by the Court under sec. 526 directing the filing of an award is appealable, but that when a decree has been pronounced by the Court affirming the award it is not appealable. It is contended on behalf of the Opposite Party that the present Code merely formulates the opinion there expressed and that no appeal lies against the order after the decree is made.

It is not profitable to discuss the reasons which led the learned Judges to make the observations on a consideration of the provisions of the old Code. That Code did not expressly give any appeal against an order filing the award whereas the present Code expressly gives a right of appeal from such order, and if it were contended to take away the right of appeal from such an order as soon as a decree is prepared in accordance with the award, we would have expected the Code to provide that no appeal shall lie against such an order if the appeal is not preferred before the decree is made.

Besides, the matters to be considered in an appeal against an order filing the award are totally different from the matters to be considered in an appeal against the decree based upon the award. An appeal will lie against the decree only if, and in so far as, it is not in accordance with or is in excess of the award. A decree may be perfectly in accordance with the award, but a party may have good grounds for complaint against the order filing the award, and we are unable to hold that although a party is expressly given a right of appeal against such an order, such right is taken away as soon as the Court makes a decree in accordance with the award.

Reference was also made to that class of cases where it has been held that it is not open to an Appellant to challenge the correctness of an interlocutory order or preliminary decree without preferring an appeal against the final decree, where (as explained in subsequent cases) the final decree has been made before the appeal against the interlocutory order or preliminary decree has been preferred. But the analogy of these cases cannot apply to a case like this. The reason of the decision in that class of cases is that the Appellant could have appealed against the

(1) I. L. R. 33 Cal. 757 : s. c. 10 C. W. N. 609 (1906).

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final decree, whereas a decree based upon an award is not appealable where such decree is in accordance with the award.

Lastly, it is contended that the Appellant himself treated his appeal as being one against the decree itself. It is pointed out that full Court-fee upon the value of the suit was paid upon the memorandum of appeal, and a copy of the decree was filed along with it. It appears that the Munsif overruled the objections to the award and by his order, dated the 28th July 1911, directed that the award be filed in Court, and that a decree be passed according to the award. The decree was signed on the 3rd August and the appeal was filed on the 28th August. The appeal was described as an appeal from the decision of the Munsif, dated the 28th July 1911. It seems that the Petitioners paid full Court-fee and filed a copy of the decree because a decree had already been made. There is however nothing to show that the Petitioner acquiesced in the decree, on the contrary the record shows that his pleader refused to sign the decree. The grounds of appeal were directed agains the validity of the order directing the award to be filed and we do not think that under these circumstances the Petitioner lost his right of appeal against the order directing the filing of the award, merely because he erroneously paid the full Court-fee and filed a copy of the decree. In the case of *Shib Kristo* v. *Satish Chandra* (2) to which reference was made, the appeal was directed solely against the decree itself and not against the award and the learned Judges observed that had the order appealed from been an order passed under rule 15 it would have been necessary to consider whether an appeal lay against such an order under the Letters Patent.

In two cases in this Court, an appeal was held to lie against an order directing the award to be filed notwithstanding that a decree had been made in accordance with the award. See *Ganesh* v. *Malida* (3), and the unreported case of *Sabitri* v. *Promoda* (4). In the latter, there was an appeal against the order directing the award to be filed and a Rule was obtained to set aside the order and the decree consequent thereon. The order filing the award was set aside on appeal and the following order was passed in the Rule. "The Rule is made absolute and the decree which has been drawn up on the basis of the order now set aside, will stand cancelled." It does not appear however whether the question raised in this Rule was argued in those cases.

The decree based upon the award is no doubt final if it is in accordance with the award, but the validity of the decree depends upon the validity of the order directing the award to be filed, and if the latter is set aside, the decree must be declared inoperative.

We are of opinion that an appeal lay against the order of the Munsif directing the award to be filed, and we accordingly set aside the order of the Court of Appeal below, and direct that Court to hear the appeal according to law. The Petitioners are entitled to costs of this Rule, which we assess at 2 gold mohurs.

Rule made absolute.

(2) I. L. R. 39 Cal. 822 (1912).

(3) 13 C. L. J. 399 (1911).

(4) App. from Or. No. 96 of 1913, decided by Mookerjee & Beachcroft, JJ., on the 21st April (1913).

[CRIMINAL REFERENCE.]

REF. No. 143 OF 1913.

IMAM, J. CHAPMAN, J. 1913. 16, July.	BALADEV MISRI, Complainant, v. A. A. M. CLARKE, Accused, Petitioner.

Criminal Procedure Code (Act V of 1898), sec. 494—European British subject, rights of, regarding trial—Conviction by a Magistrate not a Justice of the Peace—Omission of Magistrate to inform accused of such rights, if vitiates trial.

Where a European British subject was placed on his trial before a Magistrate who was not a Justice of the Peace on a charge under sec. 323, I. P. C., and the Magistrate convicted the accused without asking him whether he was a European British subject and without informing him of his rights as a European British subject under the Code of Criminal Procedure :

Held—*That the conviction and sentence should be set aside on account of the error in the procedure of the Magistrate in the trial.*

This was a reference from the Sessions Judge of Sylhet (S. E. Hinton, Esq), dated the 27th of May 1913, for setting aside the order of the Sub-Divisional Magistrate of Habiganj, dated the 10th of April 1913, convicting the accused under sec. 323, I. P. C, and sentencing him to pay a fine of Rs. 8 or in default to suffer simple imprisonment for 3 days and also directing him to pay the Court-fees (Rs. 2-12) to the complainant.

One Baladeb Misri filed a petition before the Sub-Divisional Officer, Habiganj, alleging that the Petitioner, who was the Assistant Manager of Satchuri garden, beat him on his back with a cane.

The Petitioner pleaded not guilty stating that he heard that some Satchuri coolies beat the complainant because he was formerly the coolies' priest in Satchuri and lived there, but it was discovered that he kept a Mussalman woman. They consequently threatened to beat him and he fled to Surma garden. Soon after, complainant, with some Surma coolies, came to Satchuri garden, assaulted several coolies and forcibly took away the Head Babu, the Head Sardar and some coolies to the bunglow at Surma. He was therefore set upon and beaten.

The Sub-Divisional Officer found the Petitioner guilty and convicted and sentenced him to pay a fine of Rs. 8, in default to undergo simple imprisonment for 3 days under sec. 323, Indian Penal Code, and ordered him to pay the Court-fees expenses incurred by the complainant.

Against this order the Petitioner moved the Sessions Judge on the ground that the Magistrate acted without jurisdiction inasmuch as he did not, as required by sec. 454, Cr. P. Code, ask the accused whether he was a European British subject. The Petitioner stated that he was a European British subject and that his rights were not explained to him. Moreover, the Magistrate was not a Justice of the Peace and was therefore not empowered to try a European British Subject.

The Sessions Judge made a reference to the High Court under sec. 438, Cr. P. C., recommending the setting aside of the conviction and sentence.

Babu Hememdra Kumar Das for the Accused.

The JUDGMENT OF THE COURT was as follows :—

This is a reference by the Sessions Judge of Sylhet sent up to us for setting aside the sentence of fine passed upon one Mr. A. A. M. Clarke for the offence of assault. The ground on which the order is attacked is that the accused was not informed of his right under the law to be

tried according to the procedure laid down for the trial of European British subjects.

The law is quite clear and distinct on the subject and the error in the procedure of the Magistrate in the trial of the accused is apparent.

We therefore accept the reference and set aside the conviction of the accused, Mr. A. A. M. Clarke. The fine, if paid, will be refunded.

Conviction set aside.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL No. 569 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Judgment,
1, September.

C. H. BOOTH, Accused, Appellant,
v.
THE KING-EMPEROR, Opposite Party, Respondent.

Bengal Excise Act (V, B. C. of 1909), secs. 2 (12), 46, 61—"Import," meaning of—Attempt to 'import"—Evidence—Letter written by accused when admissible against himself—Letter written to accused and intercepted, if evidence—Evidence Act (I of 1872), sec. 11.

Where the accused was convicted under sec. 46 of the Bengal Excise Act of having illicitly imported cocaine but it appeared that the cocaine was seized by the Customs authorities and was never delivered to him.

Held—*That the accused was liable to be convicted of an attempt to commit the offence of importation under sec. 61 read with sec. 46 of the Act.*

That under cl. 12 of sec. 2 of the Act the word "import" means to "bring into Bengal."

That though an article may be actually within the geographical limits of Bengal it cannot be said to have been brought into Bengal if it was intercepted at the Customs office.

It is well settled that a letter written by an accused person when self-disserving is primâ facie *evidence against him if it relates distinctly to a relevant point; it is not necessary that it should be signed; it is enough if it be traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened.*

R. *v.* DERRINGTON (1) *referred to.*

A letter addressed to the accused which appeared to have been sent in reply to a communication by the accused himself was admissible in evidence, under sec. 11 of the Evidence Act, even though the letter having been intercepted never reached the accused.

R. *v.* COOPER (2) *referred to.*

This was an Appeal against the order of the 2nd Presidency Magistrate, Mr. E. Keays, passed on the 6th June 1913, convicting the accused under sec. 46 of the Excise Act and sentencing him to undergo 3 months' rigorous imprisonment and to pay a fine of Rs. 1,000.

The material facts will appear from the judgment.

Mr. James and *Babu Monmatha Nath Mukherjee* for the Petitioner.

Mr. Pugh and *Babu Jotindra Mohan Ghose* for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

The Appellant, C. H. Booth, was charged with the commission of an offence under sec. 46 of the Bengal Excise Act, 1909, inasmuch as he had imported 491 ounces of cocaine without a license or pass. He was tried by the Second Presidency

(1) 2 C. & P. 418 (1826).
(2) 1 Q. B. D. 19 (1875).

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Magistrate of Calcutta, convicted and sentenced to rigorous imprisonment for three months and payment of a fine of one thousand rupees.

The circumstances under which the Appellant was convicted may be briefly stated in so far as they are disclosed by the evidence.

On the 23rd January 1913, the Customs authorities discovered a large quantity of cocaine concealed in several bales of old clothes which had been exported from England by C. Porter & Co., by S. S. Borneo for delivery to the adressee, one Rasu Prasad. The Invoice and Bill of Lading for the consignment had been made over by one Kalicharan Mukherjee to Cox & Co., in order that the goods might be cleared and passed through the Customs House. Kalicharan Mukherjee called at the office of Cox & Co., on the 23rd January to take delivery, and was taken to the Customs authorities who had already discovered the cocaine secreted in the bales of clothes. What information enabled the Customs authorities to make the discovery has not been disclosed in the evidence and is not material for the purposes of the present case. It is sufficient to state that Kalicharan Mukherjee was prosecuted before the Chief Presidency Magistrate and was convicted. He moved this Court and obtained a Rule. The Rule has been discharged and the sentence affirmed, though the conviction has been altered to one under sec. 61 of the Bengal Excise Act, namely, the offence of attempting to import cocaine in contravention of the law. As already stated, the Bill of Lading showed that the goods were consigned by Porter & Co. to Rasu Prasad and bore the endorsement of both Porter & Co. and Rasu Prasad. The present Appellant had ostensibly no connection with the incident, and we have not been told what circumstances led the investigating officers to suspect that the accused was in any way connected with the matter. We know this much only that on the 30th January 1913, an order was obtained from the Chief Presidency Magistrate to intercept all letters posted at Calcutta to the address of Porter & Co. of London, and on the 3rd of February a similar order was obtained for the interception of all letters addressed to the Appellant. The result was that the investigating authorities intercepted a letter dated the 28th January which was addressed to Porter & Co., and had been posted on the 29th January. This letter does not bear the signature of the writer, but evidence has been given to prove that it is in the handwriting of the accused. The letter has rightly been described by the Magistrate as a remarkable document and was in these terms :—

"Dear A., 28-1-1913.

There is no news to send. There was nothing from you this mail, and I only hope you did not send any more goods after the Borneo, but fear this would be too good. From very patient enquiries from the highest sources, I find these people were given away by people they had quarrelled with, and so far as our work was concerned, there is no fault to find. The goods were passed by the appraiser and only examined in Messrs. Cox's godown on receipt of information. So, you see, had you only remained out here, as I arranged, we might still be carrying on a good business, beside having already done 40% better. I find, when my plans are not carried out, disaster follows, but it is idle to go over this ground again. As old clothes are finished with, the question now is, what new

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to try. I suggest remnants of cloth and also alpaca; C. in paper packets can be put in these rolls after a time. But I rely chiefly on Quinine. Go to Messrs. Dompier & Co., 8, Harp Lane, London, E. C., and ask them cost price for 1lb tins for export. Don't say, of India, because they have an agent here, or if you do say, for Karachi. Pack about 40 in a case, and let me have one case to commence with, addressed to Messrs. Smith & Co., Chemists, Jubbulpore. Of course, you must get another room somewhere, and call yourself something new—how would Allen & Co., Shippers and Agents do? You should have new stationery printed. I shall clear this myself, and, in future, all goods, and store myself as well, and all will be well. About the third lot of quinine should be loaded. Unfortunately, quinine is very dear now, but we cannot help that. Some day we may make a profit on the quinine also; all you have to (do is?) to get some C. packed in a soldered tin, well papered inside; having slipped the quinine out of the outer paper, slip in the other tin and replace labels. A piece of clean wet blotting paper will remove all labels and enable you to do this quite easily. Better sell the press. Get the quinine packed in exactly similar boxes each time, nicely lined with paper, and don't fasten the top too tightly, but make all other sides very secure (with screws;) this will cause examiners to open top lid only and the loaded tins will be at the bottom. I think this is a safe game. I expect our friend Mukherjee will get 3 months and he is making an awful outcry about it. Why he gave his own name, I don't know. The silly ass talks of appeals, and will spend thousand instead of getting it over quickly. I am very sick at the accident, and fearfully disappointed but not surprised. How we shall ever get the present stock out, I don't know. Perhaps I will bring some myself some day. I can't think of any plan to get hold of already shipped stuff by transferring to Madras or recalling. But this you would have thought out a long time ago and will do your best about. In a case like this, the least said is better, and it only remains to make fresh plans. I shall never have any confidents in future. You and I only. I shall have a safe cache and sell myself according to the market; a little that way is better than a lot the old way. Unluckily the quinine plan does not deal with bottles. Hoping you are well.

Sincerely.

P. S.—But clear out of Bartholomew close at once. You might hear from Board of Trade otherwise, not to mention India Office. But they can only bluster."

The first question for determination is, whether this letter was written by the accused. We have on the record several letters admittedly written by the accused, including one written by him to the Collector of Customs. The Magistrate has noticed the extraordinary general resemblance of handwriting in the case of the intercepted letter and the letter addressed to the Collector of Customs. There is also the evidence of Mr. Hardless that two-thirds of the intercepted letter is in the handwriting of the accused, though the expert is not equally sure as to the remaining one-third. It is patent, however, that the whole of the intercepted letter was written by one person. We have further the evidence of an assistant in the Mercantile Bank who is perfectly familiar with the handwriting of the accused as one of the customers of the

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Bank. We feel no doubt upon the whole evidence that the intercepted letter was written by the accused. The next question which arises is, whether the letter refers to the incident of the 23rd January 1913. Upon this point, there is really no room for controversy. The letter plainly refers to the seizure of the cocaine on S. S. Borneo, and there is no suggestion that there was any other consignment by the same steamer which was seized about the same time. There is also no doubt that the "friend Mukherjee" mentioned in the letter, is Kalicharan Mukherjee who was prosecuted in connection with the same incident and convicted. We have, consequently, the two facts that the letter was written by the accused and that the incident mentioned therein is the discovery and seizure of the consignment of cocaine concealed within old clothes on S. S. Borneo on the 23rd January 1913. It is obvious that the letter is, in these circumstances, admissible against the accused, though it may have been intercepted. It is well settled that a letter written by an accused person, when self-disserving, is *primâ facie* evidence against him, if it relates distinctly to a relevant point; it is not necessary that it should be signed; it is enough if it is traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened. *R.* v. *Derrington* (1).

We have next to consider the effect of the contents of the letter. It has been argued by learned Counsel for the accused that the recitals in the letter do not show that the writer was the importer of the cocaine, and in this connection an elaborate argument has been addressed to us as to the relative rights of a consignor and a consignee under a C. F. I. contract. The question raised, however interesting it may be, does not affect the matter before us. The point for determination is, whether the accused has imported cocaine in contravention of the Bengal Excise Act. The term "import" as used in the Statute has a very wide significance, for under cl. (12) of sec. 2, the term "import" means "to bring into Bengal." The contents of the letter make it manifest that the accused imported the cocaine into Bengal or at least attempted to do so; it is immaterial for our present purpose to enquire whether he was the consignee and whether the title to the goods had vested in him under the terms of the contract between him and the exporters. It is worthy of note that the accused states in the letter that if the addressee had only remained in this country as suggested by him "they might still be carrying on a good business." He then proceeds to discuss with some elaboration future plans of work and possible modes of importation of cocaine with the least chance of detection. It has also been argued that on the most unfavourable view, the accused was the partner of Porter & Co., and consequently an exporter from England and not an importer into Bengal. The answer to this argument is that he may have been both exporter and importer, and it is plain, that whether he was an exporter or not, he was an importer. We are convinced that the accused did attempt to import cocaine in contravention of the law, though it may not be possible, on the evidence as it stands, to determine with precision the extent of the benefit that would accrue to him upon a successful venture. In this view, it is needless to consider in detail the other evidence on the record, which, in our opinion, materially confirms the conclusion at which we

(1) 2 C. & P. 418 (1826).

have arrived. But we may mention that there is satisfactory evidence to show that on the day following the discovery of the cocaine by the Customs authorities, telegrams were sent by C. Barker, 71, Canning Street, to Portanigra, London, and Applebaum Grodnow, each containing a single word "Milla." What this term means has not been proved, but it has been plausibly suggested on behalf of the prosecution that it was intended to signify 'Discovered.' It has been proved that 71, Canning Street, is the business address of the accused, and in this Court as also in the Court below a remarkable similarity was noticed between the admitted handwriting of the accused and the signature C. Barker on the telegraph forms. It has also been proved that a man named Applebaum was a partner of the accused, while the term Portanigra is the telegraphic address of Porter & Co., the exporters of the cocaine. These circumstances, though not conclusive by themselves, do undoubtedly tend to throw very important light on the case. We have further two other letters posted in England and addressed to the accused, which were intercepted in the Post Office. One of these is dated 24th January 13, and states "Your Milla received." This fits in precisely with the telegram sent on the morning of the 24th January 1913. The effect of this piece of evidence against the case for the defence was fully appreciated by the learned Counsel for the Appellant, and he contended that the letter addressed to the accused was not admissible in evidence. But we are of opinion that this contention is not well-founded and is opposed to the decision in *R.* v. *Cooper* (2). In that case, A was charged with obtaining and attempting to obtain money by false pretences from four persons by an advertisement offering employment to all who sent him one shilling in stamps. Letters from 281 other persons, expressed to be in answer to the advertisement, and each enclosing twelve one penny stamps were held admissible, although the letters had been intercepted at the Post Office and had never in fact reached A, and could consequently be deemed at best only constructively in his possession. In the case before us, the fact that a reply from Porter & Co., posted immediately after the telegram purporting to be sent by C. Barker and referring to the telegram, was addressed to Booth, would be a relevant fact under sec. 11 of the Evidence Act and cogent evidence to show that Booth was the sender of the telegram. Upon a consideration of the entire evidence on the record we are fully satisfied, notwithstanding the very able argument addressed to us by Mr. Langford James, that the accused did attempt to import the cocaine which was seized on S. S. Borneo on the 23rd January 1913. There is only one other point which requires consideration, namely, can the accused be held, as the Magistrate has done, to have imported cocaine, when as a matter of fact the cocaine was seized by the Customs authorities and was never delivered to him. In our opinion, upon the facts found, he is guilty of an attempt to import rather than of actual importation. Though an article may be actually within the geographical limits of Bengal, we do not think it can be said to have been brought into Bengal, if, as happened here, it has been intercepted at the Customs House. Consequently, the accused is liable to be convicted, not of an offence under sec. 46 but of an attempt to commit the offence of importation under

(2) 1 Q. B. D. 19 (1875).

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sec. 61 read with sec. 46 of the Bengal Excise Act. We alter the conviction accordingly, but confirm the sentence and dismiss the Appeal. The accused must surrender and serve out the remainder of the term of sentence as imposed by the Magistrate.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 933 OF 1913.

IMAM, J. CHAMPMAN, J. 1913, 7, August.	MIRZA HASSAN MIRZA, Accused, Petitioner, *v.* MUSST. MAHBUBAN, Complainant, Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 211—Laying false information before police—Duty of prosecution—Onus of proof—Elements necessary to be proved—Failure of defence to examine witness, effect of.

Where the Petitioner was convicted under sec. 211 of the Penal Code of having laid a false information of theft before the police and the Petitioner's case was that he had heard from his wife that the persons named in the information had disappeared and the properties named therein were missing and his information was based on this statement of the wife and the prosecution did not prove that there was no such statement by the wife who was not examined as a witness for the prosecution nor did the Petitioner examine her as a witness on his side :

Held—*That the duty of the prosecution in a case under sec. 211, I. P. C., is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge.*

That it is for the prosecution to establish their case and if they fail to supply hat proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular witness or witnesses will not imply the guilt of the accused.

That the case against the Petitioner being that no theft took place, the obligation of proving it rested on the prosecution.

In the present case the Prosecution not having established that there was as a matter of fact no theft and the Petitioner knew that there was no theft, the High Court set aside the conviction and sentence under sec. 211, I. P. C.

This was a Rule against the order of the Deputy Magistrate of Patna, dated the 11th day of April 1913, convicting the Petitioner under sec. 211, I. P. C., and sentencing him to undergo rigorous imprisonment for three months, an appeal from which order was dismissed by the Sessions Judge of Patna, on the 16th of May 1913.

The material facts will appear from the judgment.

Dr. Surahwardy and *Mv. A. K. Fuzlal Huq* for the Petitioner.

Mr. Sultan Ahmad for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

The Petitioner has been convicted of an offence under sec. 211, I. P. C., the case against him being that he laid a false information before the Police charging his mother-in-law Mussamut Langri with stealing properties belonging to him from his house and that the false information was maliciously laid with intent to cause injury to the persons implicated in the case.

The relations between the parties may be shortly stated here. Mussamut Mahbuban, daughter of Mussamut Ghafuran, who died some time before this alleged

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occurrence, was the widow of one Wajid Hossain. On the death of her husband, she married the Petitioner, Mirza Hossain Mirza. Mussamut Ghafuran, her son named Ashgar by her former husband, her sister-in-law, that is a brother's wife, Mussamut Langri and Mussamut Mahbuban, all these people seem to have been living with the Petitioner in a house in Patna city, the house being the property of Ghafuran. On the death of Ghafuran, her heirs, according to the Mahomedan Law, were entitled to their respective shares in the inheritance, the Petitioner as husband being one of them.

The case propounded by Mussamut Mahbuban was that the Petitioner was not the husband of Ghafuran but had an improper intimacy with her and was only her lover. This statement of Mahbuban has not been believed by the learned Sessions Judge who heard the appeal and the status of the Petitioner as husband has been accepted by him. We thus have it that the prosecution in attempting to prove their case against the Petitioner started by denying his status in relation to Mussamut Ghafuran and so, on a very important and material part of the case, the prosecution have set up a false allegation.

The case against the Petitioner being that no theft took place, the obligation of of proving it rests on the prosecution. We are not satisfied that they have succeeded in establishing by evidence that there was no such theft. The motive alleged for the institution of a false case against Mahbuban and Langri is said to be that the Petitioner claiming the house left by Ghafuran as his own under a purchase made by him from her attempted to propound two sale-deeds, and finding his difficulty in respect of propounding genuine title-deeds wanted to have evidence of their disappearance and thus falsely alleged against Mahbuban and Langri that they had removed the sale-deed, along with other properties belonging to the Petitioner.

We are not satisfied that the motive alleged against the Petitioner is quite sound. According to the evidence in this case, the value of the house does not seem to be much more than Rs. 95. In the absence of a sale-deed, the Petitioner would yet be entitled to a one-fourth share in the house as husband of Ghafuran. It seems to us that by laying this information against Mahbuban and Langri and stating therein that the sale-deeds had disappeared, the Petitioner, instead of establishing any evidence of the existence of the deeds, was as a matter of fact weakening his position by urging that they had been lost or stolen. No doubt, that would have left him an opportunity of adducing secondary evidence as to their contents; but it is also to be borne in mind that they were never alleged to have been registered and, that being so, more than ordinary evidence would be required to prove their contents. In the circumstances, we are not impressed by the motive alleged by the prosecution for the institution of a false case.

The Petitioner's case in the First Information was that on a certain Eid day, he had been out visiting friends. When he came back to his house, he found his wife whom he had married on the death of Ghafuran crying, and he learnt from her that Mahbuban, Langri and Asgar had disappeared from the house, that the box containing G. C. notes, jewelleries and the sale-deed had been broken open and the contents thereof were missing. He then examined the box and found that the

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valuables contained therein were not there. Thereupon he informed some of his neighbours and started on a search to find out the three absconding persons but in vain. He at last reported the incident to the Police at the thana in Patna city. From the prosecution case, it seems that Mahbuban, Langri and Asgar had been living in the same house with the Petitioner and did, as a matter of fact, disappear on the day in question.

The only point that remains to be considered is whether on that day there was a theft or not. It is quite possible that there was no theft; but we require good evidence to satisfy us on the point. The duty of the prosecution in a case under sec. 211 is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge. That has not been done in this case. The prosecution have not established that there was as a matter of fact no theft; nor have they established that the Petitioner knew that there was no theft. His case has been from the beginning that he heard from his wife that the three persons had disappeared and that the money, G. C. Notes and ornaments in the box were missing. The prosecution have done nothing whatever to prove that there was no such statement by the wife to the Petitioner. Had there been such proof, the Petitioner would undoubtedly have been guilty of laying a false charge against the persons whom he intended to injure; but that important evidence is wanting in this case.

On behalf of the Crown, it has been contended that the Petitioner having entered on his defence and examined the witnesses to prove his case was bound to examine his wife in order to prove his innocence. We may say here that it is for the prosecution to establish their case and if they fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular witness or witnesses will not imply the guilt as having been proved.

We, therefore, make this Rule absolute and set aside the conviction of the Petitioner. He will be discharged from his bail.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 99 OF 1913.

IMAM, J. CHAPMAN, J. 1913, Heard, 17, July. Judgment, 25, July.	LAKHAN CHANDRA ROY and others, Petitioners, *v.* FAKUB MONDAL and others, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 145, 435, 526, cl. (8)—Proceeding under sec. 145 sec. 526 if applies to.

A party to a proceeding under sec. 145, Cr. P. C., is not entitled to an adjournment of the case under sub-sec. 8 of sec. 526 Cr. P. C.

This was a Rule against the order of A. W. Warde-Jones, Esq., Deputy Magistrate of Purnea, dated the 12th of November 1912, declaring under sec. 145, Cr. P. C., the 1st party to be in actual possession of the disputed land and forbidding interference therewith by the 2nd party.

The portion of the judgment of the Magistrate which bears on the question decided is set out below :—

"This is a trial under sec. 145, Cr. P. C, in order to decide actual possession to eight parcels of lands claimed by one or

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other of the 1st party as against a certain zemindar named Mansukh Bhai Bhagu Bhai and his servants who are the 2nd party in his case.

"The case has been pending since the 14th of August last, but Mansukh Bhai Bhagu Bhai was added as a party on the 8th of September last; since then there have been five postponemen s for various reasons and parties fully warned more than once to be ready in all respects in the matter both of oral and documentary evidence. Notwithstanding this on the 7th November current, the 2nd party applied to this Court for another postponement under sec. 526, Cr. P. C, to move the Hon. High Court for quashing the present proceedings. As the case has been under hearing since the 2nd September the petition was rejected, it having obviously been made with no other object than to delay and defeat justice. On the 7th instant when the evidence of the 1st party was recorded, the 2nd party left the Court room and made no cross-examination of the witnesses tendered by the 1st party."

Mr. P. L. Roy and *Babu Jogendra Nath Mookherjee* for the Petitioners.

Messrs. B. Chacktaburtty, *Z. R. Zahed* and *M. Sowghat Ali* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Rule was issued to show cause why the order passed under sec. 145, Cr. P. C., should not be set aside on the ground that the Magistrate had no jurisdiction to go on with the proceedings after an application under sec. 526, Cr. P. C., had been made before him.

The only point that requires to be considered in this case is whether the provisions of sec. 526 have any application to proceedings under Chap. XII of the Code.

After carefully considering the cases, *Lolit Mohun Moitra* v. *Surju Kanta Acharjee* (1), *In re Pandurang Govind Pujari* (2), *In re Arumuga Tegundan* (3), *Gurudas Nag* v. *Gaganendra Nath Tagore* (4) and *Jaggu Ahir* v. *Murli Shukul* (5), and on considering the effect of the provisions of sec. 435, Cr. P. C, in respect of proceedings under Chap. XII of the Code, we are of opinion that a party to a proceeding under sec. 145 s not entitled to an adjournment of the case under sub-sec. 8 of sec. 526.

That being our view, the order of the Magistrate refusing to postpone the case to enable the Petitioners to come up to this Court under sec. 526 was not improper and therefore the order made under sec 145 is not without jurisdiction.

We herefore discharge this Rule.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1645 OF 1913.

IMAM, J. CHAPMAN, J. 1913, Heard, 20, November. Judgment, 21, November.	ULFAT SHAIKH and ors., Petitioners, *v.* THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 16—Difference of opinion between Magistrates forming Bench, settlement of, by casting vote of Chairman—Act VII of 1912, sec. 3, effect of, on notifications in force in Eastern Bengal and

(1) I. L. R. 28 Cal. 709 (1901).
(2) I. L. R. 25 Bom. 179 (1900).
(3) I. L. R 26 Mad. 188 (1902).
(4) 2 C. L. J. 614 (1905).
(5) I. L. R. 34 All. 588 (1912).

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Assam—Act VII of 1905, sec. 3, effect of—Notification of Local Government issued prior to 1905, application of, to Districts formerly in Eastern Bengal and Assam.

The notification issued by the then Government of Bengal under sec. 16, Cr. P. C., prior to 1905, that a difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of the Chairman, which was one of the notifications which were kept in force in the Province of Eastern Bengal and Assam by sec. 3 of Act VII of 1905, still applies to the District of Faridpur under sec. 3 of Act VII of 1912.

This was a Rule granted on the 2nd of September 1913 against an order of Babu Gopal Lal Chuckerbutty of the Bench of Honorary Magistrates of Gopalgunge, dated the 31st of July 1913, convicting the Petitioners Nos. 3 and 5 under secs. 325 and 142, I. P. C., and sentencing each to rigorous imprisonment for two months under the former section and one month under the latter and convicting Petitioners Nos. 4, 2, 6, 8 and 1 under secs. 147 and 323, I. P. C., and sentencing each to one month's rigorous imprisonment under the former section and a fine of Rs. 30 under the latter, an appeal from this order was dismissed by the District Magistrate of Faridpur, on the 11th of September 1913.

The order was the order of one of two Magistrates on the Bench, *viz.*, the Chairman who recorded a judgment of conviction whilst his colleague recorded a judgment of acquittal. The Magistrates took the view that in the circumstances the Chairman had a casting vote, the result being the convictions and sentences as stated above.

Babus Monmatha Nath Mukherjee and *Satindra Nath Mukherjee* for the Petitioners.

The JUDGMENT OF THE COURT was as follows :—

The Petitioners were tried by a Bench consisting of two Honorary Magistrates. At the conclusion of the trial the Chairman recorded a judgment of conviction and his colleague a judgment of acquittal. The Magistrates took the view that in these circumstances the Chairman had a casting vote. The trial thus resulted in a conviction. The appeal to the District Magistrate was dismissed.

The Code of Criminal Procedure enables the Local Government to make rules respecting the mode of settling differences of opinion which may arise between the members of a Bench of Magistrates. In exercise of this power the Government of Bengal issued a notification in 1906, directing that in the event of a disagreement the case shall be referred back to the District Magistrate or Sub-Divisional Officer as the case may be. The Rule was issued in the present case upon the ground that the direction contained in the notification had been contravened.

The case, however, comes from the District of Faridpur. That District was not within the limits of the Government of Bengal in the year 1906, and we have not been able to find any provision under which we can hold that the application of the notification of 1906 was extended when the territorial limits of the Government of Bengal were extended in 1912. We must hold therefore that the notification does not apply.

It has however been contended that there is at the present time no rule in force in the District of Faridpur providing for the settlement of a difference

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of opinion between the members of a Bench of Honorary Magistrates. To deal clearly with the contention it will be necessary to shortly relate the history of the matter so far as the District of Faridpur is concerned. Prior to 1905, the District was within the territorial limits of the former Province of Bengal. During that period a notification was in force under which a difference of opinion between two members of a Bench was to be settled, as it was in fact settled in the present case, by the casting vote of the Chairman. In 1905, a new Province, the Province of Eastern Bengal and Assam, was created and the District of Faridpur was declared to be within the limits of the new Province. The District thus ceased to belong to the Province of Bengal, but by the provisions of Act VII of 1905, the old notification on the present subject as well as all other notifications of the then Government of Bengal were retained in force. In 1912, the Province of Eastern Bengal and Assam was brought to an end with the result that the District of Faridpur found itself within the territorial limits of the new Presidency of of Bengal.

The contention is that when the Province of Eastern Bengal and Assam came to an end and the Act of 1905 was repealed in 1912, the old notification of the former Province of Bengal referred to which, between 1905 and 1912, derived its force in the District of Faridpur by reason of the Act of 1905, also came to an end, and the notification of 1906, having no application, as we have seen, to Faridpur, it is contended that the result was that there is no rule on the subject in force in Faridpur.

The contention cannot in our opinion prevail. Sec. 3 of Act VII of 1912 provided that all notifications in force in Faridpur (as in other parts of the former Province of Eastern Bengal and Assam) should be construed as if they had been issued by the new Governor-in-Council of Bengal. This is the meaning we attach to the section. It would be contrary to principle to hold that the general terms of the subsequent sec. 8 of Act VII of 1912, repealing Act VII of 1905, limited the application of the special provisions of the former sec. 3. It is not possible to hold that the intention of the Legislature was that the provisions of sec. 3 should not apply to notifications which derived their force in the former Province of Eastern Bengal and Assam from the Act of 1905

We must therefore hold that in the District of Faridpur the old notification is still in force, under which a difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of one of them, namely, the Chairman.

This Rule came before a Full Bench of this Court in 1906. The Chief Justice in the case of *Emperor* v. *Kali Prosanna* (1) then stated that the rule was "very unsatisfactory and equally undesirable." Similar opinions were expressed by Ghose, J., Rampini, J., Sale, J., and Pratt, J. We desire to express our concurrence and to add that we would be glad to see the new rule issued in 1906 extended to the Districts of Eastern Bengal both upon principle and with a view to uniformity.

We have been asked to set aside the convictions upon the ground that in view of the difference of opinion between the two Magistrates the District Magistrate should have acquitted in appeal. We are not able however to lay down any such

(1) 10 C. W. N. 642 (1906).

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general rule though no doubt the fact that one of the two trying Magistrates was in favour of acquittal was a very important factor calling for careful consideration.

The Rule is discharged so far as the convictions are concerned. We do not interfere with the sentences passed upon the Petitioners Nos. 3 and 5, Lebu Sheikh and Khader Sarip. In the case of the other Petitioners we reduce the sentences of imprisonment to the periods already undergone. The sentence of fine and of imprisonment in default will in each case stand.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1050 OF 1913.

COXE, J.
MULLICK, J.
1913,
20, August.

HARENDRA NARAYAN DASS, Petitioner,
v.
RAMJAN KHAN, Complainant, Opposite party.

Indian Penal Code (Act XLV of 1860), secs. 379, 109—Theft, abetment of—Claim of right set up by defence—Finding of absence of good faith without adjudication as to the existence or otherwise of right set up if sufficient for conviction.

Where the Petitioner was convicted of abetment of theft of wood from a forest and the defence of the Petitioner was that he had a right to take wood from the forest in question without a pass, but the Magistrate without deciding whether the Petitioner had such a right or not found that the Petitioner's claim to take wood without a pass could not possibly have been made in good faith inasmuch as the Petitioner had himself taken passes previously for the removal of wood from the forest:

Held—*That whatever the intention and knowledge of the Petitioner was, he could not be convicted of theft or abetment thereof when it was not found as a matter of fact that he was not entitled to take wood from the forest.*

This was a Rule against the order of P. G. Mukerjee, Esq., Sub-Divisional Magistrate of Goalparah, dated the 18th of April 1913, convicting the Petitioner under sec. 379, 109, I. P. C., and sentencing him to pay a fine of Rs. 50 or in default to undergo rigorous imprisoment for one month, an application for a reference of which order to the High Court for revision was rejected by the Sessions Judge, Assam Valley Districts, on the 12th of May 1913.

The facts will sufficiently appear from the material portions of the judgment of the Magistrate which is quoted below :—

"The accused Harendra Narayan Das is a tenant of the Mechpara zemindars at Goalpara, and the accused Ram Sing Teli is a cartman in his employ. The case for the prosecution is that accused Ram Sing did, on the 20th January last, commit theft of a cart-load of wood including a *karai* tree by cutting and removing the same from the forest of the said zemindar, without the consent of the said zemindar or their officers and without any pass for so doing and that the accused Harendra Narayan abetted the commission of the said offence.

"The accused have pleaded not guilty. The accused did not choose to make any statement verbally but have filed written statements. In his written statement the accused Harendra has said that the tenants of Goalpara have a right to cut and take fuel and grass and bamboos for home consumption from the zemindar's forests without any payment and that they have been doing so from the time immemorial, that zemindars are attempting to deprive them of this right: that in

exercise of this right he sent his servant to cut and bring the fuel, who did so. The accused Ram Sing Teli admits having brought away the firewood but denies having cut and brought any Mohali tree.

"It has been urged by the learned pleader for the defence in this case, with considerable emphasis, that his clients had a right to take the fuel without any pass and that also it should be regarded as an incidence of their tenancy. I think it is beyond the province of this Court to adjudicate whether such a right existed or not. The only thing I need look into is whether the claim of right that has been set up in the case is at all *bonâ fide* or not. In order to be *bonâ fide* the claim must be fair and good and there must be evidence to show that it is so. It has not been disputed that by general law the right to trees belongs to the landlords. In the absence of proof to the contrary the right to fell trees and take them cannot be regarded as an ordinary incidence of tenancy. Apart from this it has been proved by the prosecution in this case, that the accused Harendra Narayan Das had himself taken out passes for fuel for home consumption in 1307 and again in 1309, that his brother Meru had taken out a similar pass in 1308 and that his father Dhairjyaram had taken out passes before them. It has also been proved that the accused Harendra's neighbours have taken out passes. It has been contended on behalf of the defence that the accused Harendra was a mere school boy at the time when he took out passes and consequently did not know what he was doing and should not be held to be bound thereby. It is true that he was quite young then. But I think that this fact of having taken passes should, at any rate, be taken into consideration as showing his knowledge that passes are taken out. It is also in evidence that about a fortnight before the occurrence accused Ram Sing Teli brought another cart load of fuel and on that occasion the complainant Barkandaz spoke to Harendra and enquired if he had taken a pass and that Harendra promised to take out a pass on the next day. It also appears from the evidence of prosecution witness Hridoy Kanta Maitra, Naib of the zemindars, that in Agrahyan last accused Harendra came to him and said that he had purchased a cart and wanted to take a pass and enquired about the fee he would have to pay. The Naib told him that Rs. 6 should be paid, whereupon the accused enquired if in view of the fact that many months of the year had already expired a reduction could not be made and the Naib replied in the negative, whereupon the accused went away. This evidence stands unchallenged and unrebutted. In the circumstances set forth above I find it difficult to come to the conclusion that the claim of right set up by the accused is fair and good and justifiable.

"In view of the facts and circumstances stated above, I am inclined to hold that the accused Harendra did not act in the assertion of a *bonâ fide* claim of right, but that he acted with intent to cause wrongful gain to himself and therefore dishonestly. The accused Ram Sing Teli is a cartman in the employ of accused Harendra and I think the prosecution has not been able to sufficiently prove that he shared the dishonest intention of his master. The fact that he ran away leaving his cart may be interpreted in a way consistent with his innocence, namely, that he was simply frightened. I find the

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HARENDRA NARAYAN DASS *v.* RAMJAN KHAN.

accused Ram Sing Teli not guilty of the offence of theft with which he has been charged and acquit him. The accused Harendra is clearly guilty of abetment of theft and I find him guilty of an offence under secs. 379/109, I. P. C., and convict him accordingly."

Mr. H. N. Sen and *Babu Sahay Ram Bose* for the Petitioner.

Messrs. C. R. Das and *Bardalai* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—This was a Rule on the District Magistrate of Goalpara to show cause why the conviction of the Petitioner for an offence under sec. 379 read with sec. 109, I. P. C., should not be set aside on the ground that there was no dishonest intention in the act complained of. The Petitioner has been convicted of abetment of theft and the property said to have been stolen was wood taken from the forest.

It appears from the judgment of the Magistrate that it was urged on behalf of the Petitioner that he had a right to take wood without a pass. The Magistrate however refused to decide whether the Petitioner had such a right or not. He says :—"I think it is beyond the province of this Court to adjudicate whether such right exists or not"; and in the conclusion of his judgment he also refused to go into the question—"whether the tenants have any such right as has been set up in this case." But he fouud that inasmuch as the accused had himself taken passes for the removal of wood from the forest, his claim to take wood without a pass could not possibly have been made in good faith. It does not appear to me that the question of good faith really arises in this case. From the passage I have quoted it is clear that it was the Petitioner's case in the Court below that he had a right to take this wood. Before he can be convicted of theft or of causing wrongful gain or wrongful loss it must, in my opinion, be found that he had not this right to take the wood. The Magistrate carefully guarded himself from coming to any decision on this point, and therefore it appears to me that whatever the intention and knowledge of the accused was, he cannot be convicted of theft, when it has not been found as a matter of fact that he was not entitled to the property which he took.

In my opinion, the Rule must be made absolute and the conviction and sentence set aside and the fine, if paid, refunded.

MULLICK, J.—I agree.

Rule maae absolute.

[CRIMINAL REVISIONAL JURISDICTION]

REV. NO. 1088 OF 1913.

	MOHAR KHAN and anr.,
COXE, J.	Accused, Petitioners,
MULLICK, J.	
1913,	GAYZUDDIN SHEIKH,
21, August.	Complainant, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 202, 522—Local enquiry by pleader—Dispossession of immoveable property—Consideration of new ground at hearing of Rule.

A Magistrate has no jurisdiction to order a local enquiry by a pleader in the nature of a commission in a civil case.

An order under sec. 522, Cr. P. C., is not sustainable where there is no finding that the complainant has been dispossessed of any immoveable property.

Case in which the High Court considered a ground other than those on which the Rule was issued.

MOHAR KHAN *v.* GAYZUDDIN SHEIKH.

This Rule was issued against the order of Mr. Abdul Barik, Deputy Magistrate of Pabna, dated the 8th of March 1913, convicting the Petitioners under sec. 341, I. P. C., and sentencing them each to pay a fine of Rs. 15, in default to undergo 10 days' simple imprisonment and awarding a compensation of Rs. 15 to the complainant and further directing under sec. 522, Cr. P. C., the removal of the obstructions in question, an application for the revision of which order was rejected by Mr. G. S. Dutt, Sessions Judge of Pabna and Bogra, on 25th of April 1913.

The Petitioners were convicted under sec. 341, I. P. C., of wrongfully restraining the complainant by obstructing a path along which he alleged he was entitled to pass. The Magistrate also made an order under sec. 522, Cr. P. C, that the obstruction should be removed and the complainant allowed to use the path. The material portion of the Magistrate's judgment is set out below.

"The accused deny the existence of a path as alleged by the prosecution. Baser Khan, whose *bari* lies on the north of Goizuddin's, says that the complainant has brought this case in order to secure a path over his homestead land to the Dulai Raninagar Road.

"The accused have not adduced any evidence for their defence. They prayed for a local enquiry. According to their prayer Babu Pramatha Nath Chackrabartty, a pleader of the local bar, was deputed by an order of this Court, dated 31st March 1913, to make an enquiry and to report as to whether the disputed path ever existed.

"There was a case under sec. 133, Cr. P. C., by the same complainant against Mohor Khan and others about the obstruction caused by the latter on the Dulai Raninagar Road (*vide* Ex. No. 1). As Mohor Khan lost that case it is probable that the accused obstructed the path leading out of the complainant's *bari* to that *bari*.

"Save and except the statement of the accused there is nothing else on the record to show that this case has been falsely brought against them in order to secure a path over Baser and Mohor's bari.

"For the reasons stated above I hold that there was a path running by the east of the *bari* of the accused as alleged by the complainant and that it has been closed by the accused by use of force.

"I therefore find the accused (1) Mohor Khan and (2) Baser Khan guilty of the offence under sec. 341, I. P. C., and sentence them to a fine of Rs. 15 each and, in default, to undergo 10 days' simple imprisonment. The complainant shall get Rs. 15 only as compensation out of the fine when realised.

"I also order, under sec. 522, Cr. P. C., as force has been used in obstructing the path, that the obstructions should be removed and the complainant should be allowed to use the path."

Babu Monmatha Nath Mukherjee for the Petitioners.

Babu Sasadhar Roy for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The Petitioners in this case have been convicted of wrongfully restraining the complainant by obstructing a path along which he was entitled to pass. They have obtained a Rule from this Court on the District Magistrate to show cause why this conviction should not be set aside on the ground that the complainant's allegations are not borne out by the

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Proposed Rules for Recording Confessions.

The Government of India have published the despatch which they sent to the Secretary of State on the subject of the recording of confessions of accused persons. The enquiry instituted by the Government was two-fold, namely, (1) whether on a balance of the advantages and disadvantages, it facilitated the ends of justice to have confessions recorded at all before the commencement of the trial; (2) whether assuming that the practice of recording confessions before trial continued it was practicable to introduce more stringent safeguards against abuse and whether the actual procedure of Magistrates in recording confessions was susceptible of improvement. So far as the doing away altogether with the practice of recording confessions is concerned the Government of India is not prepared to support a radical modification of procedure, but it is proposed to make some rules with a view to ensure the voluntary character of confessions.

The argument that the cancellation of the provision in the Code of Criminal Procedure for recording confessions will remove one of the principal incentives that the police have of ill-treating accused persons and that it will compel the police to rely upon evidence and the pursuit of clues in place of the confession of the accused as a means of securing the conviction of the guilty does not find favour with the Government. One of the reasons for which Government is not prepared to refuse entirely to accept this source of information is that it would be "unwise to ignore the proved fact that the novice in crime in this country is frequently unable to keep his guilty knowledge to himself while even the more hardened criminal not infrequently insists upon unburdening his mind." This is a piece of argument which we are not prepared to accept as a proved fact; at best it is bu a surmise. It may however be stated without fear of contradiction that the instances that have been brought to light in Courts of law where confessions solemnly put forward by the prosecution as a strong piece of evidence have been ruled out as involuntary and extorted are by no means few.

It is however proposed to frame certain rules to ensure the voluntary character of confessions and the question is whether these proposed rules will have the desired effect. It is proposed that the police should be forbidden to question a prisoner once he has been arrested except with the permission of the Magistrate. A remand to police custody should not be given unless the officer making the application is able to show good and satisfactory grounds for it. A general statement that the accused may be able to give further information should not be accepted. No such order should be passed by an officer of lower status than a stipendiary Magistrate exercising second class powers and the period of remand should always be as short as possible.

Government however is not prepared to make a general rule that a prisoner who has confessed should in no circumstance be returned to police custody, but whenever possible where the object of the remand is the verification of the prisoner's statement he shall be remanded to the charge of a Magistrate and a prisoner who has been produced for the purpose of making a confession but has declined to do so or has made a statement unfavourable to the prosecution should never be remanded to police custody. It may be observed that the system of verification of confessions was introduced by a police circular and was very strongly condemned by the Calcutta High Court in *Radha Halwai's* case, 7 C. W. N. 220.

Government is prepared to restrict the recording of confessions to Magistrates of some status and experience, namely, to Sub-Divisional Magistrates

and stipendiary Magistrates of the first class or of the second class if specially empowered. As to the suggestion that no prisoner should be produced for the recording of his confession unless he has spent at least one night out of police custody Government is of opinion that although the principle underlying the suggestion is a sound one no definite rule to this effect is practicable. We think that it would have been conducive to the wholesome administration of justice if something definite could have been done in this respect specially bearing in mind that the whole mischief due to involuntary confessions is invariably traceable to police influence and that, as pointed out in *Queen-Empress* v. *Narayan*, I. L. R. 35 Bom. 543, the duration of police custody is an important factor in determining the voluntary nature or otherwise of a confession.

The Government of India is also prepared to support for general adoption the suggestion that when a confession is recorded the investigating police-officer should not be present. This suggestion has been offered by the Bengal Government in agreement with the Calcutta High Court. The Government of India also favours the suggestion made by the same Government that confessions should ordinarily be recorded in open Court and during Court hours unless for exceptional reasons.

Another suggestion is made that confessing prisoners should be questioned by the Court whether they have any complaint of ill-treatment to make, but Government does not approve of the idea of prescribing a direct interrogation of the kind suggested, but suggests as a safeguard that the Magistrate should add to the certificate required by sec. 164 in his own hand a statement of the steps which he took to remove the accused from the influence of the Police and the time, if any, given to him for reflection.

On the whole we think that the proposed rules will have a salutary effect although the net result must depend on the care and caution taken by Magistrates of Districts and other responsible officers in bringing them into operation.

CURRENT INDIAN CASES.

(CIVIL.)

Indian Succession Act (X of 1865)—Order refusing to grant Letters of Administration.

MIRS EVA MOUNTSTEPHENS *v.* MR. HUNTER GARNET ORME, I. L. R. 35 All. 448.

Under sec. 261 of the Succession Act proceedings on a contentious application for Letters of Administration or probate shall take the form of a regular suit under the Civil Procedure Code and an order of a District Judge refusing to grant Letters of Administration with a copy of the will annexed is a decree and is appealable and the Court-fee payable on the appeal is Rs. 10.

Indian Limitation Act (IX of 1908), Sch. II, Arts. 75, 120—Instalment bond.

AMOLAK CHAND *v.* BAIJNATH, I. L. R. 35 All. 455.

The Plaintiff sued on an instalment bond which provided that if any instalment remained unpaid on the due date the creditor would be entitled to recover the whole sum at once or might sue for each instalment as it fell due and remained unpaid. The Defendant made default in paying the third instalment nor did he pay any of the subsequent instalments The Plaintiff brought his suit more than six years after the date on which the third instalment fell due and sought to recover the full amount of the debt due by reason of the default in one instalment.

Held—Under Arts. 75, 120, Sch. II, the suit was barred.

Civil Procedure Code (Act V of 1908), sec. 92—Suit for declaration of Mutwali rights—Proper Court to entertain suit.

MUHAMMAD BADUL MAJID KHAN *v.* AHMAD SAID KHAN, I. L. R. 35 All. 459

The Plaintiff sued for a declaration that he was entitled to the office of Mutwalli of a certain wakf property and for the possession of the same by the ejectment of the Defendant.

Held—That the Plaintiff sued merely as an individual to enforce his own individual rights and sec. 92, C. P. C., did not apply and the suit could be entertained by the Court of the Subordinate Judge.

Occupancy holding—Usufructuary mortgage—Subsequent surrender—Ejectment of mortgagee by Revenue Court—Subsequent suit for declaration that surrender not binding on mortgagee.

SHIVA PROKASH *v.* KARNA—I. L. R. 35 All. 464

An occupancy tenant after making a usufructuary mortgage of his holding surrendered it to the zemindar who had the mortgagee ejected by a decree of the Revenue Court. The mortgagee then brought a suit to have it declared that the surrender of the holding was not binding on him.

Held—That the suit was not maintainable.

Hindu widow—Conversion to Muhammadanism and marriage with a Muhammadan, effect of.

ABDUL AZIZ KHAN *v.* NIRMA, I. L. R. 35 All. 466.

The conversion to the Muhammadan religion of a Hindu widow does not divest her of her interest in her first husband's estate in view of the provisions of Act XXI of 1850. When such widow remarries a Muhammadan sec. 2 of Act XV of 1856 (Hindu Widow's Remarriage Act) does not divest her of her interest in he first husband's estate.

Succession Certificate Act—Certificate granted to three persons jointly.

RAM RAJ *v.* BRIJ NATH, I. L. R. 35 All. 470.

On an application for a succession certificate two

other persons put themselves forward as next reversioners to the estate of the deceased along with the applicant and the three agreed that the certificate should be granted to all of them. This was done. On an appeal by one of the three :

Held—That the Appellant could not contend that the Court should not have granted the certificate, although it is inconvenient that a certificate should be granted to more than one person.

Reviews.

THE RULES AND ORDERS OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL ON ITS ORIGINAL SIDE. *By J. H. Hechle, Registrar, Original Side. Published by the Superintendent, Government Printing, Calcutta.*

A revision of the rules on the Original Side of the High Court of Calcutta had been long called for. The late Mr. Robert Belchambers' compilation of Rules and Orders of the High Court which had served to guide the solicitors and barristers for some generations were admittedly getting antiquated and obsolete in many respects. The Civil Procedure Code and many other important Acts of the Indian Legislature have undergone considerable changes and a compilation of the new rules has been anxiously expected by the profession for a long time. The work was commenced by Mr. Fink, the successor of Mr. Belchambers to the office of the Registrar on the Original Side of the High Court, but its consummation has at last been brought about by Mr. Hechle, the present Registrar, with the assistance of Mr. Remfry and Mr. J. C. Mitra, two other able officers of the Court, under the guidance of his Lordship the Chief Justice. But the brunt of the work has fallen on Mr. Hechle and it is highly creditable on his part to have been able to edit the work so ably in the midst of his multafarious duties. The Preface, which is perhaps the most interesting part of the work from a historical point of view, traces the growth of the Court from the early days of the East India Company. The editor has compiled the historical account from such standard works as Cowell, Morley, Smoult and Ryan's Preface to the Rules and Orders of the Supreme Court published in 1839, a work which is now getting very rare. The author also gives the Supreme Court Charter, the Regulating Act, subsequent statutes and the High Court Charter and Letters Patent, all of which have to this date to be referred to by our Judges (the last-mentioned almost every day and even the earlier ones not unfrequently) in connection with the Ordinary Original and the inherited jurisdiction of the Court. See *The Amrita Bazar Patrika* case (17 C. W. N. 1253). How the Rules of the High Court have undergone wholesale changes will be evident from the very first chapter which deals with the admission of Advocates. A barrister to be entitled to be admitted as an Advocate of the Calcutta High Court must be a graduate of some University in the United Kingdom or one of the Indian Universities or one who has been educated in the United Kingdom for three years. Besides, he must have read in the chambers of a barrister in England for at least a year. We understand that a Committee appointed by the India office have recommended, that reading in Chambers with a barrister need not be with a barrister in England but option should be given for reading with the barristers in India. So the rules may require hereafter some modifications. We are not however concerned with the merits of the rules in this review. They will have to be tested in practice before we can pronounce any opinion on them. But we notice that in framing the new rules or altering the old ones relating to practice matters the framers have compared the rules of the Bombay and the Madras High Courts and also the rules and orders of the High Court of Judicature in England and adopted such portions thereof as may be applicable here. For instance, in Chap. XXXI we find that a series of Rules, 96 in number, have been framed in connection with the Indian Companies Act. These rules were originally modelled on the English Companies Consolidation Act (1908) and since the passing of the Indian Companies Act of 1913, they have in some respects been modified to conform to it. These Rules are not merely applicable to the Original Side of the High Court but also to all Mofussil Courts subordinate to the High Court. We also find Rules relating to Receivers, Guardians of Minors, Sales by Registrar, Taxation of costs, Arbitration, Rules relating to the Crown side of the Court, Privy Council Appeals, Habeas Corpus proceedings are all incorporated with many important modifications and changes. The new rules are indicated in the margin as also the alteration in the old rules. In the appendix a large number of very useful forms and tables are given for illustrating the Rules. Every portion of the book testifies to the great care and labour bestowed on the work by the editor and his collaborators. The book has been very neatly printed and handsomely bound by the Government of India Printing Press.

THE INDIAN DECISIONS (New Series), Calcutta. Vols. V and VI. *Published by T. A. Venkasawmy Row & T. S. Krishnasawmy Row. Law Printing House. Madras. 1913.*

The above volumes are verbatim reprints of the Indian Law Reports, Calcutta Series, Volumes 10 to 13. The special features of these series of useful reprints have been from time to time noticed in the columns of this journal. The publishers and compilers deserve all praise for bringing out the successive volumes of the series with such commendable expedition.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before IMAM, AND CHAPMAN, JJ. APPEAL FROM APPELLATE ORDER No. 547 OF 1908. RAM CHARAN PAL CHOWDHURY AND OTHERS, Decree-holders, Appellants, *v.* SRIMATI ANANDA MOYE AND OTHERS, Respondents. 30th January 1914.

Mesne profits—Interest—Civil Procedure Code (Act XIV of 1882), sec. 211.

The appeal arose out of an application for determination of the amount of mesne profits due to the Plaintiffs, decree-holders, under a decree made by the Subordinate Judge and affirmed on appeal by the District Judge. The first Court allowed interest at six per cent. per annum for three years from the date of the decree or until possession within that time under sec. 211 of the Code of Civil Procedure, though the decree did not provide for interest. On appeal, the District Judge modified the order of the Subordinate Judge and disallowed interest on the mesne profits. Against this appellate order, an appeal was preferred to the High Court, and the case was remanded to the District Judge for ascertainment of the amount of mesne profits with the following direction. "In any case he should allow the Appellants interest on any sum found due to them." On the matter coming on for hearing before the District Judge after remand the question he was asked by the parties to decide was whether interest should be allowed for the whole period or only for three years from the date of the decree. The lower Appellate Court declined to consider the issue as raised by the parties on the ground that it had not formed the subject of appeal before him.

Held, that the Judge ought to have allowed interest on the entire amount of the mesne profits for three years anterior to the institution of the suit and for the period between the institution of the suit and the recovery of possession of the land by the Plaintiffs, decree-holders.

Babus Dwarka Nath Chuckerbutty and *Surendra Nath Das Gupta* for the Appellants.

Babus Mahendra Nath Roy, *Biraj Mohan Mojumdar* and *Prokash Chunder Sarkar* for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before COXE and D. CHATTERJEE, JJ. APPEALS FROM APPELLATE DECREES NOS. 3393 OF 1911 AND 320 OF 1912. BADUJHAMAN SINGH AND OTHERS, Appellants *v.* NARAIN SAHU AND OTHERS, Respondents. Heard, 30th January. Judgment, 10th February 1914.

Mortgagee, if entitled to crop—Purchaser of equity of redemption—Conditional decree for possession—Dispossession by mortgagor and mortgagee—Mesne profits.

The Plaintiff bought the disputed land from the 2nd and 3rd Defendants. The land at the time of sale was mortgaged to the 1st Defendant. The Defendants would not give up possession and the Plaintiff had to sue for recovery. He obtained a decree for possession on condition that he deposited the mortgage money due to the 1st Defendant. He complied with this condition but the 1st Defendant cut the crop standing on the land at the time of the decree and all the Defendants kept him out of possession although he had obtained formal delivery of possession from the Court.

The only questions arising in the appeals were whether the Plaintiff was entitled to the crop cut by the 1st Defendant, and up to what time he was entitled to mesne profits. The lower Appellate Court decided that the Plaintiff was entitled to the crop and to mesne profits up to the date of the decision of the first Court. The Defendants appealed.

In the plaint of the first suit, it was not pleaded that any tender had been made to the 1st Defendant.

Held, that as the crop was almost ripe at the time of the decree in the first suit it would have been unjust if the Plaintiff had been allowed to take it without compensation, inasmuch as up to that date the possession of the 1st Defendant had been perfectly lawful and regular.

That the Defendants were liable for mesne profits, not only for so long as they held the land but also until they communicated their relinquishment of it to the Plaintiff. This was effected by the filing of the written statements in which the Defendants disclaimed all rights to the land. Hence mesne profits were allowed up to that date and not up to the decision of the suit by the first Court.

Babus Mahendra Nath Roy, *Karunamoy Bose* and *Jatindra Nath Bose* (for *Babu Kshetra Mohun Sen*) for the Appellants.

Babus Umakali Mukherjee and *Satis Chunder Ghose* for the Respondents.

A. T. M. *Appeals partly allowed.*

MOHAR KHAN *v.* GAYZUDDIN SHEIKH.

facts; and also to show cause why the order that has been passed under sec. 522 should not be set aside.

The first ground in our opinion fails. But we have heard the learned Vakil who appears for the Petitioners on another point. It appears that the accused applied for a local enquiry and the Magistrate thereupon ordered a local enquiry by a pleader as if he were directing the issue of a commission in a civil case. The pleader ultimately reported, but no notice was taken either of this report or of any evidence on which it may have been based. It appears to us that the accused must have been misled by this procedure. The learned Vakil who appears for the Opposite Party tells us that he is prepared to argue the point and we think we can deal with the question without issuing another Rule. The Magistrate clearly had no authority to issue this commission, and it is natural to suppose that the accused must have been seriously misled by it and must have thought that when the Magistrate had ordered an enquiry he would pay some attention to the results of it. In such circumstances, they might well have refrained from producing witnesses. We think therefore that the accused should have a further opportunity of adducing evidence.

As regards the order under sec. 522 it is not in our opinion sustainable. There is no finding in this case that the complainant has been dispossessed of any immoveable property.

The Rule will accordingly be made absolute in these terms and the case will go back to the Magistrate for further enquiry. The accused will be given an opportunity of adducing such evidence as they desire.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD ATKINSON.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
Heard, 1, 4 and 5, August.
Judgment, 10, December.

BHAIYA SHER BAHADUR, Plaintiff, Appellant,
v.
BHAIYA GANGA BAKHSH SINGH & ors, Defendants, Respondents.

Will—Interpretation—Intention of testator to be gathered from language of will and surrounding circumstances—Illegitimate son of Hindu by Mahomedan concubine, treated as Hindu and living and marrying a Hindu lady according to Hindu rites—Issue, if legitimate—"Aulad" *and* "Khandan," *meaning of,* primâ facie *refer to legitimate issue.*

Where it appeared on the evidence that the testator, a Hindu, treated J, an illegitimate son of his by a Mahomedan woman, as a Hindu in religion and desired that others should so treat him, that he had been married twice to two Chhatri ladies, and he treated these marriages as lawful marriages and desired that others should so treat them, and consequently resolved to regard and treat the offspring of these unions as legitimate and desired that they should be so treated and regarded by others; and by a testamentary disposition, dated the 15th of May 1878, made a settlement of certain properties for the maintenance of J and his "aulad" *issues for generation after generation, in which it was provided* inter alia *that the grant was to be perpetual, impartible, indivisible and incapable of being otherwise charged or encumbered and was not to be the subject of any co-ownership, and that on the death of J, his representative was to succeed him as proprietor without* "*division*" *as a* rais *and this proprietor was to be one of the issues* (aulad) *of J* "*on whom the right may devolve,*" *the other issues*

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(*aulad*) *of the family* (khandan) *of J being only entitled to get food and raiment out of the grant, with the further provision that the marriage and funeral expenses of the male and female children of the family of J were to be paid also out of the grant :*

Held—*That in interpreting the document the Court had to determine what were the wishes and intentions of the testator as revealed by its language, viewed through the light of the circumstances which surrounded him at the time he made it, and that the intention of the testator was that on J's death only those of J's issue whom he wished to be regarded as J's legitimate issue by his Chattri wives were to benefit by the gift.*

That there was nothing in the Will to suggest that the word "aulad" *should be given a meaning defferent from its* primâ facie *meaning of* "*legitimate issue.*" *Nor was there any reason for extending the meaning of the word* "khandan" *which ordinarily refers to the group of descendants who constitute the family of the progenitor, so as to include illegitimate offspring.*

Quære :—*Whether J who was found to have done his utmost to become an orthodox Hindu and to pass as such in society and whose father from his youth upwards aided and encouraged him in those efforts and procured his marriage, when he was only 15 years of age, to be celebrated according to strict Hindu rites with a Hindn lady, did in fact thereby become a Hindu and whether the issue of such marriage was legitimate according to law.*

This was an Appeal from a Decree of the Court of the Judicial Commissioner of Oudh, dated 26th February 1906, confirming a Decree of the Subordinate Judge of Gonda, dated 3rd January 1905. The principal point for decision was whether the Appellant was the legitimate son of one Jang Bahadur Singh. Both Courts in India found that he was in fact illegitimate.

The facts out of which the litigation arose are as follows :—Maharaja Sir Digbijai Singh of Balrampur (hereinafter referred to as "the Maharajah") was a Hindu of the Janwar Chattri caste. He had relations with a Mohamedan woman, a prostitute, named Imam Bandi, by whom he had a son named Jang Bahadur Singh, who was the father of Plaintiff and the first four Defendants. Jang Bahadur Singh was born in 1849.

The mother of the Plaintiff and of the second, third and fourth Defendants was a Mohamedan, named Najmunnisa or Rahmani. The Plaintiff's case was that Jang Bahadur Singh was born, lived and died a Mohamedan, that he was lawfully married according to Mohamedan customs to Najmunnisa, and that Plaintiff and his brothers, the second, third and fourth Defendants, were the legitimate offspring of that marriage.

Jang Bahadur Singh was three times married according to Hindu rites, first to a lady of the Kumar Chattri caste, named Musamat Hansraj Kunwar, by whom he had issue the first Defendant ; second to another lady of the same caste, named Raj Kali Kunwar, the fifth Defendant, and third to another Hindu lady who was not a party to the suit.

The Plaintiff in his plaint denied that Jang Bahadur Singh was lawfully married to these Hindu ladies ; but the fact of these marriages was not untimately disputed by him, and they were found by both the lower Courts to have taken place. The children of these marriages were married to Hindus.

On the 15th March 1878, the Maha-

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rajah made a Will, by which, after reciting that he had then no legitimate issue, but was not without hope of having issue, he provided that, in case he should die without leaving a natural born or adopted son, his widow should have power to adopt.

On the same day the Maharajah executed a document which was referred to throughout the proceedings as a codicil, by which, after reciting that he had an illegitimate son, Jang Bahadur Singh, who would not, according to Hindu law, succeed to his property, but for whom he was anxious to make provision, he settled a sum of Rs. 48,000 per annum, to be paid "to Jang Bahadur Singh and his issue for generations after generations, as long as the family of Jang Bahadur Singh and his descendants remain in existence."

Cls. 3 and 4 of the codicil were as follows:—

"3. For his lifetime Jang Bahadur Singh has a right to spend this money, but after his death, one of his issue, on whom the right may devolve, shall be considered the proprietor of this maintenance allowance without division as a rais. The other issue of the family of Jang Bahadur Singh shall be entitled to get food, raiment and other necessary expenses out of the monthly allowances, and in addition to it the representative of Jang Bahadur Singh, whoever he may be, shall pay the marriage and funeral expenses of male and female children which may from time to time be required in the family of Jang Bahadur Singh; and this rule shall continue to be observed in the family of Jang Bahadur Singh for generation after generation.

"4. When there remains no descendant of the family of Jang Bahadur Singh at any time, the monthly allowance of Rs. 4,000 will be resumed, and remain in proprietary possession of the proprietor of the riasat the gaddinashin."

To secure the payment of the allowance a number of villages were assigned in perpetuity to "Jang Bahadur Singh and his family descendants."

The Maharajah died on the 27th May 1882. Jang Bahadur Singh died on the 1st October 1899, and the first Respondent succeeded to and took possession of the whole of his property. This property fell under two categories, first, the villages comprised in the said codicil, and set out in Schedule "A" of the plaint, and second, certain other moveable and immoveable properties set out in Schedules "B" and "C".

The present suit was instituted on the 3rd April 1902, to eject the first Respondent from all the said properties. In his plaint the Plaintiff claimed that as the eldest legitimate son of Jang Bahadur Singh he was his father's sole heir, and entitled to possession of all his father's estate, which he alleged to be impartible, both by virtue of the said codicil, and in accordance with the custom prevailing both in the Balrampur estate and generally among Raises.

Written statements were filed by all the Defendants. The second, third and fourth Defendants who filed identical written statements generally supported the Plaintiff's case, except that they denied that the estate was impartible and claimed that it was divisible in equal shares between themselves and the Plaintiff.

The first Defendant in his written statement denied that Jang Bahadur Singh was a Mohamedan. He alleged on the contrary that he had from his birth been brought up as a Hindu, remained a Hindu

all his life and was buried with the ceremonies prescribed by the Hindu religion. He alleged that he was the legitimate son of the lawful marriage of Jang Bahadur Singh and Hansraj and as such was Jang Bahadur's sole heir, and that the fifth Defendant was also the lawful wife of Jang Bahadur.

The fifth Defendant claimed to be the sole lawful wife of Jang Bahadur Singh and denied that the mothers of the Plaintiff and the first four Defendants were his wives.

The following issues were fixed—

1. Was Jang Bahadur a Mohamedan and is succession to his estate governed by the Mohamedan law?

2. Are the Plaintiff and the Defendants 2, 3 and 4 Jang Bahadur's ligitimate sons and entitled to his estate under the Mohamedan law?

3. (*a*) Does the codicil of the 15th March 1878 entitle the Plaintiff to succeed to Jang Bahadur's estate to the exclusion of his brothers (Defendants 2, 3 and 4) on the score of seniority in years?

(*b*) Does there obtain the rule of primogeniture in the family of the Maharajah of Balrampur? If so, does the custom apply to the estate left by Jang Bahadur?

(*c*) Is the Plaintiff otherwise entitled to Jang Bahadur's estate to the exclusion of Defendants 2, 3 and 4?

4. Did Jang Bahadur live and die a Hindu and is succession to his estate governed by the Mitakshara School of Hindu law? If so, is the Defendant No. 1 Jang Bahadur's legitimate son and his sole heir?

5. If the Plaintiff and his brothers (Defendants 2, 3 and 4) be the illegitimate sons of Jang Bahadur, and the Defendant No. 1 (Ganga Bakhsh) his legitimate son, does the Plaintiff possess the right of inheriting the whole estate by virtue of the codicil and the custom put in issue 3, or of inheriting an equal share in the estate with Defendant No. 1?

6. If the Plaintiff and the Defendants 1, 2, 3 and 4 be all illegitimate sons of Jang Bahadur, is the Plaintiff entitled, according to the codicil of 15th March 1878, and the custom referred to in paragraph 13 of the plaint, to the whole of the property in suit, or is he entitled in the alternative to share Jang Bahadur's property equally with Defendants 1, 2, 3 and 4?

7. If Jang Bahadur did not die either a Hindu or a Mohamedan, what would be the rights of the parties in regard to succession to his estate?

8. Did the Defendant No. 1 get the properties mentioned in List C attached to the plaint on Jang Bahadur's death? What is their value?

The hearing of the case extended, with intervals, from August 1903, to July 1904, more than 100 witnesses were examined, and a great mass of documentary evidence was recorded.

The Subordinate Judge found that the Maharajah brought up Jang Bahadur Singh as a Hindu from his birth, had him initiated into the Hindu religion, and caused him to be married to two Hindu ladies of the Chattri caste. That these marriages were, in fact, performed at the instance of the Maharajah was admitted in argument by the Plaintiff's counsel.

The Subordinate Judge also found that Jang Bahadur Singh had his food cooked by Hindu cooks, and observed the rules and customs of Hindus in eating, that he habitually worshipped Hindu idols, and had free admission for purposes of worship to Hindu temples, that he wore the sacred

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thread, that he put on the tilak or caste mark of chandan, and wore the Hindu dhoti, and that in many other respects, social and religious, he observed Hindu customs and ceremonies, and lived as a Hindu.

These conclusions of the Subordinate Judge were based on a consideration, not only of a mass of oral evidence, but more especially of a series of documents extending over a large number of years, consisting of accounts and correspondence which shewed that Jang Bahadur Singh observed Hindu feasts, performed Hindu religious ceremonies, visited Hindu shrines and places of pilgrimage, and was to all outward appearance a Hindu, and could not have been mistaken for a Mohamedan.

The Plaintiff produced a great volume of evidence, both oral and documentary, to prove that Jang Bahadur Singh was brought up and lived as a Mohamedan, that he was circumcised, and that he was married to Najmunnisa according to Mohamedan law. In reference to this evidence the Subordinate Judge says: "The Plaintiff has in my opinion utterly failed to show that Jang Bahadur Singh during his infancy was brought up as a Mohamedan, and was circumcised and married to the mother of Plaintiff and Defendants 2, 3 and 4. He has also failed to show that Jang Bahadur Singh ever professed Mohamedanism or observed any of the practices which adherents of Mohamedanism usually observe."

The Subordinate Judge also said with reference to the nikah marriage alleged to have taken place between Jang Bahadur Singh and the Plaintiff's mother "I have carefully considered the evidence of the five witnesses produced by the Plaintiff, and I am of opinion that they have been tutored to make the statements they have made. Among the five witnesses there is not even one on whose evidence any reliance can safely be placed. The story told by these witnesses moreover seems to me to be an exceedingly improbable one." "It is clear that the documents relied on by the Plaintiff do not at all show that the Plaintiff's mother was treated as the married wife of Jang Bahadur, or the Plaintiff as his legitimate son."

The Subordinate Judge also relied on certain statements made on oath by Jang Bahadur Singh in the course of litigation in 1886: "My first marriage was in the family of a Surajbans of Poora Murah, a Hindu, and my second was with the Birhar Thakurs, where the Maharajah was married the second time. The present Bari Maharani is the third wife. If I had been a Musulman I could not have married as I have done." "I have a Mohamedan woman in keeping. She is not married. I have four children by her. I do not cohabit with her."

On a full consideration of all the evidence the Subordinate Judge found that Jang Bahadur Singh was presumably from his birth a Mohamedan until he was able to make a choice, but that he never did in fact profess the Mohamedan religion, that the Plaintiff and his brothers were the illegitimate sons of Jang Bahadur Singh and therefore not his heirs, that Jang Bahadur Singh was not born a Hindu, but that he all his life professed the Hindu religion, that neither Hindu nor Mohamedan law nor the Indian Succession Act governed the succession to his estate, but that the principles of justice, equity and good conscience applied, and that in accordance with these principles the succession to Jang Bahadur Singh's estate should be decided, under the circumstances, in accordance with the rules

of Hindu law, and by those rules Ganga Baksh, the first Defendant, was Jang Bahadur Singh's sole heir. These findings disposed of issues 1, 2, 4 and 7.

The third issue was decided by implication by the above findings and required no further consideration.

The fifth issue raised the question whether the Plaintiff, though illegitimate and not a legal heir of Jang Bahadur Singh, was entitled to possession of the latter's estate by virtue of the aforesaid codicil. The argument on behalf of the Plaintiff was that the rule of primogeniture prevailed in the Balrampur family, and that by the codicil the Maharajah intended that the same rule should apply to the estate settled by it, so that the estate should descend to the eldest son of Jang Bahadur Singh whether legitimate or not.

The Subordinate Judge found that the Balrampur Raj was one of those to which the rule of primogeniture applied, but that this rule could not apply to an illegitimate son.

On the sixth issue the Subordinate Judge held that the first Defendant was Jang Bahadur Singh's sole heir, and on the eighth issue that certain specified moveable property valued at Rs. 14,935 came into first Defendant's possession on his father's death.

In the result the Plaintiff's suit was dismissed with costs.

In the course of his judgment, the Subordinate Judge, Mr. Krishna Kumar, said :—

Mahadeo (Defendant's witness No. 1) was only 6 or 7 years old when Jang Bahadur was born and his evidence on the question before us must be put aside as worthless. Tulshi Ram Thekadar (Defendant's witness No. 16) who has for a long time been connected with the Balrampur Estate confirms Chattarpal and Kali Parshad Singh in their statement that the wife of Bhindya Chal was Jang Bahadur's wetnurse. Tulshi Ram lives where Bhindya lived and Bhindya Chal was related to him. The evidence furnished by the testimony of Chattarpal Singh (Defendant's witness No. 17), Kali Parshad Singh (Defendant's witness No. 7), Tulshi Ram (Defendant's witness No. 16), and Sheo Dial (Defendant's witness No. 35), and by the statement of Jang Bahadur made on the 8th January 1886 before the District Judge of Fyzabad (Defendant's Exhibit 1) does in my opinion fairly establish that on Jang Bahadur's birth, his father, the late Maharaja Sir Digbijai Singh, determined that the infant would be brought up as a Hindu and that as the first step of the scheme which he had formed for Jang Bahadur's introduction into the Hindu community he arranged that the infant got its suck from Hindu women The learned Counsel for the Plaintiff has strenuously contended that this testimoney should be rejected as worthless, because, he says, it is impossible to suppose that an intelligent man like the late Maharaja Sir Digbijai Singh, K. C. S. I., should ever have entertained the foolish notion of accomplishing the impossible task of making Hindu of a non-Hindu. The contention in my opinion is based on a mistaken notion that Hinduism is rigidly exclusive and does not under any circumstance admit into its fold one who is not born a Hindu. Hinduism is described by Sir Monnier Williams (Religious Thought and Life in India, Part I, page 57) as "a vast hospitable mansion which has opened its doors to all comers and has not refused a welcome to applicants of every grade from the highest to the lowest if only willing to acknowledge the spiritual headship of the Brahmans and adopt caste rules."

Sir Alfred Lyall in his "Asiatic Studies," (page 101) endorses this view and says that Brahmanism so far from being a non-missionary religion in the sense of a religion that admits no proselytes is one that every year makes more converts than is done by all the other religions in India put together. At p. 104 of the "Asiatic Studies" Sir Lyall quoted from Sir George Campbell's report upon his Government of Bengal in 1871-1872, where Sir George Campbell observed: "It is a great mistake to suppose that the Hindu religion is not proselytising: the system of caste finds room for any number of outsiders: so long as

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people do not interfere with existing castes they may form a new caste and call themselves Hindus and the Brahmans are always ready to receive all who will submit to them. *The process of manufacturing Rajputs from ambitious aboriginies goes on before our eyes.*" (The italics are mine.)

A remarkable illustration of the elastic and accommodating nature of Hinduism is furnished by the present day Kshatriyas of Nepal which, adjoins the Estate of the Maharaja of Balrampur. According to Hodgson, the original stock of Nepal is Mongol. Driven by the Musalman invaders in the 12th century, the Brahmans fly from the plains and settle on the neighbouring hills of Nepal. They make converts of the Mongol natives and invest them with the rank of Kshatriyas They marry the native Mongol girls and to their descendants by these girls they give the rank and dignity of Kshatriyas which they enjoy to the present day. (W. J. Wilkins' Modern Hinduism, p. 177, and Carnegy's Notes on the Races, Tribes and Castes of Avadh 1868, p. 50).

Sir Alfred Lyall cites in his "Asiatic Studies" (p. 104) the case of a tribe in Ajmere "of whom one-half were forcibly made Musalmans while the other held its own non-Hindu customs and until very lately inter-married with its Musalman kindred," and Sir Lyall tells us that "this last mentioned half has Brahmanized and would no more marry with Musalmans than the Raja of Benares."

If Hinduism is so elastic, the constitution of the Chattri community would seem to be still more so.

"We know on the authority of Todd" says Mr. Carnegy in his Notes on Races, Tribes and Castes of Awadh, at p. 38 "that the proud Udeypur family, the oldest royal family in the world, which alone of all the royal Chattri families of the East disdained a matrimonial alliance with the Mohamedan Emperors of Delhi, is yet descended from a Christian princess. About the laxity in matrimonial alliances among the Chattris and the causes which until recently conduced to it, I would refer to Mr. Carnegy's Notes from pp. 37 to 40. The late Maharaja's wish to make Hindu of Jang Bahadur from the time of his birth when strictly speaking he could have no religion, was then not so foolish as the learned Counsel for the Plaintiff would make it appear to be. The Maharaja had social position, immense wealth and great sagacity to help him in carrying out his scheme and we will see presently what he was able to achieve with these powerful instruments in his hand.

* * * * * * *

I hold that Jang Bahadur, though *presumably* born a Mohamedan, was not brought up as a Mohamedan and never professed the Mahomedan religion and that he was never a Mohamedan *in fact.* I also hold that Jang Bahadur was brought up as a Hindu and that Jang Bahadur throughout his life was a follower of the popular form of the Hindu religion. I further hold that the Plaintiff and his brothers are illegitimate sons of Jang Bahadur and have no title to inherit Jang Bahadur's estate even if Mohamedan law governed the devolution of that estate. This leads us to the next question as to what law is applicable to succession to the estate of Jang Bahadur.

According to the Mohamedan law of the Sunni School, Jang Bahadur was *presumably* a Mohamedan by birth and should be *presumed* to have been a Mohamedan *until he was able to make a choice.* We have found however that as a *matter of fact* Jang Bahadur was brought up not as a Mohamedan but as a Hindu and that *after he was able to make a choice, he did not choose the religion of Islam* but on the other hand lived and died in the faith of Hinduism. Jang Bahadur was throughout his life a follower of the popular idolatrous form of Hinduism, a form directly antagonistic to the cardinal principles on which the religion of *Islam* is founded. He never believed in "the messengership of Mohammad" and his whole life showed that he was not a believer in the unity of God.

Jang Bahadur was throughout his life then never a Mohamedan and the Mohamedan law is clearly not applicable to succession to his estate. Is the Hindu Law applicable? "Hindu law has obligatory force only upon those who are Hindus by birth as well as by religion." (Tagore Law Lectures, 1870, edition 1870, p. 3), see also Mr. Justice Banerji's Tagore Law Lectures on Hindu Law of Marriage and Stridhan, 2nd Ed., pp. 15, 16, 17 and 18. Jang Bahadur, it has already been found, was *not a Hindu by birth* although his religion was Hinduism. The Hindu law is not applicable to the succession of Jang Bahadur's estate.

What is the law then which governs succession to Jang Bahadur's estate? It has not been

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pleaded on either side that the Indian Succession Act has any application. And I do not think it is applicable. Stokes in his Commentaries on the Indian Succession Act has pointed out that "in sec. 331 of that Act the term "Hindu" was used as a theological term and denoting a person professing any form of the Brahminical religion or religion of the *Purans*" (*vide* notes under sec. 331 of Act X of 1865 in Henderson's Testamentary Succession and Administration of Intestate Estates in India, 2nd Ed., p. 236). I am unable to hold that in enacting the Indian Succession Act, an Act "based upon and in the main embodying the English law," the legislature intended to force its provisions on a person like Jang Bahadur, who though born of a Hindu father by a Mohamedan woman, was throughout his life a consistent follower of the Hindu religion, and who contracted matrimonial alliances with a number of respectable Hindu families according to the forms of the Hindu religion. This view finds support in the case of *Buddhi Bibi* v. *Babu Ram* (1). Sir John Edge, C. J, and Justice Knox in that case held that the Indian Succession Act was not applicable to a person who though born of a Hindu father by a Mohamedan mistress had followed and professed the Hindu tenets and lived the life of a Hindu.

The Mohamedan law and the Hindu law and the Indian Succession Act being equally inapplicable to the succession of Jang Bahadur's estate we must under the provisions of sec. 3 (*g*) of the Oudh Act (Act 18 of 1876), act according to "justice, equity and good conscience." In *Buddhi Bibi* v. *Babu Ram* (1), the case above cited, a Mohamedan claimed as heir to one Inder Kunwar through her mother. It was found that Inder Kunwar was the daughter of a Mohamedan prostitute by a Hindu father and had been brought up in her father's house as a Hindu. She had been married according to Hindu ceremonies to a person who was the son of a Mohamedan mother by a Hindu father and who lived as a Hindu. The learned Judges of the Allahabad High Court who decided the case held that "neither Babu Ram (Inder Kunwar's husband) nor Inder Kunwar can be regarded for any purpose as Mohamedans." The learned Judges further said: "They must be regarded if not strictly as Hindus as persons following and professing the Hindu tenets and living as Hindus . . . . . . We do not think the Indian Succession Act applies . . . . . We can only apply the principle adopted by this Court in *Raj Bahadur* v. *Bishen Dayal* (2) and, as far as possible, the rule of Hindu law."

(1) All. W. N. for 1891, p. 66 (1890).

(2) I. L. R. 4 All. 343 (1882).

Jang Bahadur, we have seen, was throughout his life a follower of the Hindu religion and its tenets and always lived the life of a Hindu and in acting on the rule of justice, equity and good conscience for determining his lawful heir and successor to his estate, we must as far as possible apply the rule of Hindu law. And judged by these rules, the Plaintiff and his brothers who are Mohamedans and illegitimate sons of Jang Bahadur have clearly no right to inherit his estate. Is the Defendant No. 1. Jang Bahadur's legitimate son and also heir on the rule of equity, justice and good conscience and on the application of so much of the Hindu law as may be applicable to Jang Bahadur? The question must in my opinion be answered in the affirmative. The Defendant No. 1 is the Hindu son of Jang Bahadur by Hansraj Kunwar, who was married by her Hindu guardians to Jang Bahadur in strict observance of the Hindu ceremonial of marriage and in the belief that the solemnization of the Hindu rites made the marriage as good as any other marriage in a Chattri family.

On Hansraj's death Jang Bahadur performed her obsequies according to Hindu rites. His son by Hansraj (Defendant No. 1) he brought up as a Hindu. He educated him with all the care which a father could bestow on the education of his son. He married him in Chattri family of unquestionable respectability amidst great rejoicing and strictly according to Hindu rites. The evidence of the Defendant No 1's witnesses Sri Bahadur (Defendant's witness No. 8) and Lalman (Defendant's witness No 38) and Mendai Lal (Defendant's witness No. 52) shows that Jang Bahadur died in the belief, that his sole heir and successor could be no other than his Hindu son, Ganga Bakhsh On the principle of justice, equity and good conscience I hold that Ganga Bakhsh is the legitimate son and sole heir of Jang Bahadur.

Against the decree of the Subordinate Judge the Plaintiff appealed to the Court of the Judicial Commissioner of Oudh.

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Judgment in the said appeal was delivered on the 26th February 1906.

The learned Judges of the Appellate Court held as a point of law that Jang Bahadur Singh was by birth a Mohamedan. They also held that the Subordinate Judge rightly rejected the evidence by which it was sought to establish that Jang Bahadur Singh was circumcised, and the direct evidence as to the celebration of the alleged nikah or marriage between Jang Bahadur Singh and Najmunnisa.

The Plaintiff, however, relied chiefly on evidence that Jang Bahadur Singh lived with Plaintiff's mother and recognised Plaintiff and his brothers as his sons, which they alleged amounted to evidence of acknowledgment of legitimacy from which a valid nikah should be presumed.

The Appellate Court, after considering all the evidence on this point put forward by the Plaintiff, found that the Plaintiff had failed to produce reliable evidence of the nikah, and that it was impossible to infer the existence of a lawful nikah from such cohabitation as had been proved, or to presume that Plaintiff and his brothers were legitimate from the conduct or statements of Jang Bahadur Singh.

The learned Judges said: "There is no evidence that Jang Bahadur defrayed the expenses of clothing and feeding the Plaintiff and his brothers, and there is clear evidence that after Imam Bandi's death, when they succeeded to part of her property, he refused to pay anything for them. The evidence that Jang Bahadur cohabited with Plaintiff's mother is of no value. That he visited her constantly is clear enough; but it seems that his private rooms were in the Hindu part of the house, and that he did his daily *puja* in that part of the house. I do not consider it proved that they lived together as husband and wife, or that they had the reputation of doing so."

In the view taken by the learned Judges of the Appellate Court, the question whether or no Jang Bahadur Singh became a Hindu was of no importance, provided that the nikah could be shewn to have taken place, and that he was then a Mohamedan. "The crucial question was whether there was a nikah between Plaintiff's mother and Jang Bahadur." The learned Judges came to the conclusion that Jang Bahadur Singh was "neither an orthodox Hindu nor an orthodox Mohamedan. He no doubt called himself a Hindu and if he had any religion, it was the popular idolatrous form of Hinduism," and therefore if the Plaintiff were found to be of legitimate birth, the circumstance that his father became a Hindu to the extent shewn by the evidence would be no reason for passing over the Plaintiff and giving the property to the Defendant."

Having found that the nikah was not established, the Appellate Court held that it could not be contended that Plaintiff, being an illegitimate son, could be entitled to the estate under the provisions of the codicil.

On these findings the Plaintiff's appeal was dismissed with costs.

Against the decree of the Court of the Judicial Commissioner of Oudh the Plaintiff has appealed to His Majesty in Council.

Sir R. Finlay, K. C., and *Mr. B. Dubé* for the Appellants, while admitting that Jang Bahadur adopted many of the observances of the Hindu religion, contended that the Subordinate Judge was wrong in treating the matter as though Jang Bahadur became a Hindu and a member of the Kshatriya caste under which conditions

alone his marriage could be valid and his children legitimate. Both Courts have concurrently found that Jang Bahadur was a Moslem by birth. A Moslem could not be converted into a Hindu. Jang Bahadur could become a Hindu by religion but he could not possibly thereby become a Kshatriya by caste. The caste is now too rigidly fixed—he could not be a Sudra even. A man cannot acquire caste except by birth. The marriage of Jang Bahadur with Hansraj Kunwar was absolutely void. Banerjee's Hindu Law of Marriage and Stridhana (Tagore Law Lectures, 1878) 2nd Edn, pp. 68 and 74; Trevelyan's Hindu Law (1912), p. 34; Mayne's Hindu Law (7th Edn.), pp. 106-107; *Padam Kumari* v. *Suraj Kumari* (3), *Melaram Nudial* v. *Thanooram Bamum* (4), *Narain Dhara* v. *Rakhal Gain* (5). A Hindu can marry outside his caste under Act 3 of 1872 only and then by declaring that he is not a Hindu. The circumstances are similar to those in *Barlow* v. *Orde* (6), which case was applied in *Skinner* v. *Naunihal Singh* (7). "In justice, equity and good conscience" the Appellant should succeed as rais, but under the present decision he gets nothing, not even a right to maintenance.

The word "*aulád*" means "children," "offspring," and was wide enough to include both legitimate and illegitimate children.

Barlow v. *Orde* (6) laid down that according to natural law "children" of a man meant children begotten by him from a wife or other woman and acknowledged by him as his children. The Respondent was not a legitimate son under the Hindu Law. All the sons of Jang Bahadur were treated by the Maharajah with equal kindness and consideration, and even by Jang Bahadur himself. There was no reason why the Appellant and his brothers should not have been provided for by the Maharajah. They were brought up and educated by the Maharajah who appointed a special servant to look after them. There was a mass of evidence including that of witnesses of the Respondent himself which showed that Jang Bahadur was not treated by the Janwar Kshatriyas and other high caste Hindus as a Kshatriya, and even as a pure Sudra. Whatever might have been the Hindu Law or usage of the Hindus in ancient times, the Hindu Law of marriage and caste was well-settled in the present age. A marriage to be valid according to the Hindu Law must be between members of the same caste of Hindus by birth and not by conversion.

Mr. DeGruyther, K. C, and *Mr. Eddis* for the Respondents.—The case now put forward on behalf of the Appellants differs from that presented by the plaint by which the Appellant claimed the whole estate or alternately a quarter by including his uterine brothers but excluding the first Respondent. Their case at the trial was that the four sons were legitimate but that the first Respondent was illegitimate. If Jang Bahadur remained a Mohamedan, the Mohamedan Law governs the inheritance and the Plaintiff as an illegitimate son can have no claim. Both Courts found that the alleged marriage did not take place. The object of the codicil was to make provision for Jang Bahadur, not for his illegitimate children. The Maharajah had made a separate settlement upon Imam Bandi

(3) I. L. R. 28 All. 458 (1906).
(4) 9 Suth W. R. 552 (1868).
(5) I. L. R. 1 Cal 1 1876)
(6) 13 Moo. I. A. 277 (1870).
(7) L. R. 40 I. A. 105: s. c. 17 C. W. N. 858 (1913).

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and had in his lifetime given large estates to Jang Bahadur from which he could himself make such provision for them as he wished. The evidence shows that the first Respondent was sufficiently accepted into the Kshatriya caste to make a valid marriage in that caste. The authorities cited on behalf of the Appellant do not controvert the proposition that a person may be introduced into a Hindu caste—Bhattacharja's Hindu Castes and Sects, p. 9, where he says that even Englishmen could become Hindus. Banerjee's Hindu Law of Marriage and Stridhana, 2nd Edn., p. 73. Reliance was placed on the judgment of the Subordinate Judge. A Hindu Will should be construed according to the ordinary notions and wishes of Hindus respecting the distribution of property and having regard to the surrounding circumstances. Effect ought to be given to the real intention of the testator. *Soorjeemoney Dossee* v. *Denobundoo Mullick* (8), *Maulvie Mahomed Shumsool Hooda* v. *Shewukram* (9), *Radha Prosad Mullick* v. *Ranimoni Dassi* (10) which shows that succession passes to legitimate heirs only. The word "*aulad*" includes only legitimate children unless there is something in the Will to indicate a different intention, which there is not. It is not possible to suppose that the Maharajah intended that the Appellant, a Mohamedan, should be rais. Again the word "*Khandan*" of Jang Bahadur could only mean one thing and that is his Hindu family and not the illegitimate Moslem children. If Jang Bahadur did not truly become a Hindu yet under the justice, equity and good conscience rule, the succession should be guided by the principles of the Hindu law since he was brought up by the testator as a Hindu and adopted the religious observances of that religion. *Abraham* v. *Abraham* (11), *Francis Ghosal* v. *Gabri Ghosal* (12). Justice, equity and good conscience in the present case point to the application of the law most nearly applicable to Jang Bahadur, and to that which the Maharajah intended should be applied.

Sir R. Finlay, K. C., in reply. The evidence was conclusive that the first Respondent was not recognized as a member of the Kshatriya caste. He could not become a member of the Kshatriya caste. Once born in one caste a person cannot enter into another caste, much less enter it by conversion. Williamson's Modern Hinduism, pp. 262 and 263.

Herring's Hindu Tribes and Castes, Introd., p. xxii.

(LORD ATKINSON in the course of the argument said that where in an appeal the terms of a document in the Vernacular are material it is very important that a copy in the Vernacular be included in the record before the Board).

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an Appeal from a judgment and decree, dated the 26th February 1906, of the Court of the Judicial Commissioner of Oudh, which affirmed a judgment and decree, dated the 3rd of January 1905, of the Court of the Subordinate Judge of Gonda, dismissing the Plaintiff's suit.

The action out of which the appeal arises was instituted on the 3rd of April 1902 by the Plaintiff as eldest son and heir of his father, Jang Bahadur Singh

(8) 6 Moo. I. A 525 at 550 (1857).
(9) L. R. 2 I. A. 7 at p. 14 (1874).
(10) L. R. 35 I. A. 118; s. c. 12 C. W. N. 729 (1908).
(11) 9 Moo. I. A 195 at p 239 (1863).
(12) I. L. R. 31 Bom. 25 (1906).

by a Mahomedan woman, claiming to recover the possession of the several villages mentioned in the Schedule annexed to the Statement of Claim, same forming part of an estate called the Balrampur estate which had been bequeathed to the Plaintiff's father by his, the Plaintiff's paternal grandfather, the Maharajah of Balrampur, by a codicil, dated the 15th of March 1878, to the last Will of the Maharajah. Possession of these villages had been taken in the year 1899 by the first Defendant, and since then retained by him. Mesne profits were claimed in respect of this possession, and a claim was added to recover possession of the moveable and immoveable property mentioned in Schs. B and C, also annexed to the Statement of Claim, or in the alternative the Plaintiff's legal share thereof, on the ground that the same was property acquired by the Plaintiff's said father, with an additional claim for further relief.

The first Defendant, Bhaiya Ganga Bakhsh Singh, filed a written statement alleging that the Plaintiff was the issue of a Mahomedan woman with whom his the said Defendant's father, Jang Bahadur Singh, had had illegal intercourse, as were also the Defendants numbered 2, 3, and 4, and that her nikah had never taken place, that his father followed the Hindu religion bigottedly, and was a Hindu from his boyhood up to his death, that he married for the first time a Hindu lady of a Surajbansi Chhattri family, that the Defendant No. 1 was the only child of that marriage, is the only legitimate son and heir-at-law of his father, and is consequently under the provision of the said codicil entitled to the allowance therein mentioned.

The Plaintiff replied traversing the several allegations contained in this and the other written statements filed by other Defendants, and upon these pleadings the eight issues set forth at page 884 of the Record were knit. A vast body of evidence was given bearing upon each of these issues. Many of them are no longer of importance on this appeal, which is the ultimate stage of the litigation. The real questions now in dispute are first, the proper construction of the language of this codicil of the 15th of March 1878, and second, the actual intention which the Maharajah desired to effect in executing it.

The facts so far as material to the decision of these questions are as follows. The Plaintiff is the first-born son of his father, and the 2, 3, and 4 Defendants are his brothers, sons of Jang Bahadur Singh by the Mahomedan woman already mentioned. It has been found as a fact by both the Courts before which this case has come, that no ceremony of marriage was ever gone through between Jang Bahadur Singh and this woman, that she was his mistress not his wife, and that, consequently, the Plaintiff and his brothers are illegitimate. The Appellant accepts this finding as conclusive on this point. The first Defendant is the son of Jang Bahadur by a Hindu lady of the Chhattri caste with whom he had, admittedly, gone through the ceremony of marriage according to the strict Hindu rite.

The validity of this marriage is impeached by the Plaintiff upon the ground that at the time it was celebrated Jang Bahadur was neither a Hindu nor a member of the Chhattri caste, and that consequently the first Defendant is, like the Plaintiff and his brothers, illegitimate. The issue thus raised necessitated a somewhat lengthy examination of the life

history of Jang Bahadur. He was, as already mentioned, the son, born in the year 1846, of a rather distinguished man, a Hindu by religion of the Junwar Chhattri caste, Sir Drighijai Singh, Maharajah of Balrampur, by a Mahomedan mistress named Imam Bandi, and was therefore, as held by both the Courts above-mentioned, a Mahomedan by birth. This dicision is also accepted by the Appellant.

The Subordinate Judge, at page 945 of the Record, finds that "Jang Bahadur was brought up, not as a Mahomedan under the influence of his Mahomedan mother, but by his Hindu father in the religion of Hindus." "That (p 956) he never professed the Mahomedan religion and was never a Mahomedan in fact; that *after he was able to make a choice* he did not choose the religion of Islam, but on the other hand lived and died in the faith of Hinduism. . . . that he was throughout his life a follower of the popular idolatrous form of Hinduism, a form directly antagonistic to the cardinal principles upon which the religion of Islam is founded," "and he (the Judge) came to the conclusion that as Jang Bahadur was never throughout his life a Mahomedan, the Mahomedan law did not regulate the succession to his estate, and as he was not a Hindu by birth neither did the Hindu law regulate it; that (p. 959) neither of these laws nor yet the Indian Succession Act governed him at his death, and that according to the principles of justice, equity, and good conscience, and by the application of so much of the Hindu law as was applicaable to the case, Ganga Bakhsh Singh, the first Defendant, was his father's legitimate son and sole heir."

The Court of the Judicial Commissioner, whilst abstaining from pronouncing any definite opinion on the legitimacy of the first Defendant, gave in the following passage of their judgment a sketch of the status, life, and character of Jang Bahadur Singh, which, though it differs to some extent from that of the Subordinate Judge, is, in their Lordships' view of the evidence, fairly accurate. It runs thus:

"Jang Bahadur belonged to no caste, and even if the issue of his marriage with Hansraj Kunwar should be held to be legitimate, a point on which I express no opinion, it is clear that the Hindu community at Balrampur treated the validity of the marriage as open to question The Subordinate Judge has cited several authorities to show that the Hindu religion admits proselytes of all kinds The truth of this is indisputable, but it is equally true that the admission of a proselyte and his descendants into the society of orthodox Hindus is a very slow process. The Defendant's witnesses hit off the position exactly when they say that they might eat with Jang Bahadur's family if they persevered in their Hindu habits and maintained their character for several generations (*see* the evidence of Defendant's witnesses Nos. 9 and 10). In two parts of one and the same house Jang Bahadur had a Mohamedan and a Hindu family and seems to have been on equally affectionate terms with both. He ate food in English Hotels and Railway Refreshment Rooms, drank gin and kept fowls and pigs. It is evident that he was neither an orthodox Hindu nor an orthodox Mohamedan. It appears to be that he led a double life as was almost inevitable under the circumstances. He no doubt called himself a Hindu, and if he had any religion it was, as the Subordinate Judge says, the popular idolatrous form of Hinduism, but he is not proved to have been an orthodox Hindu and therefore it seems to me that if the Plaintiff were found to be of legitimate birth the circumstance that his father became a Hindu to the extent shown by the evidence would be no reason for passing over the Plaintiff and giving the property to the first Defendant."

It has been urged on behalf of the Respondents that the Court of the Judicial

Commissioner was mistaken in supposing that Jang Bahadur kept his two families in two sides of the same house, that in truth and fact, he kept them in two different houses. This is really a small matter and does not affect the general accuracy of the passage.

A vast body of evidence was given describing in great detail the participation of Jang Bahadur Singh on many occasions in the most solemn rites and ceremonies of the Hindu religion. It was proved by many witnesses that he wore, somewhat ostentatiously, the Hindu tilak on his forehead, that he was invested by his father with the scared thread, that he kept a Hindu cook to cook his food, &c. The fair result of the evidence in their Lordships' opinion is that Jang Bahadur did his utmost to become an orthodox Hindu, and to pass as such in the society in which he lived. That his father, from the boy's youth upwards, aided and encouraged him in those efforts; and, finally, when he was only 15 years of age, procured a marriage to be celebrated with great pomp and rejoicing according to the strict Hindu rite between him and the already mentioned Hindu lady of the Chhattri caste, Hansraj Kunwar.

This lady's family were apparently not well off, and it was stated in evidence that the Maharajah gave to her brother Sheo Dial a village to induce him to consent to the union. This, however, only proves the anxiety of the Maharajah to bring about the marriage. No doubt the Maharajah did not attend the ceremony himself. He allowed certain priests to perform for him those ceremonies properly performable on such occasions by a father, but the marriage cannot but be regarded as a somewhat bold attempt to force, as far as possible, the son's entrance into the ranks of a high (twice-born) caste, and it might well be that the father, as the Subordinate Judge thought, may have absented himself from the ceremony from motives of prudence. On the other hand it is difficult to believe that all the parties concerned, Sheo Dial, with his own sons and his daughters to get married, the Maharajah with his position and distinction, the priests with their duties to their religion and office, and all those who assisted at the ceremony with their notions of what was due to their creed, would have promoted, or taken part in an elaborate public function if they knew that it could at best create only a relation of permanent concubinage, without hope or prospect of elevation into a worthier and more respected state. The evidence of Sheo Dial is important in this connection. He said he went with two Pandits to visit the Maharajah, that he had learned that Jang Bahadur was a Mahomedan woman's son, that on his expressing his scruples about the contemplated marriage owing to this fact the Maharajah assured him that Jang Bahadur was a Hindu; that he (the Maharajah) held him (Sheo Dial) by the arm and said: "From childhood I have got him suckled by a Brahmin woman. He eats with me. He does puja, and his ways are the ways of a Hindu." Sheo Dial further says that Jang Bahadur Singh wore a tilak of chandan, that his cook was a Hindu, that he saw him sitting near the Maharajah at dinner, and that hearing and seeing this he, Sheo Dial, consented to the marriage of his sister with Jang Bahadur. No doubt it is stated by another witness that the Maharajah did not sit at meals with this son, but unless this evidence of Sheo Dial be an

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entire fabrication it bears additional testimony to the anxiety of the Maharajah to have his son accepted and treated as a Hindu. Hansraj Kunwar died in the Maharajah's lifetime. Jang Bahadur performed all the obsequies proper to be performed according to the Hindu religion by a surviving Hindu husband. His father, in the year 1872, got him, then about 24 years of age, again married to another Hindu lady, a member of the same Chhattri caste, Raj Kali Kunwar, who survived him, and is the fifth Defendant in this suit. There was the same publicity and pomp as on the occasion of the first marriage, the same religious ceremonial. The Maharajah absented himself on this, as he did on the former occasion, and got his duties performed vicariously in the same way. The sole issue of this second marriage was a girl. Both she and Bhaiya Ganga Bakhsh Singh married members of the Chhattri caste. Sir Robert Finlay insists that the law for many centuries has been that a Hindu must be born not made, and he cited several authorities in support of that proposition. On the other hand the treatises referred to by the Subordinate Judge at page 889 and the following pages of his judgment appear to tend in an opposite direction, and the facts of this case show that in this matter of marriage the rules both of Hinduism and of caste were not, in this instance at all events, strictly applied. In the view their Lordships take it is unnecessary to express any opinion on the point. The matter for decision in this case being the construction of a codicil to the Maharajah's Will, the point is not what is the strict rule of the Hindu religion, or the strict rule of the Chhattri caste, but this, namely, what were the wishes and intentions of the testator as revealed by the language of that instrument, viewed through the light of the circumstances which surrounded him at the time he made it.

It would be strange indeed if the man who had made it his special care to rear this son of his as a Hindu, and had succeeded in marrying him to two high caste Hindu women, should intend or desire, whatever might be the strict letter of the law, to place the offspring of these unions on the same level as the illegitimate children of his son's Mahomedan mistress and make them all equally the objects of his bounty.

Much reliance was placed by the Appellants upon the evidence of several witnesses, members of the Chhattri caste, which was directed to show that they would not eat with Jang Bahadur Singh, take betel leaves from him, or recognise him as a member of that caste, or of the Hindu religion, and it was contended that the Subordinate Judge had not paid sufficient attention to this evidence, or given it its due weight. He has no doubt not commented upon it at any great length, but it would be quite unreasonable because of this to conclude that he had not fully considered it. When the evidence is examined it will be found that the objection of many, if not most of these witnesses, to eat with Jang Bahadur or to give him betel leaves, &c., was due to the well-known and undisputed fact that he was the illegitimate son of a Mahomedan mistress, rather than to the fact that he was not a genuine Hindu. This is notably so in the case of the witnesses Kali Parshad, page 723, and Jagdeo Singh, page 726. The former said, "I did not eat with Jang Bahadur because he was Imam Bandi's son," and again, "I wont eat kutcha food touched by Ganga Bakhsh.

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I wont drink water from his hand because his grandmother was a Mahomedan," and the latter said "I cannot eat food cooked by Raj Kali Kunwar because she was Jang Bahadur's wife," but he proceeded to say that he would have no objection to eat with Jang Bahadur Singh if the Maharajah had asked him to do so, and then he added the important statement: "Jang Bahadur had offended the Maharajah by keeping a Mahomedan woman, that woman had four sons, she lived with Bandi as Jang Bahadur's mistress for 12 or 13 years until her death." Babu Basudeo Lal, an educated man and an advocate, at p. 731, says "Jang Bahadur took particular care to put on the tilak more than a born Hindu would take because he was anxious to appear a Hindu; that from the orthodox point of view he (the witness) did not consider him a Hindu, but he could not say he was a Mahomedan, because he professed to be a Hindu," yet he gave not this fac but the fact that Jang Bahadur was of illegitimate birth as the reason for his unwillingness to take water from his hands.

Hanwant Singh (page 127) gives remarkable evidence to the same effect. He said: "I consider Jang Bahadur a Hindu. He worshipped like a Hindu. He did pilgrimages like a Hindu. He gave *dans* to Brahmins like a Hindu. His ways were those of a Hindu. I saw him doing puja in the temple for the first time 30 years ago, and three times altogether I saw him feeding Brahmins at the temple." Yet despite what he saw, and his opinions on Jang Bahadur's religion, he says on the next page he would not eat with him because he was born of Imam Bandi, nor would he eat with Ganga Bakhsh, because presumably he was his father's son, though he admits that if the latter "persevered in his Hindu habits for two generations, he would be taken into the *biradri*."

These witnesses are fair specimens of those examined on this point. Their evidence might be of importance if it was necessary for their Lordships to determine whether or not the Defendant No. 1 was the legitimate son and heir-at-law of Jang Bahadur. The Subordinate Judge has (at page 961) determined that question in the affirmative. Their Lordships concur with the Court of the Judical Commissioner in thinking that it is not necessary to determine it one way or the other, for the purposes of the decision of the appeal, and they therefore abstain from expressing any opinion upon it. What is of importance, when one has to construe this codicil, and determine what was the testator's intention in making it, is to ascertain in what light he regarded his son, the marriages he helped that son to contract, and the issue that sprung from them.

Their Lordships are of opinion that the reasonable conclusion to be drawn from the evidence is that the Maharajah treated this son of his as a Hindu in religion, and desired that others should so treat him, that he treated his marriages with the two Chhatri ladies as lawful marriages and desired that others should so treat them, and consequently resolved to regard and treat the offspring of these unions as legitimate, and desired they should be so treated and regarded by others; and that it was in this frame of mind he made the testamentary deposition which is in dispute. It is lengthy, and in its material parts runs thus:—

"Whereas I have a son, named Jang Bahadur Singh born of an unmarried *Mahal*, and whereas he is not born of *Khas Mahal*, and it is against the usage of the family and against religion according to the Hindu Shastras, so he is not considered capable of *gaddinashini* and the pro-

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prietorship of the *riasat*. But he also being born of my loins, it is incumbent on me that such means be provided for support as would enable him and his (aulad) issues to support themselves well and with respect. Accordingly ever since the date of his birth till this day whenever proper opportunity presented, grant was made for his support; and during my lifetime I shall make grants according to my will whenever I shall deem it expedient to do so. But with a view to clearly make a provision beforehand in order that there may not remain any co-ownership and dispute relating to a part or the whole of my moveable and immoveable property, a property should be determined for Jang Bahadur Singh and his (aulad) issues for generation after generation in order that the conditions of the deed may remain binding in perpetuity. Accordingly the settlement is made as follows. It is this: Rs. 4,000 per mensem or Rs. 48,000 per annum shall be continued to be paid by the proprietor of the *riasat*, the *locum tenens* of the *gaddinashin* for the time being; and that amount shall be paid to Jang Bahadur Singh and his (aulad) issues for generation after generation as long as the (Khandan) family of Jang Bahadur Singh and his (aulad) issues remain in existence."

"DETAILS OF CONDITIONS.

"1. He shall not directly or indirectly take part in running the *riasat*, and shall also remain a well-wisher of the *riasat*.

"2. He shall not transfer his maintenance allowance to a stranger by sale, mortgage or otherwise.

"3 For his lifetime Jang Bahadur Singh has a right to spend this money, but after his death from among his (aulad) issues one person (Jis Ko haq pahunchta ho) to whom the right may go shall be considered proprietor of this maintenance allowance without division as a *rais*. The other issues of the family of Jang Bahadur Singh shall be entitled to get food, raiment and other necessaries out of the monthly allowance; . . . .

"4. When there remains no descendant of the family of Jang Bahadur Singh, at any time, the monthly allowance of Rs. 4,000 will be resumed and remain in proprietary possession of the proprietor of the *riasat*, the *gaddinashin*.

"5. For the realisation of the monthly allowance, a few villages with *jama* and names of demarcated villages and hamlets are selected, and a list of the same is annexed to the document The *jama* of the selected (*tajwis shuda*) villages will be credited from year to year towards the aforesaid fixed monthly allowance of Rs. 4,000. Neither has the proprietor of the *riasat*, *gaddinashin*, power to realise the *jama* of the selected villages yielding Rs. 48,000, including *mal* and *sewai*, from Jang Bahadur Singh or his descendants, nor is Jang Bahadur Singh or his family descendants competent to demand the fixed monthly allowance of Rs. 4,000 from the *gaddinashin*, the proprietor of the *riasat*.

"6. The *jama* of the selected villages, a copy of which is attached to the document, shall be deemed the *jama*, including *mal* and *sewai* in perpetuity. And the proprietor of the *riasat* for the time being shall have no power to increase or decrease the *jama*. And Jang Bahadur Singh and his family descendants shall raise no excuse as to increase or decrease of the *jama*. And the proprietor of the *riasat* shall have no power to cancel the lease. And Jang Bahadur Singh and his family descendants shall have no proprietary right against the proprietor of the *riasat*, except that of deriving benefit from the selected villages. Besides, Jang Bahadur Singh and his family descendants shall have no power to transfer the immoveable property by sale or mortgage or otherwise. But they shall continue in perpetuity to hold possession over the said villages.

"7. The villages selected for payment of the monthly allowance shall have their boundaries maintained according to the map of *had-o-bast kishtwar*. The proprietor of the *riasat* shall have no power to vary them contrary to it, nor shall Jang Bahadur Singh or his descendants have any."

Then follow the details of the villages leased out in perpetuity for the payment of the monthly allowance of Rs. 4,000. The testator then makes a bequest to Imam Bandi, the mother of Jang Bahadur, in the following words:—

"Besides, with a view to support the mother of Jang Bahadur Singh, I propose to fix Rs. 1,000 per mensem, or Rs. 12,000 a year for her personal expenses. She, that is, the mother of Jang Badadur Singh has power to spend the fixed allowance without interference by anybody else, and may, in her lifetime, make a will in favour of anybody whom she pleases, and in respect of any good

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work she likes, and it will be deemed liable to be acted upon. And for the purpose of realising the aforesaid annuity of Rs. 12,000, a few villages, mentioned below, are given by way of *theka* with *jama* assessed thereon. The money will be realised from those villages from year to year."

He then gives a list of the villages out of which the Rs. 12,000 was to be collected, and proceeds to add :—

"These few sentences have been put down to make provision for her support while in the enjoyment of health and possession of the five senses and out of my own pleasure and accord, in order that they may be of use after me."

The testator died on the 27th of May 1882. In or about January 1894 Jang Bahadur Singh became insane. He so continued for several years, and died on the 1st of October 1899 leaving as his own the moveable and immoveable property mentioned in Schedules B. and C. attached to the Statement of Claim. The first Defendant, as already mentioned, immediately went into possession of the property mentioned in Schedule A. and has since retained it.

Jang Bahadur Singh was created by the codicil ancestor or first proprietor of the estate, maintenance allowances somewhat resembling rent-charges, were charged upon it. It was to be perpetual, impartible, indivisible, and incapable of being otherwise charged or encumbered, and it was not to be the subject of any co-ownership. On the death of Jang Bahadur a person, styled at page 224 the representative of the former, was to succeed him as proprietor of this maintenance allowance, without "division" as a rais. "This proprietor was to be one of the issue of Bahadur Singh"—the other issue (aulad) of the family (khandan) of Jang Bahadur Singh being only entitled to get food and raiment out of the allowance. In addition the marriage and funeral expenses of the male and female children of the family of Jang Bahadur Singh were to be paid. The only indication given as to how the particular individual, one of the issue of Jang Bahadur, who was to succeed him as proprietor of the allowance, was to be ascertained is that contained in the words "on whom the right may devolve." The testator must have had in mind some law or rule which would apply to fix the succession. What law could this high caste Hindu possibly have had in mind for such a purpose other than the Hindu law ? That law, however, in the matter of succession to property, takes no account, in the three higher classes, of illegitimate descendants. Sir Robert Finlay, as their Lordships understood, admitted this contention—at least to this extent, that if when a suceessor came to be ascertained the class of beneficiares contained both legitimate and illegitimate members, the eldest legitimate male would by the Hindu law succeed ; but where, as in the present case, as he contended, all the children were illegitimate, the eldest male amongst them should succeed. But by what law or rule he did not indicate. It is difficult to suppose that if the testator intended all his grandchildren to be put upon the same level he would not have indicated some method by which the successor to his son should be selected. If he relied at all upon the Hindu law to select that successor it could only be because he wished it to be assumed that that law applied to some of the issue of his son, and that could only be the case if those members of the issue were to be taken to be legitimate.

At the date of this codicil Jang Bahadur was only about 30 years of age. He had already had one son by his deceased Chhattri wife. He had been married for some time to another Chhattri wife, by whom

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it was quite possible he might have had male issue, and it would have been quite in conflict with the whole tenor of the Maharajah's treatment of and conduct towards his son Jang Bahadur, to deprive by this codicil these marriages and the issue springing from them of the character and status he had striven to secure for them. The Court of the Judicial Commissioner came to the conclusion that the Maharajah thought these marriages of his son were valid, and the issue of them legitimate. However that may be, it is clear, their Lordships think upon the whole of the evidence, that he wished them to be so regarded by others. Nothing would more surely have defeated that desire—than that he should by this testamentary instrument show that he himself regarded them in a wholly different light, and placed the children of these marriages on an equality with those of a Mahomedan concubine. The Maharajah has used the word "*aulad*" throughout this codicil to describe the issue of his son Jang Bahadur. The Court of the Judicial Commissioner has laid it down that this word *primâ facie* means legitimate issue. This case is not one where a gift is made by will of the corpus of a fund, or a life interest in a fund to the "children" of the testator or of another as a class. There may be good reason in some such cases for holding that in India the word "children" includes illegitimate children, but here a succession of life interests from generation to generation is intended to be set up, the successor or "proprietor" in each instance being vested with absolute control of the income, subject only to the duty of maintaining the issue (aulad) of the family (khandan) of the first proprietor, Jang Bahadur Singh. There is nothing on the face of the will to suggest that a meaning should be given to the word "aulad" different from its *primâ facie* meaning; but if it is to be read as including illegitimate issue, then it follows that the testator intended to bring into the line of succession not only his illegitimate grandchildren but their illegitimate issue from generation to generation. Such a construction would render rather unnecessary the provision (No 4, page 224) that if no descendants of the family of Jang Bahadur remained, the monthly allowance should fall into the possession of the gaddinashin, and would also seem to defeat the whole purpose and object of the testator in establishing this succession of life interests. Nor do their Lordships see any reason for extending in this instance the meaning of the word "*khandan*," which ordinarily refers to the group of descendants who constitute the family of the progenitor, so as to include illegitimate offspring, who from the necessities of the case cannot share in the family life or its worship or ceremonials.

It has been strenuously urged by Sir Robert Finaly on behalf of the Appellant: firstly, that there would have been nothing easier for the testator, if he desired to exclude his illegitimate grandchildren from all benefit under this codicil than to have said so. The question is, has he not done so by the use of the word *aulad*. But even if this be not so, it was quite as easy for him to include them in the class described by the word issue as to exclude them from it, so that the argument cuts both ways. And it was in the second place contended that having regard to his interest in these children, he never could have intended to leave them unprovided for. He undoubtedly did show some interest in them, but not a very keen interest, and it is by no means clear that he did not intend

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them to be provided for in the way they have been, in fact, provided for, namely, by being maintained by their grandmother Imam Bandi during her life, out of the income left to her by the codicil. He enabled her by the exercise of the testamentary power over this income conferred upon her to provide for them after her death. The income was large, Rs. 1,000 per mensem. She was a woman who at the date of the codicil must have been at least 45 years of age, her son Jang Bahadur being then 30 years of age. The son's mistress and her children lived with her. She, according to the evidence, helped to rear them. It was scarcely conceivable that she should require Rs. 12,000 per annum for her personal expenses alone. The power of disposing of this income by will clearly showed that the testator had some object in view beyond providing adequately for her maintenance. What more natural than that this income, handsome in amount, and disposable by her will, should have been given to enable her to provide for her grandchildren. Their Lordships are therefore of opinion that having regard to all the evidence in the case and the provisions of the codicil itself, the intention of the testator plainly was to treat the marriages of Jang Bahadur with the two Chhattri women already mentioned as valid marriages, and the issue of those marriages as legitimate issue. They think that the judgment appealed from was right, and that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Sanderson, Atkin Lee & Eddis* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 4090 OF 1910 AND 98 OF 1911.

FLETCHER, J. N. R. CHATTERJEA, J. 1913, Heard, 26 and 27, November. Judgment, 27, November.	SARAT CHANDRA MUKHOPADHYAY and another, Defendants, Appellants, *v.* RAJENDRA LAL MITRA and others, Plaintiffs and others, Defendants, Respondents.

Lease for a term—Clause allowing removal of fixture after expiry of lease, if a renewal clause—Notice of a lease—Notice of terms of a lease—Estoppel—Ouster—Suit for joint possession.

Terms in a lease giving the lessee, if unwilling at the end of the term to take a fresh settlement, the right to take away the fixtures put on the land cannot operate as a covenant under which the lessee could compel the lessor to grant a fresh term.

A party having notice of a lease must be taken to have notice of the terms of the lease.

The doctrine of estoppel by conduct does not apply in a case in which the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact.

A suit for joint possession is not maintainable unless there is actual ouster.

If it is stated by the Defendant in possession that the Plaintiff has no right and if he is refused leave to enter the land, it is a case of actual ouster and a suit for joint possession will lie.

This was an Appeal against the decree of W. N. Delevingne, Esq., District Judge of Zillah Hughly, dated the 30th of

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August 1910, modifying the decree of Babu Surendra Nath Mitra, Subordinate Judge of that District, dated the 22nd of March 1909.

The facts necessary for the purpose of this report are shortly these :—

Luchmi Narain and Gouri Sankar were owners of a plot of land about 7 bighas odd allotted to their share on partition. Luchmi Narain granted a lease with respect to his share of the land in favour of Gouri Sankar for a term of 51 years on the 1st Falgun 1262, corresponding to 12th February 1856, which was to expire in Magh 1313, corresponding to February 1906. This lease was described as *ijara pattah* and the following clause was inserted in it.

"If you or your heirs be unwilling to take an *ijara* settlement of the said property on the expiry of the term you or your heirs shall take away such appurtenances which you make at your own cost."

Gouri Sankar, on the 2nd April 1856, granted a permanent lease in favour of Bengal Coal Co. Ld., (Defendant No. 7) of the entire land and in this lease there was a recital to the effect that Gouri Sankar was entitled to the lands of his brother by virtue of a settlement from him. Defendants Nos. 6 and 8 were the purchasers of the interest of Gouri Sanker in the property.

The Plaintiffs, who were the heirs of Luchmi Narain, instituted this suit on the 26th September 1907 for recovery of joint possession of their share. The other facts will be found in the judgment of the Court.

Babus Mahendra Nath Roy, Hemendra Nath Sen, Jogendra Nath Mukherji, Khirode Lal Sen and *Biraj Mohan Majumdar* for the Appellants.

Mr. B. Chuckerbutty and *Babu Sib Chandra Palit* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—These are two appeals presented against a judgment and decree passed by the learned District Judge of Hughly, dated the 30th August 1910, reversing the judgment and decree passed by the learned Subordinate Judge. The suit was brought by the Plaintiffs for joint possession of certain lands in which they claimed an 8 annas share. The first Court dismissed the suit; but, on appeal, the learned District Judge reversed the decision of the Subordinate Judge. Two appeals have been presented to this Court : one (No. 4090 of 1910) by the Defendant No. 7, *i.e.*, the Bengal Coal Company and the other (No. 98 of 1911) by the Defendants Nos. 6 and 8. The case has been dealt with very fully by the learned District Judge who has given a very long and careful judgment. When you look at the facts, the case is one of extreme simplicity. The Plaintiffs derived their title to the land through one Luchmi Narayan. The Defendants Nos. 6 and 8 claim title through one Gouri Sankar. It is not necessary to go into the intermediate title. The Defendant No. 7, the Bengal Coal Company, claim under a lease executed by Gouri Sankar in their favour, dated the 21st Chaitra 1262, of the Bengali year which corresponds to 2nd April 1856. Gouri Sankar had, prior to the granting of this lease to the Bengal Coal Company, the Defendant No. 7, acquired from Luchmi Narain a lease of his share for a term of 51 years from the month of Falgun in the Bengali year 1262 to the month of Magh in the Bengali year 1313 : and in that lease was con-

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tained this clause:—"If you or your heirs be unwilling to take an *ijara* settlement of the said property on the expiry of the term, you or your heirs shall take away such appurtenances which you make at your own cost." The lease expired on the expiration of the term of 51 years when an attempt was made by the Plaintiffs to be put into joint possession but they were refused. The statements made in the written statement in this suit show quite clearly what the case made by the appealing Defendants is. First of all, in para. 7, Sarat Chandra Mukerjee, that is, the Defendant No. 6, sets up that he is entitled to have a fresh settlement and get a new lease granted under the terms of a covenant for renewal. In the 8th para. he sets up another case that even assuming that he is not entitled to a renewal, he is entitled, under the provisions of the Transfer of Property Act to receive a notice to quit before the Plaintiffs can get a decree for *khas* possession and in the 12th para. he sets up a case that the Plaintiffs cannot get joint possession unless they make an application for partition. The defence set up by the Bengal Coal Company is much stronger because they set up that the Plaintiffs' suit is barred by estoppel, latches and acquiescence as well as by limitation, the Defendant Company having been in adverse possession for 51 years upon a claim of permanent title. It seems to me that those are the cases on which the parties offered to defend the suit when it was brought to Court and we are bound to consider those defences in deciding this case. As my learned brother pointed out in the course of the argument, if the sole defence that was raised in the suit had been that the proper remedy of the Plaintiffs was by partition, then the Plaintiffs could have either applied to the Court to have the plaint amended by adding a claim for partition or they could have instituted another suit claiming partition. But the case has not proceeded on that footing at all. These points have been used solely with intent to defeat the Plaintiffs in the present suit. One thing is clear on the findings of the learned District Judge. First of all, that the Bengal Coal Company had express notice of the lease by Luchmi Narain to Gouri Sankar. That is a finding of fact and the facts on which the learned Judge finds that amply warrant the finding. But if that had not been so, I do not think it would have made very much difference. Having found that the Defendant No. 7, the Bengal Coal Company, had notice of the lease, of course, the learned Judge very properly found that they had notice of the terms of the lease. The term of the lease was 51 years and the grant to the Bengal Coal Company purported to be a grant of a permanent tenure from the 2nd April 1856. The Bengal Coal Company must be taken to have known that the permanent lease could only operate out of the share of Gouri Sankar; and so far as regards the share which Gouri Sankar held as a lessee from Luchmi Narain, it could only take effect during the pendency of the term. That seems to have been found by the learned District Judge quite clearly and there is no doubt about that fact.

The first point which has been raised in these appeals is that the lease from Luchmi Narain to Gouri Sankar, dated the 12th February 1856, contained a covenant for renewal—either a covenant to renew for a term of 51 years or a covenant to renew in perpetuity. In my opinion, if the matter is free from authority,

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it is quite impossible to say that these words giving the lessee a right at the expiry of the term to take away what the document calls the appurtenances,—I suppose, the fixtures put on the land,—could operate as a covenant under which the lessee could compel the lessor to grant a fresh term. Moreover, this has been the view that was taken on this very document in a former case. Our attention has been directed to *Jagendra Chandra Mitter* v. *Rajendra Nath Mitter* (1), and the same view was taken as to the effect of this lease of the 12th February 1856. It would be quite impossible for any body reading this document to come to the conclusion that a license in a lease giving to the lessee a right to carry away the fixtures on the expiry of the term necessarily involves a stipulation that if he does not carry away the fixtures his lease would be renewed. That is sufficient, in my opinion, to dispose of the case of renewal.

Then we had a very extraordinary point discussed before us, that is, estoppel by conduct against the persons claiming through Luchmi Narain. The learned District Judge found and found as a fact that the Bengal Coal Company, the persons who set up this estoppel against the Plaintiffs had express notice of the terms of the lease from Luchmi Narain to Gouri Sankar. If the Bengal Coal Company cared to lay out money on a 51 years' lease on a portion of the land they must take consequences. Many people lay out money on lands which are let out for shorter terms than a permanent tenure; but I have never heard that the doctrine of estoppel by conduct applies in a case in which the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact. This case of estoppel, in my opinion, has no force at all.

The other point is really the point which has been argued before us most strenuously, at any rate this morning, and that is as to whether the Plaintiffs are entitled to a decree for joint possession or whether their proper remedy is not to proceed by way of partition and have their share in the property allotted to them. Of course, the authorities are clear, that, unless there is an ouster of the Plaintiff, he cannot sue for joint possession. In this case, I have already called attention to what the points are that were raised in the written statements. In those written statements there is a clear denial of the title of the Plaintiffs to have any immediate right in the property. It is said that the interest of the Plaintiffs is reduced to that of being entitled to a portion of the rent payable by the Defendant No. 7 for the land of which the Defendant No. 7 claims to be a permanent tenant. If it is stated by the man who is in possession that the other side has no right and if he is refused leave to enter the land that is a case of actual ouster, and it is apparent that the present case is a case of actual ouster when you read the written statement. As my learned brother pointed out in the course of the argument, if that point had been the only point raised that the proper remedy was to proceed by way of partition, the Plaintiffs might have elected to proceed either by a fresh suit or by an amendment of the existing suit to have the property partitioned. But that was not the case at all. The whole case that was presented before us was that the

(1) 18 C. L. J. 262 (1891).

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Plaintiffs were not entitled to get joint possession on the ground that the Defendant No. 7 had obtained a permanent interest in the property. That being so, it seems to me that on all grounds the judgment of the learned District Judge which has been very carefully considered and written out at great length is right and that the present appeals must fail and must be dismissed with costs.

N. R. CHATTERJEA, J.—I agree.

[CRIMINAL REFERENCE.]

REF. No. 175 OF 1913.

IMAM, J. | NIKUNJA BEHARY SEN,
CHAPMAN, J. | Complainant,
1913, | v.
Heard, | HARENDRA CHANDRA
7, August. | SINHA, Accused,
Judgment, | Petitioner.
8, August.

Indian Penal Code (Act XLV of 1860), sec. 499, Exc. 9—Pleader, question by, to witness in cross-examination conveying imputation, if can be subject of charge of defamation—Presumption of good faith—Rebutting evidence, nature of.

A question put to a witness in cross-examination by a pleader making an imputation affords no ground for a criminal prosecution. A pleader is entitled to the presumption that the questions he asks in cross-examination are asked in good faith for the protection of the interest of his client. To rebut this presumption there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause.

This was a reference under sec. 438, Cr. P. C., by the Sessions Judge of Sylhet, recommending that the proceedings taken by the Additional District Magistrate of Sylhet, on 2nd June 1913, summoning the accused pleader to answer a charge of defamation under sec. 500, I. P. C, on the ground that the accused pleader put an alleged defamatory question to the complainant while being examined as a witness for the prosecution in a case, might be quashed.

The facts were as follows :—

The accused, a pleader of the Judge's Court of Sylhet, was summoned by the Additional Magistrate of Sylhet under sec. 500, I. P. C, on the complaint of one Nikunja Behari Sen. The complainant was a prosecution witness in a case under sec. 408, I. P. C., in the Court of a Deputy Magistrate and the accused was the pleader for the defence. In cross-examination he asked the complainant (Nikunja) the following question—"Do you drink or smoke ganja?" The complainant said that there was no foundation for the question and that the accused in the case under sec. 408, I. P. C., maliciously had it put by his pleader because he was angry with the complainant for giving evidence. The Sessions Judge of Sylhet made a reference to the High Court recommending the quashing of the criminal proceedings started against the accused pleader and he stated therein that the question was admittedly based on specific instruction. Moreover, the question was not a random one. The defence in the sec. 408, I. P. C., case was that the case was entirely concocted and the witnesses were associates of Girindra the complainant. The complainant Nikunja said in cross-examination "Girindra drinks liquor and smokes ganja." The next question "Do you drink and smoke ganja" naturally follows for the purpose of showing association with Girindra. The learned Magistrate in his explanation suggests that the pleader acted without good faith,

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Contents.

NOTES.

Rules for admission of Barristers in the High Courts.

In reviewing the new rules and orders on the Original Side of the Calcutta High Court last week we said that the requirement that a barrister desiring to join the High Court must read in the chambers of a barrister in England for a year is now under the consideration of the Secretary of State. It may ultimately be decided in favour of the view we put forward *viz.*, that he must be given the option to study with a barrister in India or England as he pleases. The English *Law Journal* of the 24th January last published the following information on the subject :—

The High Courts in India have recently adopted certain regulations for the enrolment of duly qualified barristers, which have been the subject of some criticism. The sub-committee recently appointed by the London Advisory Committee for Indian students to inquire into the difficulties of the Indian students in the United Kingdom have made the following recommendations :—(1) That students should be given the option of deciding whether the year prescribed for reading in chambers should be worked out in the United Kingdom or in India. (2) That students should be allowed to commence their chamber work before being called to the Bar. (3) That the Rule of the Bombay High Courts requiring a student to read in the Chambers of a European Barrister of 10 years' standing should be widened so as to allow students to read with barristers of recognised standing of any nationality. The Advisory Committee have approved these recommendations and have submitted them to the Secretary of State for his consideration.

Habeas Corpus—Court of Appeal.

The decision of the Court of Appeal in England in the matter of a recent Habeas Corpus petition is both interesting and instructive. In *Rex.* v. *Governor of Brixton Prison*, the application was made for a rule *nisi* first in the King's Bench Division before Ridley and Bankes, JJ., for a writ of Habeas Corpus for the production of Le Gros who was arrested in London upon an extradition warrant on a charge of an extraditable offence committed within the jurisdiction of the French Republic and was kept in custody in the Brixton gaol. This application was refused. Thereupon Counsel on the same facts and affidavits wen before the Court of Appeal presided over by the Lord Chief Justice and moved for a writ. On His Lordship pointing out to Counsel that under the Judicature Act of 1873, the Court of Appeal was precluded from reviewing any order of the Divisional Court in a criminal matter except in some special cases provided for by special statutes, counsel relied on the Extradition Act of 1870, and *Cox* v. *Hakes* (15 App. Cas. 506), which followed the practice before the three Common Law Courts in England were amalgamated under the Judicature Act of 1873. The law as laid down there by Halsbury, L. C., was that after an application had been rejected by one Court or Judge, "the person detained might make a fresh application to every Judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not be influenced by the previous decisions refusing discharge," the reason assigned being that "for a period extending as far back as our legal history, the writ of Habeas Corpus has been regarded as one of the most important safeguards of the liberty of the subject."

It was, therefore, argued before the Lord Chief Justice that even if his Lordship denied the jurisdiction of the Court of Appeal, still he was a Judge of the King's Bench Division and the Petitioner had every right to move him personally. To this his Lordship replied that while sitting in the Court of Appeal he ceased for the time being to be a Judge exercising original jurisdiction and could only exercise the powers of a member of a Court of Appeal. His Lordship refused to decide

the question whether the applicant was entitled to go from Court to Court or Judge to Judge till a writ was granted or a legal justification made out for his detention. It would not be out of place to notice in this connection a similar application made before the Court of Appeal in *Savarkar's* case. There the application was made to the Court of Appeal after its rejection in the King's Bench Division. The Court of Appeal held that they had jurisdiction but rejected it on its merits. The reason their Lordships assigned for their decision was that the Fugitive Offenders Act, 1881, which is applicable only to cases where extradition was demanded from one part of His Majesty's kingdom to another, by secs. 10 and 35 gave "original jurisdiction" to every "Superior Court" and "Superior Court" in that Ac is defined to be "Her Majesty's Court of Appeal and High Court of Justice" It may seem at first sight to be anomalous that the Superior Court should be authorised to go into the question of legal justification of detention when the prisoner is to be tried by another Court within the Empire but not when his surrender is demanded by a Foreign power. But the difference in procedure may be justified on the ground that the obligation to extradite at the instance of a Foreign power arises out of treaty obligations, and it is obviously not desirable that the trial of the criminal in the State which has jurisdiction to try him should be put off indefinitely by the decision of the enquiring Court being made subject to review by higher Courts in a Foreign Jurisdiction.

Pleaders' clerks if may "file" documents.

A correspondent from the Mofussil writes to us questioning the authority of pleaders' clerks, even when registered, to file petitions and other papers in Court or in offices attached thereto. We can hardly conceive of a practice being suffered to grow up of allowing pleaders' clerks to exercise for themselves functions reserved by the law and rules having the force of law to pleaders and mukhtears only. But pleaders, any more than mukhtears, are not bound to do every act they are authorised to do by their own hands. They must often employ agents to perform the physical acts of putting in papers and taking them out, and therefore there is no objection to pleaders' clerks delivering or depositing documents in Courts and offices under the directions of their employers, the latter and not their clerks being responsible for these acts. The practice on the Appellate Side of the High Court is for pleaders to endorse on the back of papers to be filed by their clerks an authority to them to file the papers. Of course, when there is the authority of the pleader in fact, a written authority endorsed as above is not absolutely essential. No exception, we think, can be taken therefore to clerks filing papers and documents in Courts and Court offices if they do so under the authority of pleaders or mukhtears under whom they are employed. Solicitors' clerks are also allowed to file papers in the same way in the offices on the Original Side of the High Court.

Deportations and Martial law in South Africa.

The English *Law Journal* of the 24th January last has the following leaderette on the recent deportations and the declaration of martial law in South Africa.

While, of course, there is no resemblance between the condition of South Africa at present, threatened as it is with a general strike and outrages by dynamitards, and that of Alsace-Lorraine, English jurists must view with equal concern the use of martial law in either country. It is a serious matter, even in times of civil commotion, for the ordinary law courts of the country to be divested of their jurisdiction—however partially—in favour of military tribunals. In times of actual warfare, of course, when the country is invaded by a foreign enemy, the rule is different; then martial law supersedes the ordinary law until the invader is expelled and peace restored (*Ex parte Marais* [1909]). Then the maxim comes into play, *Salus republicæ suprema lex*. But in times of peace no Government has power to substitute military for civil courts where British law prevails Such is the Common Law of England as laid down in a long series of constitutional cases, and a careful examination of the South Africa Act, 1909, which created the Union of South Africa, reveals, in its one hundred and fifty-two sections, no statutory provision over-riding this rule. Indeed, by section 17 the command of naval and military forces throughout the Union is expressly reserved to the King or the Governor-General as his representative; military affairs are taken out of the province of the Colonial Government. It follows, then, that acts done in South Africa by military tribunals in pursuance of the powers conferred upon them by the recent proclamation are all subject to revision in due course by the civil and criminal courts of the Colony. Only two pleas can be used in defence of any such acts before an ordinary court. One is the Common Law plea that the persons entrusted with the execution of martial law has used no greater amount of force than was reasonably necessary to safeguard life and property. That is always in a proper case a justification of acts which would otherwise be criminal whether or not martial law has been proclaimed. The second plea is that an Act of Indemnity has been passed, either by the Cape or the Imperial Parliament, excusing such acts, otherwise illegal. It is authoritatively announced that the South African Government is about to introduce into the Cape Parliament such an Act of Indemnity. It may be assumed that, in accordance with constitutional precedents, the proposed Indemnity Act will expressly provide for compensation to persons injured by the operation of martial law, and for redress where abuse of the powers entrusted to any officer may be proved.

CURRENT INDIAN CASES.

(CIVIL.)

Pre-emption, suit for—Custom—Material evidence.

JANKI MISSIR *v.* RANNO SINGH, I. L R. 35 All. 472.

In a suit for pre-emption where the Court is trying the issue of the existence or non-existence of a custom every instance of a sale to a stranger is material evidence which the Court ought to take into consideration

but it should be clearly and distinctly proved to the Court who the vendees were and any other circumstances connected with the sales.

Acquisition of occupancy right by Mohunt—Agra Tenancy Act.

PARMANAND SING *v.* MAHANT RAMANAND GIR, I. L. R. 35 All. 474.

There is no express prohibition against the acquisition of an occupancy holding by the manager of a *muth* on behalf of the *muth*, under the Agra Tenancy Act.

Civil Procedure Code (1908), Or. 34, r. 5—Court Fees Act (VII of 1870).

BAJRANJI LAL *v.* MAHABIR KUNWAR, I. L. R. 35 All. 476 (F. B.).

Ad valorem Court Fee must be paid on an appeal against an order under Or. 34, r. 5, C. P. C., which is a final decree.

Hindu Law—Female heir, representing estate.

MAHADEO SING *v.* SHEO KARAN, I. L. R. 35 All. 481.

A Hindu daughter died after obtaining a decree for possession of her father's estate against trespassers, and her sons applied for execution.

Held—That the daughter represented the father's estate when she brought the suit and the persons who succeeded to the estate were entitled to execute the decree obtained by her.

Civil Procedure Code (1908), Or. 34, r. 1—Mortgage suit—Necessary parties.

ALAM SING *v.* GOKAL SING, I. L. R. 35 All 484.

A simple mortgage of a certain property was executed in favour of one A. Thereafter a usufructuary mortgage of a portion of the same property was executed in favour of A and N. A brought a suit on the first mortgage without making N a party to the suit.

Held—That N as subsequent mortgagee of a portion of the mortgaged property had an interest in the equity of redemption and was therefore a necessary party within the meaning of Or. 34, r. 1, C. P. C., but the effect of the omission of N from the suit was not the total dismissal of the suit but only so much of it as related to the portion included in the second mortgage.

Injury to railway passenger—Contributory negligence.

JEHANGIR MUNCHERJI LALI *v.* THE BOMBAY BARODA RAILWAY COMPANY, I. L. R. 37 Bom. 575.

While a train was running at a fair speed the Plaintiff was seated in a compartment with his left arm projecting out of the window. This arm was injured and fractured by an open door of a stationary train on another line. It appeared that notices were put up in carriages by the Railway Company cautioning passengers not to put any portion of the person out of the window while the train is in motion. The Plaintiff sued the Railway Company for damages.

Held—That the Plaintiff was guilty of contributory negligence and was not entitled to recover damages.

Civil Procedure Code (1908), Or. 41, r. 11—Summary dismissal of appeal.

HANMANT *v.* ANNAJI, I. L. R. 37 Bom. 610.

Under the circular order of the Bombay High Court an Appellate Court dismissing an appeal under Or. 41, r. 11 must write a judgment and a formal decree must be drawn up.

Transfer of Property Act (IV of 1882), sec. 52—Lis pendens.

BHOGI MAHADEO *v.* GANGA BAI, I. L. R. 37 Bom. 621.

A Hindu widow obtained a decree declaring a charge on the family property on account of her maintenance, thereafter the Plaintiff purchased a portion of the family property. Subsequent to this the widow applied for execution of her decree and the same property which had been purchased by the Plaintiff was sold at a Court sale to one A. The Plaintiff sued to set aside the sale in favour of A.

Held—That the doctrine of *lis pendens* as embodied in sec. 52 of the Transfer of Property Act which so far as concerns the present case limits the applicability of the doctrine to purchases made "during the active prosecution in a Court of a contentious suit or proceeding" and the sale to the Plaintiff was not affected by *lis pendens.*

Court sale.

TIMMAPPA *v.* NARSINHA, I. L. R. Bom. 631.

In each case it is a question as to what the Court intended to sell at public auction and what the purchaser expected to buy. The Court cannot sell more than what the law allows.

Reviews.

THE INDIAN ARBITRATION ACT (IX of 1899). *By the Late Mr. H. N. Morrison, Bar-at-Law. Second Edition. Revised and brought up-to-date. Thacker, Spink & Co., Calcutta. 1914.*

This work was originally published in 1901 and has long called for a revision. We find the recent Indian cases incorporated in the notes and also references to English cases given where they may be usefully referred to. The provisions of the Civil Procedure Code are also given in the appendix. They can only serve the purpose of comparison with those of Act IX of 1899. But the provisions of the Code which relate to references by agreement as also the provisions of the Contract Act and the Specific Relief Act, which have a bearing on the question, are given of the outset. Then follows the Act (IX of 1899) with annotations. The annotations may also be usefully referred to in connection with the provisions of the Civil Procedure Code so far as they relate to references by agreement. The Rules of the different High Courts in connection with Act IX of 1899 are given in the appendix. Every man of business in the Presidency towns and Karachi will find it useful to keep this little book on his table. The printing, paper, binding and general get-up are all that can be desired.

THE INDIAN CONTRACT ACT, as amended up-to-date. *By Mahendra Nath Ray, B. L. Published by Rai M. C. Sarkar Bahadur & Sons, 75-1-1, Harrison Road, Calcutta. 1914. Price Rs. 7.*

This is a cheap and handy edition of the Indian Contract Act, which besides embodying Indian case-notes draws liberally upon English and Indian text-books for the purpose of elucidating and explaining the provisions of the Act. The provisions of the Act differ on some points very materially from the law obtaining in England, and this difference is carefully pointed out. In an appendix are set out the provisions of the Carriers Act, the Usury Laws Repeal Act and the Interest Act. The book will satisfy all ordinary requirements of practitioners and will be found useful also by law students.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*Kreglinger* v. *The new Patagonia meat & Cold Storage Co., "Ltd."* Before THE LORD CHANCELLOR & LORDS HALSBURY, ATKINSON, MERSEY AND PARKER. 20th November 1913.

Clog on the equity of redemption or collateral undertaking outside and clear of the mortgage.

This was an appeal from a decision of the Court of Appeal. The facts were as follows :—

Under an agreement the Appellants were to lend the Respondents £10,000, repayable on demand, with interest at 6 per cent. If, however, among other conditions to be observed, the interest was duly paid, the Appellants were not to demand repayment till September 30, 1915, but the Respondents were to be at liberty to pay off the loan earlier. To secure the loan the Respondents by the agreement charged their undertaking and all their property, both present and future, with the payment of the principal sum and interest, to the intent that the charge should be a floating security on the undertaking and property, but so that the Respondents should not create any mortgage or charge in priority without the Appellant's consent, or without such consent sell their farms or lands. The principal sum was to become payable in certain prescribed events. By cl. 8 of the agreement the Respondents were not for five years from the date of the agreement (*i.e.*, till August 24, 1915), to sell sheepskins to anyone excepting the Appellants, so long as the latter were willing to buy at a price equal to the best price (c.i.f., London) offered by anyone else, and the Respondents were to pay to the Appellants a commission of 1 per cent., on the sale price of all sheepskins sold by the Respondents to anyone else.

The Respondents had now paid off the loan, and claimed that such payment had put an end to the option of the Appellants to buy the Respondents' sheepskins. Under the terms of the agreement this option would, if valid, continue operative until August 24th, 1915. What the Respondents said was that the stipulation was one that restricted their freedom in conducting the undertaking or business which was the subject of the floating charge; that it was consequently of the nature of a clog on their right to redeem and invalid, and that, whether it clogged the right to redeem or was in the nature of a collateral advantage, it was not intended and could not be made to endure after redemption.

The Appellants, on the other hand, said that the stipulation in question was one of a kind usual in business, and that it was in the nature not of a clog but of a collateral bargain outside the actual loan, which they only agreed to make in order to obtain the option itself. The controversy which had thus arisen was brought before Mr. Justice Swinfen Eady on a motion for an interlocutory injunction to restrain the Respondents from selling sheepskins to anyone else than the Appellants. The learned Judge refused this motion on the ground that the point had been settled adversely to the Appellants by decisions of the House of Lords. The case was brought formally before the Court of Appeal, but was disposed of there without argument, with a view to taking the point as speedily as possible before the House of Lords.

The House of Lords allowed the appeal and declared that the Appellants were entitled to the injunction claimed by them. The Lord Chancellor in his judgment said :—

The most general of these was that if the transaction was once found to be a mortgage it must be treated as always remaining a mortgage and nothing but a mortgage. That the substance of the transaction must be looked to in applying this doctrine, and that it did not apply to cases which were only apparently or technically within it, but were in reality something more than cases of mortgage, *Howard* v. *Harris* (1 Vern., 190) and other authorities show it. It was only a different application of the paramount doctrine to lay it down in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest. The Legislature during a long period placed restrictions on the rate of interest which could legally be exacted. But equity went beyond the limits of the statutes which limited the interest, and was ready to interfere with any usurious stipulation in a mortgage. In so doing it was influenced by the public policy of the time. That policy had now changed, and the Acts which limited the rate of interest had been repealed. The result was that a collateral advantage might now be stipulated for by the

mortgagee, provided that he had not acted unfairly or oppressively, and provided that the bargain did not conflict with the third form of the principle. This was that a mortgage could not be made irredeemable, and that any stipulation which restricted or clogged the equity of redemption was void. It was obvious that the reason for the doctrine in this form was the same as that which gave rise to the other forms. It was simply an assertion in a different way of the principle that once a mortgage always a mortgage and nothing else.

The rules he had stated had now been applied by Courts of Equity for nearly three centuries, and the books were full of illustrations of their application. But it was inconsistent with the objects for which they were established that these rules should crystallize into technical language so rigid that the letter could defeat the underlying spirit and purpose. Their application must correspond with practical necessities of the time.

The rule as to collateral advantages, for example, had been much modified by the repeal of the Usury Laws and by the recognition of modern varieties of commercial bargaining. In *Biggs* v. *Hoddinott* [1898] (2 Ch. D. 307), it was held that a brewer might stipulate in a mortgage made to him of a hotel that during the five years for which the loan was to continue the mortgagor would deal with him exclusively for malt liquor. In the 17th and 18th centuries a Court of Equity could hardly have so decided, and the judgment illustrated the elastic character of Equity jurisdiction and the power of Equity Judges to mould the rules which they applied in accordance with the exigencies of the time. The decision proceeded on the ground that a mortgagee might stipulate for a collateral advantage at the time as a term of the advance, provided, first, that no unfairness was shown, and, secondly, that the right to redeem was not thereby clogged. It was no longer true that, as was said in *Jennings* v. *Ward* (2 Vern., 520), "a man shall not have interest for his money and collateral advantage besides for the loan of it." Unless such a bargain was unconscionable it was not good. But none the less the other and wider principle remained unshaken, that it was the essence of a mortgage that in the eye of a Court of Equity it should be a mere security for money, and that no bargain could be validly made which would prevent the mortgagor from redeeming on payment of what was due, including principal, interest, and costs. He might stipulate that he would not pay off his debt, and so redeem the mortgage, for a fixed period. But whenever a right to redeem arose out of the doctrine of equity, he was precluded from fettering it. This principle had become an integral part of our system of jurisprudence, and must be faithfully adhered to.

The question in the present case was whether the right to redeem had been interfered with. And this must, for the reasons to which he had adverted in considering the history of the doctrine of equity, depend on the answer to a question which was primarily one of fact. What was the true character of the transaction? Did the Appellants make a bargain such that the right to redeem was cut down, or did they simply stipulate for a collateral undertaking, outside and clear of the mortgage, which would give them an exclusive option of purchase of the sheepskins of the Respondents? The question was in his opinion not whether the two contracts were made at the same and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts. If in the case before the House their Lordships arrived at the conclusion that the agreement for an option to purchase the Respondents' sheepskins was not in substance a fetter on the exercise of their right to redeem, but was in the nature of a collateral bargain the entering into which was a preliminary and separable condition of the loan, the decided cases ceased to present any great difficulty.

Referring to *Noakes* v. *Rice* ([1902] A. C., 24) and *Bradley* v. *Carritt* ([1903] A. C., 253), he came to the conclusion that the stipulation now in question was a contemporaneous but collateral contract, in substance independent of the security, and that there was no reason either in morals or in equity which ought to prevent the intention of the parties from being left to have its effect.

Honorable F. Russell, K. C., and Mr. Galbraith for the Appellants.

Messrs. Micklem, K. C., and Ellis for the Respondents.

B. D. *Appeal allowed.*

HOUSE OF LORDS--*Ramsden & Car* v. *Chessum & Sons.* Before the LORD CHANCELLOR AND LORDS KINNEAR, DUNEDIN AND ATKINSON. 10th November 1913.

The user of goods supplied must pay for them.

This was an appeal from a decision of the Court of Appeal (Kennedy, L. J., dissenting) reversing a decision of Hamilton, J. The Plaintiffs were merchants selling door furniture. The Defendants were builders. Ward, one of the architects of the Defendants, ordered certain door materials from Plaintiffs who supplied them and the Defendants were informed of the supply. The things supplied were used by the Defendants. The Plaintiffs sued for the price but the Defendants denied that Ward was their agent. Hamilton, J., held that the goods having been used by the Defendants they must pay for them. The House now allowed the appeal and restored the decision of Hamilton, J. The LORD CHANCELLOR said :—

The case was a simple one; it was a case in which it was sought to recover the price of goods

sold and delivered. The law as to this class of cases was not obscure. If A. brought goods to B. to be used upon work which B was doing, and B. knew that those goods were not brought as a gift, but were meant to be paid for, and B. then used the goods upon his work, the inference to be drawn from those facts was that there was an implied promise on the part of B. to pay for the goods. That was exactly what happened in this case, and there was nothing in the facts of the case to displace the *primâ facie* inference that B. was liable.

Messrs. Sankey, K. C., and Eames for the Appellants.

Messrs. Radcliffe, K. C., and Scott for the Respondents.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Cookes* v. *Morrison & Co., "Ld."* Before the MASTER OF THE ROLLS AND LORDS JUSTICES SWINFEN EADY AND PHILLIMORE. 5th November 1913.

As between the interest of the hirer under a hiring agreement and the interest created by an equitable mortgage, the former takes precedence.

This was an appeal from a decision of Eve, J. By an agreement between the Plaintiffs and the predecessors-in-title of the Defendant Company the Plaintiffs erected an installation on the Defendant's premises. The payment was to be by instalments and in default of one instalment the whole was payable and the fixtures were to remain the property of the Plaintiffs until the whole amount was discharged. Subsequently the Defendant issued debentures in the usual form by way of floating security, and on behalf of the debenture-holders a receiver was appointed. The receiver now refused to recognize the Plaintiffs' claim to the fixtures for non-payment of the instalments on the ground that the debenture-holders had no notice thereof. The Court below allowed the Plaintiffs' claim to remove the fixtures and the present appeal was dismissed. In the course of his judgment the MASTER OF THE ROLLS said :—

The judgment of Mr. Justice Parker in *re Samuel, and Allen, and Sons (Limited)*, [1907] 1 Ch., 575, stated the true view of the law and was one which ought to be followed. At p. 582, after expressing the opinion that an equitable mortgagee must be held to take subject to prior agreements he said :—"I think that those agreements, if they are in the form which has been used in this case, do create an equitable interest by which a subsequent mortgagee who does not get the legal estate is bound, and that, applying the ordinary principles of priorities as between the interest of the hirer under the hiring agreement and the interest created by the equitable mortgage, the interest created by the hiring agreement takes precedence." He (the Master of Rolls) was of opinion that that decision was quite right and was consistent with, he would not say decisions, but important *dicta* by members of the Court of Appeal.

Mr. Harman for the Appellant.

Mr. Maugham for the Respondents.

B. D. *Appeal dismissed.*

KING'S BENCH DIVISION.—*Gabriel & Sons* v. *Churchill & Sim.* Before MR. JUSTICE PICKFORD. 14th November 1913.

A del credere agent—To what extent is he liable to the buyer and the seller?

The Defendants, timber brokers, sold goods for account of the Plaintiffs and signed the contract as brokers "brokerage and guarantee 2½ p. c." to unnamed principals. After these principals had been known the Plaintiffs agreed with them to pay penalty if the delivery was late. It proved late and the disclosed principals attempted to set-off the penalty against a part of the price of the goods. The Plaintiffs now sued the Defendants as *del credere* agents for the price. The learned Judge dismissed the claim. He said :—It was necessary to see whether the authorities established the proposition that such a contract imposed a liability upon the *del credere* agent to be sued on the contract. There was no doubt that at one time it was thought that it did impose such a liability. That seemed to have been the opinion of the Court in *Grove* v. *Dubois* (1 Term. Rep. 112), where Lord Mansfield said :—"A commission *del credere* . . . is an absolute engagement to the principal from the broker, and makes him liable in the first instance." Story, commenting on that case, said :—"But the doctrine of that case on this point seems incorrect. A factor with a *del credere* commission is liable to the principal if the buyer fails to pay or is incapable of paying. But he is not primarily the debtor. On the contrary, the principal may sue the buyer in his own name, notwithstanding the *del credere* commission; so that the latter amounts to no more than a guaranty." The decision in *Grove* v. *Dubois* (*supra*) had been disapproved in subsequent cases, and in his Lordship's opinion was not law. The first case in which it was considered was in *Morris* v. *Cleasby* (4 M. and S., 566), where Lord Ellenborough said :—"The principal must always be debtor, and that whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable." That case was followed in *Hornby* v. *Lacy* (6 M. and S., 166), and therefore those cases disposed of the opinion expressed in *Grove* v. *Dubois* that a *del credere* agent was a person primarily liable on the contract.

The question was considered again in *Couturier v. Hastie* (8 Ex., 40). He thought, however, that the Judges in that case had no intention of interfering with the decisions in *Morris* v. *Cleasby* and *Hornby* v. *Lacy*, because if they had so intended they would have expressly dealt with them. But he did not think that the judgment in *Couturier* v. *Hastie* lent any support to the Plaintiffs' contention. The Court expressly adopted the reasoning of an American Judge on this very point in *Wolff* v. *Koppel*, where he referred to *Morris* v. *Cleasby* and *Hornby* v. *Lacy* as authorities on the question. Mr. Baron Parke in delivering the judgment of the Court said :—"A higher reward is paid in consideration of their taking greater care in sales to their customers and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents—namely, responsibility for the solvency and performance of their contracts by their vendees." Mr. Schiller naturally relied upon the words "solvency and performance" in support of his contention. But he did not think that Baron Parke had any intention of laying down such a proposition as Mr. Schiller contended for which was opposed to the judgment of the American Court and also to the rest of his judgment. Mr. Schiller also cited the case of *Fleet* v. *Murton* (L. R, 7 Q. B, 126) where Mr. Justice Blackburn, although he was not considering the position of a *del credere* agent, used wide language as to the liability of the agent. Lord Justice Melish also used similar language in *Ex parte White*; *In re Nevill* (L. R., 6 Ch., 397). He there said :—"A *del credere* agent . . . is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contract which he makes with them." It was quite clear that in using that language this question was not specifically before those Judges, and he did not think that those Judges intended to lay down that a *del credere* agent was liable for the performance of the contract in the ordinary sense. Those cases were not authorities for the Plaintiffs' contention that if an agent had taken a *del credere* commission, and a dispute arose between the buyer and the seller, the *del credere* agent could be called upon by the seller to litigate the dispute and take upon himself all the obligations and also all the rights of the buyer. He did not think that the cases showed that that was the obligation of a *del credere* broker. It was not necessary to decide whether the obligation of a *del credere* agent extended only to guaranteeing the solvency of the buyer, or whether it would extend to a case where the buyer was perfectly solvent, but where his assets could not be got at. He did not think that the obligation of a *del credere* agent extended beyond this, that when there was an ascertained amount due from the buyer to the seller and the buyer failed to pay, whether from insolvency or otherwise, then the *del credere* agent was liable to pay, and that the obligation did not extend so far as to make the *del credere* agent liable to litigate disputes between the buyer and seller.

Messrs. Schiller, K. C., and Hogg for the Plaintiffs.

Messrs. Wallace, K. C., and Chaytar for the Defendants.

B. D.

KING'S BENCH DIVISION.—*Waters* v. *Braithwaite*. Before JUSTICES DARLING, ROWLATT AND ATKIN. 19th November 1913.

Cruel ill-treatment of cows must be punished although the practice was tolerated by an old custom.

The Respondent was prosecuted for cruelly ill-treating a cow by allowing her to be over-stocked with milk. She had not been milked for over 19 hours and the expert evidence was that cows in full milk ought to be milked every 12 hours, and that over-stocking caused them pain and was harmful to them The defence was that over-stocking before offering them for sale was an old established custom of the farmers in the district. The Magistrates dismissed the summons, but that order was set aside, and the learned Judges remitted the case with a direction to convict. In the course of his judgment MR. JUSTICE DARLING said—

It was found that this treatment of cows was customary, the object being that the udder should be very much distended, so that possible purchasers might see that the cows were heavy milkers. It was not denied that this caused great pain; no one alleged that it produced any benefit to the cow, but, on the contrary, it was stated to do her harm. The only benefit there was might be that of the owner. It was said that the Respondent caused the animal unnecessary pain. The case proved that the pain was unnecessary as far as the cow was concerned, and the Respondent did cause unnecessary suffering by omitting to have her milked, or preventing her from being milked by muzzling the calf. If the custom of doing this did exist, it was time that it ceased, and people must find some other means of judging whether a cow was a good milker or not.

In *Ford* v. *Wiley*, 23 Q. B. D. 203, Mr. Justice Hawkins said—

"If the law were that any man or any body of men could in his or their own interests, or for his or their pecuniary benefit, cause torture and suffering to animals without legitimate reason, and could, when charged with cruelty, excuse himself or themselves upon the ground that he or they

honestly believed the law justified them, though in fact it did not, it is difficult to see the limits to which such a principle might be pushed, and the creatures it is man's duty to protect from abuse would oftentimes be suffering victims of gross ignorance and cupidity."

Lord Coleridge said :—There was ample authority in *Ford* v. *Wiley*, 18 Q. B. D. 532, and in the statute itself to enable them to say that where unnecessary suffering is caused by some act of an owner it could not be justified on the ground of old custom and of benefit to commercial persons.

Mr. Bevan for the Appellant.

B D.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

THE LORD CHANCELLOR.
LORD PARKER.
LORD DUNEDIN.
LORD SUMNER
LORD PARMOOR.
1914,
27, January.

MRS. ANNIE BESANT
v.
NARAYANIAH.

Privy Council, Appeal to—Order directing guardian appointed by father to restore minor son to father—Minor in England, father in India—Stay of execution till hearing of Appeal—Hearing expedited.

This was an application by Mrs. Annie Besant for stay of execution of the decree made by the Madras High Court ordering the Petitioner to deliver up the boys, named Krishnamurti and Nityananda, to their father and guardian—the Respondent.

It was stated in the petition that in January 1909, the Respondent came to live together with his family in a cottage belonging to the Theosophical Society, the Respondent performing secretarial duties for that Society. Early in 1910 the Petitioner offered to take charge of the two boys, who are now aged 18 and 15 respectively, and to educate them and requested the Respondent to constitute her their legal guardian. This he did in a letter of March 6, 1910. From the middle of December 1910, the boys ceased to live with the Respondent and had lived in the charge of a tutor in the head-quarters of the Society. The Petitioner had entered the names of the boys at New College, Oxford, and had made the necessary arrangements for them to take up their residence in October next. Mr. Justice Bakewell held that any delegation of guardianship by a father was revocable, and that an agreement to the contrary was void, and accordingly the Respondent was entitled to revoke the authority.

Mr. Cozens-Hardy, K. C. (with him *Mr. Turnbull*) for the Appellant.—The High Court granted the Petitioner leave to appeal but refused a stay of execution of that part of it which directed her to hand the boys over to the Respondent. The Petitioner contended that in the circumstances it would be disastrous for the boys to be sent back to India until after the hearing of the appeal.

The LORD CHANCELLOR said it was a case which ought to be disposed of at a pretty early date. He thought their Lordships would probably advance the hearing, and in that case it would be absurd to send the boys to India, as they would have to come back. Assuming that the appeal was going to be disposed of within a couple of months, was it not rather absurd to send the boys out to India when they would have to come back? What did it matter if they stayed in England a little longer?

Mr. Kenworthy Brown for the Respondent asked that it should be made a condition of staying execution that the boys should remain in England.

Mr. Cozens Hardy said that under doctors' advice the boys had been to Sicily. He did not know whether his learned friend suggested that they should stay here or go to Sicily.

The LORD CHANCELLOR said he thought it was better that they should stay in England or at any rate that they should not go abroad without a special application being made.

Their LORDSHIPS granted the stay of execution and intimated that the hearing of the appeal would be expedited.

Solicitors: *Messrs. Lee and Pembertons* for the Petitioner.

Solicitors: *Messrs. Douglas Grant* for the Respondent.

B. D.

NIKUNJA BEHARY SEN *v.* HARENDRA CHANDRA SINHA.

i.e., without due care and attention, because Nikunja once called upon him for a certificate, from which fact he infers apparently that he should have had sufficient knowledge of Nikunja to make him more careful in asking questions. Nikunja, however, in his examination on his complaint stated 'I have seen Harendra Babu pleader in connection with a post once but he does not know me well enough to be able to say personally about my character and habits. Harendra Babu in his affidavit denies all personal knowledge of the Petitioner and states that he relied entirely on his client's instruction.'

Mr. A. Rasul with *Babu Hemendra Kumar Das* for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

This case comes before us on a reference from the Sessions Judge of Sylhet. One Nikunja Behari Sen was a prosecution witness in a case under sec. 408, Indian Penal Code. The pleader for the defence asked the witness in cross-examination:— "Do you smoke or drink ganja"? The witness replied in the negative. Subsequently the witness laid a complaint against the pleader before a Magistrate alleging that the question was asked only to satisfy the grudge of the pleader's client. Summons was issued under sec. 500, Indian Penal Code.

The learned Sessions Judge has referred the matter to this Court and has recommended that the proceedings against the pleader be quashed. The petition of complaint did not allege any improper motive on the part of the pleader himself. There was merely a suggestion that the pleader had no means of knowing whether the instruction he had received from his client in the matter was true or false.

In our opinion the Magistrate should have dismissed the complaint. It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it or of any other person (Indian Penal Code, sec. 499, ninth exception). A pleader is entitled to the presumption that the questions he asks in cross-examination are asked in good faith for the protection of the interest of his client. The presumption therefore is that a question asked in cross-examination making an imputation affords no ground for a criminal prosecution. To rebut this presumption it is not sufficient merely to allege that the client knew the imputation to be untrue; for the duty of the pleader is to presen his client's case. So far, at any rate, as the purposes of a prosecution for defamation are concerned, it would be wholly unreasonable to say that it is the duty of a pleader to enquire whether his client's case is true or false. To rebut the presumption of good faith in such a case there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause. No such motive was suggested in the present case.

The view which we have taken is supported by the case of *Upendra Nath Bagchi* v. *The Emperor* (1).

It is for the public good that a person charged with the responsibility of an advocate should, so far as may be, feel unfettered by any control other than that of the presiding Judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of

(1) 13 C. W. N. 340 (1909)

his client. The provision of the ninth exception to sec. 499, Indian Penal Code, must be interpreted accordingly.

We direct that all further proceedings be stayed.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
Heard, 31, October.
Judgment, 10, December.

THAKUR SHEO NARAIN SINGH, since deceased, and others, Appellants,
v.
THAKUR BISHUNATH SINGH and another, Respondents.

Joint family business—Dissolution and accounts—Private arbitration—Award, operation of, on moneys realised by member on behalf of family—"Cash," meaning of—Equitable set-off—Order made before remand, if binds Court at final hearing.

The members of a joint family business referred their disputes (in view of dissolution) to an arbitrator before whom on 31st July 1895 they stated inter alia *that they had divided amongst themselves all the moveables consisting of cash and kind etc.; that a sum of Rs. 5,650 was payable to one of them B; that they had understood the accounts among themselves and that "now no co-sharer has any right to demand accounts from another;" and the arbitrator made his award on 5th August 1895. At the date of the award there was an undischarged usufructuary mortgage executed on 16th June 1883, for 14 years, by one M in favour of B as representing the family, to be discharged by receipt of the usufruct:*

Held—*That the terms and intent of the award precluded the other co-sharers from asking for an account of moneys realised previous to the date of the award.*

The word "cash" referred to all moneys received by the parties before the statement was made to the arbitrator.

Held, further, *that in the circumstances of the case the Court of the Judicial Commissioner was right in allowing the Defendant's plea of equitable set-off at the final hearing after a remand it had ordered for certain inquiries, although at the previous hearing it had upheld the decision of the lower Court rejecting the plea.*

The facts of the case sufficiently appear from their Lordships' judgment.

Mr. L. DeGruyther, K. C., and *Mr. B. Dubé* for the Appellants submitted that the lower Appellate Court had placed a wrong construction upon the terms (quoted in the judgment) of the award. Askari's debt was still outstanding at the date of the award, and the Appellants were entitled to an account thereof. Further, the Respondents were not entitled to set-off the moneys under the terms of the award.

Sir Erle Richards, K. C., and *Mr. Grey* for the Respondents were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This is an Appeal from a Judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 26th of July 1909, and arises out of a suit brought by the Plaintiffs-Appellants in the Court of the Subordinate Judge of Rae Bareli against the Defendants-Respondents for an account of the joint money-lending business and other reliefs. Although a number of questions appear to have been discussed in the Courts in India the only two argued on this Appeal depend on the construction of certain provisions of an Award made on the 5th of August 1895, which

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admittedly put an end to the joint status of the family, and on the applicability of the principle of equitable set-off to the facts of this case in so far as one of the points for determination is concerned.

The Plaintiffs are the sons of one Gur Bakhsh Sing, who with his brothers, the Defendants-Respondents, formed a joint Hindu family. On his death disputes appear to have arisen between the nephews and uncles which were referred to the arbitration of one Syed Fida Husain, who made the Award referred to above. It is a very able document and appears to deal with the subjects of dispute in concise and perspicuous form. After reciting that "in every way the executants gave the Arbitrator complete power for decision, and engage themselves and their representatives to be bound by whatever decision would be passed by him," the document proceeds to state :—

"But on the 31st July 1895 each of three parties in his statement recorded by me stated that after he execution of the agreement all the three brothers have divided among themselves all the moveables consisting of cash and kind, ornaments, clothes, and household goods, and that therefore there is no necessity for filing list thereof or giving any decision thereon ; that the sum of Rs. 3,150 on account of deficiency in the price of ornaments and Rs. 2,500 which is the personal money of Thakur Bishunath Singh contributed to the joint business, total Rs. 5,650 is to be paid to him; that the manner in which this money is to be paid has to be decided; that they have understood the accounts among themselves and that now no co-sharer has any right to demand accounts from another; that only the grain kept for home consumption and for dealings with the tenants, the agricultural implements, cattle, horses, and elephants are still undivided."

The Plaintiffs seek in the present suit for an account of the debts and monies realised by the Defendants during their management of the joint money-lending business, and in list C. attached to the plaint they specify particularly the debts in respect of which the claim for account is directed. The important items in the list relate to a usufructuary mortgage, dated the 16th of June 1883, executed by one Mohammed Askari in favour of Bishunath Singh as representing the joint family. The principal sum secured by the mortgage was Rs. 32,000 ; and it was provided that should the mortgagor fail to discharge the principal and interest within the period of 14 years, the term of the mortgage, the mortgage debt would become discharged at the end of that period by the receipt of the usufruct. Under this covenant the first Defendant was receiving the usufruct of the mortgaged property towards the liquidation of the principal and interest. At the time of the Award two years were still outstanding in respect of this mortgage.

There is no reference to the Award in the plaint, but the Defendants contend that under the terms and intent of the Award the Plaintiffs are not entitled to the relief they seek. The first question for determination, therefore, is whether having regard to the declaration contained in the Award the Plaintiffs are or are not precluded from asking for an account of monies realised previous to the date of the Award.

The Subordinate Judge dismissed the Plaintiffs' claim in this respect on the ground that in his judgment it was barred by limitation. The Judicial Commissioners, proceeding on the Award, have held that it seemed to them sufficiently clear from the provisions of the document the arbitrator did not intend to confer on any one of the brothers the right to demand from the others an account of the profits enjoyed to the date of the Award under Mohammed Askari's usufructuary

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mortgage. Their Lordships think that the conclusion at which the Appellate Court in India has arrived is correct.

The word "cash" in the passage quoted clearly refers in their opinion to all monies received by the parties before the statement was made to the Arbitrator, and in any event it appears to their Lordships that the stipulation in the Award that "now no co-sharer has any right to demand accounts from another" covers this claim and excludes it.

The second question relates to a sum of Rs. 5,900 or thereabouts regarding which the Defendants claim a set-off against the amount decreed in favour of the Plaintiffs on other items.

The Arbitrator had found that two sums of Rs. 5,650 and Rs. 1,000 respectively were payable to the Defendant Bishunath, and had declared that it should be "paid out of the joint income." And he added that he would specify later on "the joint income."

Similarly he had found that Rs. 5,150 was payable to Jadunath, Bishunath and Jadunath, each being liable to the other for a certain share of these debts, became entitled to receive from the Plaintiffs, the sons of Gur Bakhsh, Rs. 5,900. The Defendants contend that they are entitled to a set-off as regards this sum against the amount decreed to the Plaintiffs on account of "the joint income" of the parties. The Subordinate Judge refused to give effect to the Defendants' contention, and his view was upheld at one stage of the case by the Court of the Judicial Commissioner. At a subsequent stage when the case came back to the Appellate Court after the remand it had ordered for certain enquiries, the learned Judges who heard the Appeal modified the view previously expressed, and considered that having regard to the circumstances of the case, the Court would be justified in applying the principle of equitable set-off to the Defendants' claim. Their Lordships concur generally with the reasons given by the learned Judges for coming to this conclusion.

In the result their Lordships think that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON. SIR JOHN EDGE. MR. AMEER ALI. 1913, Heard, 10, November. Judgment, 3, December.	PARBATI DASI, since deceased (now represented by UDOY NATH KAR), Appellant, *v.* RAJA BAIKUNTHA NATH DE and others, Respondents.

Hindu Law—Joint family—Self-acquisition, property in name of co-parcener when—Test, source of purchase-money.

Where there is a dispute whether a property standing in the name of a junior member of a Hindu family is his self-acquisition, the criterion is to consider from what source the money comes with which the purchase-money is paid.

DHURM DAS PANDEY *v.* SHAMA SOONDRI DIBIAH (1), GOPI KRIST GOSAIN *v.* GUNGA PERSAUD GOSAIN (2) *followed.*

Where there was no evidence that the son in whose name the property was purchased

(1) 3 Moore's Ind. App. 229 (1843).
(2) 6 Moore's Ind. App. 53 (1854).

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had any separate fund or that the properties in dispute were purchased with money belonging to him :

Held—*That the presumption was clear and decisive that the property was acquired by the father in the name of the son and it was not the latter's self-acquired property.*

In this Appeal there were concurrent findings of fact, namely, that the properties were not the self-acquired properties of Rup Charan.

Mr. G. E. A. Ross, K. C. (with him *Dr. Abdul Majid*) submitted that the Court below ought to have presumed that the properties were acquired by Rup Charan in whose name the conveyances stood unless the contrary was shewn.

Mr. L. DeGruyther, K. C., and *Mr. Dunne* for the Respondents were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This is an Appeal from a Judgment and Decree of the High Court of Bengal, dated the 27th of July 1906, which affirmed a decree of the Subordinate Judge of Cuttack, in the Province of Orissa, dismissing the Plaintiff's suit.

The parties are Hindus governed by the Dayabhaga law, and are descended from one Raghunath De. Raghunath had three sons, Rup Charan, Sonatan and Shyamanand, who admittedly formed a joint Hindu family. The Plaintiff is the daughter of Rup Charan, and she brought this suit in the Court of the Subordinate Judge for a declaration that certain properties included in Sch. Ka attached to the plaint were the self-acquired properties of her father which devolved upon her after the death of her mother, Annapurna, and for the usual consequential relief in respect thereof. She also alleged that Rup Charan survived his father, and that she is entitled to the one-third share in Raghunath's estate which vested in Rup Charan on Raghunath's death.

The Defendants, on the other hand, alleged that Rup Charan predeceased his father and that the Ka properties were acquired by Raghunath in the name of Rup Charan, and were not the self-acquired properties of Rup Charan.

Both the Courts in India have concurrently found against the Plaintiff the facts on which she bases her claim. They have held that she has failed to prove that the Ka properties were acquired by her father out of his own funds; and that it had been established that Raghunath survived Rup Charan. They have accordingly dismissed the Plaintiff's suit.

As it is not their Lordships' rule to interfere in cases in which there are concurrent findings of fact, it has been argued by Mr. Ross, on behalf of the Plaintiff, that the Courts below erred in not drawing proper conclusions from the documentary evidence of the Plaintiff. In other words, he contended that as the conveyances stood in Rup Charan's name the Courts ought to have presumed that the Ka properties were his self-acquired properties until disproved by the Defendants.

The principle applicable to this class of cases where there is a dispute whether a property standing in the name of a junior member of a Hindu family was his self-acquisition was enunciated so long ago as 1843 in *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (1), where Lord Campbell said :—"The criterion in these cases in India is to consider from what source the money comes with which the

(1) 3 Moore's Ind. App. 229 (1843).

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purchase-money is paid" This principle was reaffirmed in 1854 in *Gopi Kist Gosain* v. *Gunga Persaud Gosain* (2).

In the present case both the Courts below have found that there was no evidence that Rup-Charan had any separate funds or that the properties in dispute were purchased with money belonging to him. In the absence of such evidence the presumption is clear and decisive that they were acquired by the father in the name of the son, and that they were not the self acquired properties of Rup Charan.

On the whole their Lordships are of opinion that this Appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Solicitors: *Mr. Edward Dalgado* for the Appellant.

Solicitors: *Messrs. Downer and Johnson* for the Respondents.

B. D. *Appeal dismissed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

CHAUDHURI, J.
1913,
1, September.

In the matter of sec. 45 of the Specific Relief Act (I of 1887), and In the matter of A. RASUL, Applicant.

Specific Relief Act (I of 1877), sec. 45—Mandamus, writ of—Discretionary power, how exercised—Personal right of and threatened injury to person seeking relief—Person holding office on conditional appointment, if entitled to relief—When validity of appointment in question, if application entertainable before validity declared by suit—Honorary office—Proceedings not meant for opinion of Court in doubtful matters—Universities Act (VIII of 1904 and II of 1857), University Regulations, cl. 12—Government of India Act, 2 and 3 Geo V., c. 6 and Notifications—Parties—Provision for post-graduate studies, if compulsory or enabling—Internal arrangements of University—Part performance, if discretionary duty becomes obligatory by—Estoppel—Notice implied as to powers of statutory bodies.

Sec. 45 of the Specific Relief Act provides an exceptional remedy; being discretionary it must be exercised with caution and the duty sought to be enforced must be clear and obligatory. The first condition is that the applicant must show clearly the existence of his personal right and that an injury is threatened to such right.

In the absence of any letter of appointment or of any unconditional resolution of appointment it could not be held that the applicant has been appointed, and having regard to the resolution of the Senate it could not be said that they ever intended to appoint him without the sanction of the Governor-General.

That the fact of the applicant having lectured during a part of the term did not establish a continuing right to lecture.

When the duty is conditional on the approval of another person or body being obtained, there is no right to a Writ of Mandamus until such approval has been given.

Dictum of COCKBURN, L. C. J., *in* R. *v.* ST. LUKE'S, CHELSEA (1) *followed.*

The principle underlying the jurisdiction in these cases is that the proceedings can confer no title not already existing though they may affect the consummation of the relator's title, if he had one; but it gives him none.

R. *v.* CLARKE (2).

The existence of a legal right is the foundation of every Writ of Mandamus.

EX-PARTE NAPIER (3).

(2) 6 Moore's Ind. App. 53 (1854).

(1) 31 L. J. Q. B. 50 at p. 53 (1862).
(2) 2 East. 75 at p. 83 (1801).
(3) 18 Q. B. 692 at p. 695 (1852).

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In all cases where the validity of an appointment is the main point in dispute, the writ is not granted until the controversy has been tried at law and an adjudication had in favour of the relator.

SPELLING ON INJUNCTION, 2ND ED., P. 1365, *referred to.*

The writ does not lie to try the title. The Court has always refused to allow an application for Mandamus to be made the occasion or excuse for obtaining the opinion of the Court on some doubtful point of law.

Whether the sanction required under sec. 12, Chap. XI of the University Regulations for the appointment of a University lecturer is ultra vires *or not having regard to 2 and 3 Geo. V, c. 6 and the notifications of the Government of India thereunder and whether the words "Governor of the Presidency of Fort William in Bengal in Council" should be substituted for "the Governor-General in Council," cannot be tried in these proceedings. The Governments concerned are not parties to the proceedings and cannot be made parties under the express provisions of sec. 45 of the Specific Relief Act.*

It is a clear principle of law that no order affecting the status or rights of any parties concerned in the matter ought to be determined in proceedings of this nature or of any proceedings whatever unless they are parties thereto.

Any such question arising between the University and the Governor General in Council may perhaps be decided in a properly constituted suit but not in a summary proceeding of this nature.

The personal right referred to in sec. 45 of the Specific Relief Act is not a right in rem, *such as every human being in civilized society possesses independently of any act of his own.*

IN RE RUSTOM JAMSHEDJI IRANI (4) *dissented from.*

He alone is a competent relator who has some interest other than that of the community at large in the question to be tried.

R. *v.* BROWN (5).

An honorary lecturership may not be an office of any pecuniary value, but it is undoubtedly an office of consequence; but the fact that no arrangements are being made by the University for the delivery of such lectures can hardly be said to be an injury to the personal right of the lecturer.

The provision in the University Regulations that the Syndicate shall appoint a place for lectures in consultation with the lecturer, imposes no obligation on the Syndicate to appoint any definite time. Having regard to that fact the Court cannot give a complete or effectual remedy such as is contemplated in the section. These are, besides, matters of internal arrangement with which Courts are unwilling to interfere, unless under express obligation.

Although sec. 1 of Ch. XI of the University Regulations imposes on the University an obligation to provide for post-graduate teaching by appointing lecturers it cannot be construed that the duty is not only imperative but also immediate. The provision is only an enabling one.

Although it may be true in some cases that work, which before it is begun is only permissive, becomes obligatory by part performance after it has been begun, yet it is not true as an abstract proposition of law in every case, and it does not follow that the appointment of a University lecturer which is discretionary becomes obligatory by reason of its part performance.

(4) 3 Bom. L. R. 653 (1901).
(5) 3 T. R. 574 note (b) (1760).

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YORK AND NORTH MIDLAND RAILWAY Co. *v.* THE QUEEN (7) *explained.*

Whether the University having availed itself of the services of the applicant is estopped from denying his title as lecturer is a question which can only be determined in a properly constituted suit.

Although the doctrines of estoppel and part performance apply to corporations yet no sort of part performance or ratification can bind a corporation to a transaction which the Legislature has forbidden it to undertake as here under sec. 12 in Ch. XI of the University Regulations.

The University could not be held bound by representations made by any individual officer without the authority or sanction of the University.

All persons dealing with a statutory body like the University, or its agents, are deemed to have notice of the limits publicly set to their authority, and it is well accepted law that such a corporation is not bound by anything done by such agents in its name when the transaction is on the face of it in excess of the powers defined by Statute.

The applicant must be deemed to have known the conditions imposed upon the Senate by the University Regulations and to have accepted the office with knowledge of such limitations, and he is not entitled to rely upon any estoppel on the part of the University in these proceedings such as would validate his appointment.

Even if the sanction of the Governor-General in Council to his appointment be held not necessary, it does not under the circumstances of this case better the position of the applicant.

EX PARTE BROWN, IN RE MASTER (8) *explained.*

Whether or not under the Statutes the Government of India is vested with any power to impose conditions or limitations on the statutory powers of the Senate is a difficult and doubtful point, which cannot be decided as a side issue in proceedings of this summary character.

(7) 1 El. and B. 860 (1853).
(8) 8 Ch. A. 783 (1877).

The Petitioner stated in his petition that he had been appointed a lecturer in International Law by the Senate of the Calcutta University in July 1912, for a period of two years, and that he had delivered lectures up to the academic year ending May 1913. That he was about to commence his lectures in June 1913, and to continue his lectures up to May 1914, when he received a letter, dated 24th June 1913, from the Registrar of the University saying that the Government of India had refused to sanction his appointment. With this intimation the Registrar forwarded to Mr. Rasul (the Petitioner) the following letter from Mr. Sharp on behalf of the Government of India.

No 996.

FROM

THE HONOURABLE MR. H. SHARP, C. I. E,
Joint-Secretary to the Government of India.

To

The Registrar of the Calcutta University,
(Through His Excellency the Rector).

Simla, the 20th May 1913.

SIR,

I am directed to reply to your letters Nos. 1228 and 1229, dated the 23rd August 1912, forwarded with Mr Kerr's letter No. 6304, dated 13th November 1912, in which sanction is requested to the appointment or re-appointment of certain gentlemen as University Lecturers for a term of two years.

2. It is observed that the resolutions of the syndicate and the Senate upon which these recommendations are based were passed on various dates between the 1st June and the 27th July. It is understood that the Honourable the Vice-Chancellor announced the arrangements before the

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Senate upon the 27th July, 1912. But, as will be observed from the preceding paragraph, intimation was not received by the Government of India through His Excellency the Rector until the middle of November or half way through the academic year. The Government of India were, therefore, placed in a position in which they must either accept the proposals of the University with retrospective effect, or cause great inconvenience to the University and dislocation of study. It seemed best to them to wait until the end of the academic year, condone the irregularity and place matters on a regular footing for the second year.

3 In the case of three gentlemen, however, the Governor-General in Council is not prepared to condone the irregularity beyond the conclusion of the first year's course—*viz.*, Dr. A. M. S., Mr. A. Rasul and Mr. K. P. J. The last has, it is understood, resigned. His Excellency in Council does not consider it desirable to appoint as University Lecturers men who have recently taken a prominent part in political movements. It is in strict accordance with the higher views of University teaching and the development of Universities into Teaching and Residential Universities which are now generally accepted, that an atmosphere of pure study should be fostered by all means in our power.

4. The Governor-General in Council is, therefore, pleased to condone the irregularity of the current academic year and to authorise the treat ment of the lectures already delivered as having been University lectures He is further pleased to sanction the appointment of the gentlemen mentioned in the appendix to this letter as University Lecturer in the subject opposite their names for the academic year commencing the 1st June 1913. He awaits further proposals for lecturerships in Arabic History (International Law) and Ancient Indian History.

5. I am to request that in future proposals regarding the appointment of University Lecturers may reach the Government of India in ample time before the commencement of the academical year.

I have etc.,
(Sd.) H. SHARP,
Joint Secretary to the Government of India.

The Petitioner thereupon addressed to the Registrar of the Calcutta University the following letter :—

To

P BRUHL, Esq., D. Sc., F.C.S., F.G.S.,
Registrar, Calcutta University.

SIR,

I duly received your letter, dated the 24th June instant, enclosing a copy of the Government of India letter on the subject of my appointment as a University Lecturer.

With reference thereto I beg to point out in the first place that my appointment was absolutely honorary and was not of my own seeking. As a matter of fact, after having more than once shown a disinclination to accept the offer made to me on behalf of the University authorities, I was induced to accept it as a part of my public duties as a citizen and not for pecuniary remuneration. Under these circumstances the remarks of the Government about myself are not only uncharitable but absolutely uncalled for and unfounded I venture to submit that such considerations, even if well-founded, ought in no event be allowed to determine Government interference in matters similar to the present.

In the next place, I am advised that since the first August 1912, the Governor General in Council has no right or power to interfere in a matter of this kind. The attempt on the part of the Governor-General in Council to exercise powers in respect of the appointment of the University Lecturers for the University of Calcutta, is from and after the said first August 1912, an illega assumption of power and authority and therefore *ultra vires*. It is to be borne in mind that the Indian Universities Act was passed in 1904 when the Presidency of Fort William in Bengal was under local Government consisting of a Lieutenant-Governor, the Governor-General in Council having certain jurisdiction which need not be referred to in detail over the territories of the said Lieutenant-Governor. The Indian Universities Act conferred certain rights, powers and functions upon the Governor-General in Council in relation to the University of Calcutta, whereas in the Presidencies of Bombay and Madras, such rights, powers and functions were conferred upon the Local Government respectively, that is to say, the respective Governors-in-Council. The said Act also appointed the Lieutenant-Governor in his official capacity the Rector of the University of Calcutta. An Act of Parliament, called the Government of India Act, 1912, being 2 and 3 George V., c. 6, was passed in

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June 1912. By section 1 of that Act the position of the Governor and the Governor-in-Council of Bengal was put on exactly the same basis as the position of the Governors-in-Council of Bombay and Madras with regard to all the rights, duties, functions and immunities except such of them as the Governor-General in Council might reserve to himself by proviso (a) of the same section. By sub-section (2) of section 1, however he was precluded from reserving to himself the power to extend the limits of the town of Calcutta, By section 5 the Governor-General in Council was. given power to appoint the day on which the statute was to come into operation. By two notifications of the Home Department, both dated the first August 1912, the first being No. 1628, the Governor-General in Council appointed the first day of August 1912, as the day when the statute was to come into operation, and the second being No. 1627, the Governor General in Council reserved to himself, only one set of powers out of all powers till then exercisable by him in relation to the Presidency of Fort William in Bengal, *viz*, the powers exercisable by him in relation to the High Court of Judicature at Fort William in Bengal (see Gazette of India, 1912, Part I, p. 800). The view I take is fortified by the statements made by the Marquess of Crewe in the House of Lords on the 25th June 1912, at the third reading of the Bill which, when passed, became the statute I have referred to :—

"I seek to remove at the outset a misconception which had existed in India regarding the Provisions of the Bill reserving to the Governor-General the powers now exercisable by him in relation to the Presidency of Fort William in Bengal. I understand it is believed by many persons that some obscure and formidable powers were by this provision reserved to the Governor-General as against the Governor of Bengal and that in that respect the latter was placed in a somewhat inferior position to his brothers of Bombay and Madras. Such was not the case. Great pains had been taken to give the Governor of Bengal precise equality in all respects with the two other Presidency Governors. The sole power which the Viceroy obtained under the provision was that until a change was made in reference to the High Court of Calcutta he would go on appointing the Acting Judges of the High Court which now included the area of the new Lieutenant-Governorship of Behar and Orissa."

I, therefore, venture to submit that from the said first day of August 1912, the Governor-General n Council has ceased to have any power in relation to the University of Calcutta and the Governor of Bengal in Council has since then been invested with all powers till then exercised by the Governor-General in Council in relation to the University of Calcutta. The result is that the action taken by the Governor-General in Council with regard to my appointment is a nullity in law.

Further I beg leave to point out that it is not open under the Regulations of the University of Calcutta for any authority "to condone the irregularity of the *current academic* year" because the said Regulations say the "University Lecturers shall in the first instance be appointed for *two years.*" If my view of the law is correct, as I feel convinced and am advised that it is, it is useless for the Governor-General in Council to invite the University to submit to him 'further proposals for lecturerships in Arabic, International Law and Ancient Indian History" and "future proposals regarding the appointment of University Lecturers."

Lastly, I beg you to place this letter of mine before the Senate and such other authorities as you may decide. In case the University should prefer to give effect to the illegal order of the Governor-General in Council in respect of my appointment as a University Lecturer, I reserve to myself the right to take such legal steps against the Governor-General in Council and the University and such other bodies or persons as I may be advised in that behalf.

27th June 1913.

I have the honour to be,
Sir,
Your most obedient servant,
A. RASUL.

Then, on the 10th of July 1913, the Petitioner addressed the following letter to the Registrar.

To

P. BRUHL, ESQ., D. Sc., F.C.S., F.G.S.,
Registrar, Calcutta University.

Sir,

May I be permitted to draw the attention of the authorities of the University of Calcutta to the extremely anomalous and embarrassing position in which I find myself placed at the present moment in the absence of a reply to my letter of the 27th ultimo. I presume that until the University elect

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to give effect to the direction contained in the letter No. 996 of the 20th May 1913 from the Hon'ble Mr. Sharp to yourself I am still the University Lecturer in International Law for the academical year just commeneed and as such I owe it not only to the University but also to the students that I ought to commence my lectures without delay. I have therefore no other alternative but to request you to be so good as to notify to the students that I appoint 11 A.M. on Saturday the 26th inst. as the time and Darbhangha Buildings as the place for the first lecture this year in my subject. I am obliged to take this course as I desire to avoid any suggestion hereafter that I was not ready and willing and did not offer to do my duty by the University and the students.

I have etc.,
(Sd.) A. RASUL.

10th July 1913

On the 26th of July 1913, the Registrar addressed the following letter to the Petitioner.

No. 690.

FROM

P. BRUHL, ESQ., D. Sc., M. I. E. E., F. C. S., F. G. S.,
Registrar, Calcutta University.

To

A. RASUL, ESQ., M.A., B.C.L., BAR-AT-LAW.
Senate House, the 26th July 1913.

SIR,

With reference to your letter, dated the 10th July 1913, I am directed to inform you that as the Governor-General in Council has, under sec. 12, Ch. XI of the University Regulations, declined to sanction your appointment as University Lecturer, for the current academic year, the Honourable the Vice-Chancellor and Syndicate regret that they cannot allow you to deliver lectures as proposed by you.

I have the honour to be,
Sir,
Your most obedient servant,
P. BRUHL,
Registrar.

On the 1st of August Mr. Rasul addressed the following letter to the Registrar.

To

P. BRUHL, ESQ., D. Sc., M. I. E. E., F. C. S., F. G. S.,
Rigistrar, Calcutta University

DEAR SIR,

With reference to your last letter No. 690, dated the 26th July 1913 and addressed to me by you on behalf of the University of Calcutta, I understand that the University refuses to recognise my position as the University Lecturer in International Law for the present Academical year and allow me as such to exercise my functions and deliver my lectures on the basis of the letter of the Government of India, dated 20th May 1913. I have been advised and I assert that I am still the University Lecturer in International Law for the remaining period of two years for which I was duly appointed by the University, *viz.*, the present Academical year, that in law no sanction of any Government is required for such appointment, and that assuming, although not admitting, that any sanction is necessary, it is the sanction of His Excellency the Governor-of-Fort-William-in Bengal-in-Council. I, therefore, call upon the University through you forthwith to make arrangements for lectures to be delivered by me and, if the University thinks that the sanction of any Government is necessary, to seek such sanction from the Governor-of-Fort-William-in-Bengal-in-Council (allowing me in the meantime to proceed with my lectures) and also to refrain from appointing any other lecturer in my place. Please treat this matter as urgent and let me have an early reply stating whether the University will give immediate effect to the requisitions herein made or compel me to take such steps as I may be advised to assert my right.

1st August 1913.

I have the honour to be,
Sir,
Your most obedient servant,
A. RASUL.

Upon these facts this application was made under sec. 45 of the Specific Relief Act on behalf of the Petitioner for a Rule upon the University of Calcutta to show cause why the University should not make arrangements for the delivery of lectures on International Law by Mr. Rasul

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during the rest of the term for which he alleged he had been so appointed.

Mr. B. Chakravarti (with him *Mr. H. D. Bose* and *Mr. B. K. Lahiri*) for Mr. Rasul.—The application may be looked at from two points of view : (1) To enforce the statutory duties of a Corporation, *i.e*, the University, (2) To restore the Petitioner to an office of a public nature.

As to (1), the main object of Act VIII of 1904 was to make the University a teaching body. See sec. 3 of the Act and sec. 1 of Chap. XI of the University Regulations. This object of the Act was to be attained by the appointment of University Professors and Lecturers. See secs. 3 and 25 (2) (*e*) of the Act and Chaps. IX, X and XI of the Regulations. It was incumbent on the University to appoint University Lecturers. See Regulations, Chap. XI, sec. 1. Cf. the same with the 1st sections of Chaps. IX and X of the Regulations. The appointment of the University Lecturers therefore is a command from the Legislature to which it is the business of the Courts to enforce obedience. Even if such appointments were merely discretionary with the University, it might become obligatory in certain circumstances. See Craies Statute Law, pp. 251-252. Moreover, a work permissive in its inception becomes obligatory by part performance—*Vide* observations of Jervis, C. J., *York and North Midland Railway Co.* v. *The Queen* (7).

As regards (2), the Writ of Mandamus lies for all offices of a public nature : also for a function with emoluments or fees annexed as in this case. See Tapping on Mandamus, pp. 171-172. As to the meaning of the word "public," see Tapping, pp. 173-174. The value of the importance to the public is not to be scrupulously weighed. The office must be known to law and must not be one at will but must be for a fixed period as in this case. Mr. Rasul has *primâ facie* title to the office or function. (See Short on Mandamus, p. 230). Syndicate recommended his appointment to the Senate, under the Statute there can be no conditional recommendation. (See sec. 3 of Reg. XI.) The Senate appointed him for 2 years. The Senate has the power either to appoint or not the person recommended by the Syndicate. The Senate, however, cannot make any conditional appointment, *e.g.*, subject to the sanction of the Governor-General. Any such condition being *ultra vires* will be of no effect and the appointment will stand. The principle of severability of portions of bye-laws will apply. See Maxwell on Statutes, p. 601. So the conditions attached to recommendation and appointment as well as the condition embodied in sec. 12 of Reg. XI will be of no avail. Moreover, since the 1st August 1912, the Governor-General in Council has no right or power to interfere in a matter of this kind. Any sanction by him is not only not necessary but will be *ultra vires*. See 2 and 3 Geo. V., c. 6. See notifications of Home Department, Government of India, dated 1st August 1912, Nos. 1627 and 1628. It is an executed office, Pollock's Contract, p. 138. This application fulfils all the requisites of sec. 45 of the Specific Relief Act. Mr. Rasul is a person aggrieved by the refusal of the University. He has no other remedy at all indicated by the Statute.

(7) 1 El. & B 860 (1853).

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—Sec. 45 of the Specific

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Relief Act provides an exceptional remedy. It is in substitution of the Prerogative Writ of Mandamus, which our Court on its Original Side had jurisdiction to issue. Five conditions are laid down in the section, provisos (*a*) to (*e*), which the applicant invoking this jurisdiction has to satisfy. The conditions are cumulative, all of them have to be fulfilled. The remedy is of a summary nature and coercive in character. Being discretionary it must be exercised with caution and the duty sought to be enforced must be clear and obligatory. The first condition is that the applicant has to show a threatened injury to his personal right, that such right does exist and a clear injury must also be shown. He must also show that he has no other specific and adequate legal remedy, and that the remedy applied for will be complete.

By sec. 3 of Act VIII of 1904 power has been given to the University to appoint Professors and Lecturers. By sec. 4, the body corporate of the University is constituted and the powers of that corporate body are vested in the Senate. By sec. 25 of Act VIII of 1904 the Senate of the University with the sanction of the Government is empowered to make Regulations consistent with the Act of Incorporation as amended by the said Act of 1904, and with the last-mentioned Act, to provide for all matters relating to the University including the appointment and duties of the Registrar and of all officers and servants of the University and of Professors and Lecturers appointed by the University. The applicant states that on the recommendation of the Syndicate of the said University, the Senate appointed him University Lecturer in International Law for Post-graduate students, that such appointment was made some time in the month of July 1912 for a period of two years; that after his appointment he began to deliver lectures on International Law and continued to do so up to the end of the academic year ending May 1913, and his lectures were attended by over 80 students: that the Petitioner was about to commence his lectures for the current academic year which will end in May 1914, when he was informed by the Registrar of the University that the Government of India had refused to sanction his appointment as University Lecturer. He contends that he is still the University Lecturer in International Law, and the Government of India has no authority to interfere with his appointment. He contends that the Regulations promulgated by the Government of India under the Act are *ultra vires*, in so far as they provide that no University Lecturer shall be appointed without the sanction of the Governor-General in Council (sec. 12, Chap. XI of the Regulations).. The contention is based upon the provision in sec. 3 of Act VIII of 1904—the power to appoint lecturers being given to the Corporate Body of the University, as defined by that Act. It is also contended that although under the Act "Government" means in relation to the Calcutta University, the Governor-General in Council, yet having regard to the fact that the Governor-General in Council not having by Notification reserved to themselves any right over the University, they had ceased to have any power over the University of Calcutta The relator further contends that the result is that the action taken by the Governor-General in Council, with regard to his appointment is a nullity in law. The application sets out certain correspondence between the relator and the University authorities, to

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which it is needless to refer in detail. In one of these letters, namely, the relator's letter of the 10th July 1913, he purported to appoint 11 A.M., Saturday the 26th July, as the time and the Darbhanga Building as the place for his first lecture this year. In reply to that letter the Registrar of the University said that inasmuch as the Governor-General in Council had under sec. 12, Chap. XI of the University Regulations declined to sanction the Petitioner's appointment as University Lecturer for the current academic year, the Hon'ble the Vice-Chancellor and the Syndicate could not allow the Petitioner to deliver lectures as proposed by him. The Petitioner in his letter of the 1st August insisted that in law, sanction of the Government is not required for such appointment, and that assuming although not admitting, that any sanction was necessary, it was the sanction of His Excellency the Governor of Fort William in Bengal in Council, and not of the Governor General in Council. The Petitioner proceeded to ask the University forthwith to make arrangements for lectures to be delivered by him and if the University thought that the sanction of the Government was necessary, to seek such sanction from the Governor of Fort William in Bengal in Council. The Registrar wrote in reply saying that the Syndicate found itself unable to accede to his request. The refusal of the Syndicate to comply with his requisitions is complained of as the injury to the personal right of the relator. As the relator had not set out the resolutions of the Syndicate and the Senate and his letter of appointment in his application, I required a further affidavit, which has now been filed.

Now it appears that the Resolution of the Syndicate was in the following form:—"That the Syndicate recommend to the Senate that with the sanction of the Governor-General in Council, the undermentioned gentlemen, Mr. Rasul being one of them, be appointed University Lecturers in History for a period of two years with effect from July 1912, to lecture in the special branch of the subject mentioned against his name. (See Minutes, Calcutta University, Part IV, 1912, 29th June 1912, p. 1262). It appears that the above recommendation of the Syndicate came up before the Senate on the 13th of July 1912, when the following resolution was passed:—"That the Governor-General in Council be moved to sanction the appointment of the following gentlemen, the Petitioner being one of them, as University Lecturers in the subject noted against the name of each for a term of two years with effect from the Session 1912-13." See Minutes of the Senate, dated 13th June 1912, p. 1318, Calcutta University Minutes, Part IV, 1912). In putting the motion to the Meeting the Vice-Chancellor observed that the University was "to be congratulated on the satisfactory arrangement it had been able to make for the furtherance of Post-graduate study in the different subjects. The services of an eminent Vedic scholar had been secured to teach the Vedas. The staff in History was particularly strong and the work of lecturing in the special branches of the subject had been entrusted to competent men, who had received their training in one or other of the older Universities of England." I have quoted the above as some reliance is placed by the relator upon the speech by the Vice-Chancellor. It further appears that certain other names came up before the Senate on the 27th July 1912, when

the Hon'ble the Vice-Chancellor addressing the Senate announced that they had secured the services of Messrs. Rasul and others, who had taken their degree of History either at Oxford or Cambridge to deliver special courses on selected topics. It is clear, therefore, that the Syndicate recommended his appointment subject to the sanction of the Governor General in Council and the Senate thereupon resolved to move the Government to sanction the appointment of the Petitioner amongst others as University Lecturer. The Resolution of the Senate is not one of appointment, not even of a provisional appointment pending the sanction of the Governor-General in Council. The Vice-Chancellor no doubt said at the meeting of the Senate on the 13th July that the work of lecturing had been entrusted to competent men. What he meant was that the services of competent men had been arranged for or secured. But whatever he may have meant, the Senate is only bound by its resolution.

Paragraphs 4 and 5 of the relator's affidavit do not accurately set out the Resolutions of the Syndicate and Senate.

The relator states in paragraph 8 of his affidavit of the 18th August that to the best of his recollection he received in or about the month of July 1912 a communication in writing from the Registrar of the University that he had been appointed University Lecturer in History for a period of 2 years from July 1912, requesting him to appoint the time and place for the delivery of his lectures and thereupon he wrote back to the Registrar making such appointment, and delivered his lectures and continued to do so during the academic year 1912-1913.

He believes he has lost the letter. His attorney wrote for a copy from the University, but they have not on record in their office, copy of any separate letter addressed to Mr. Rasul. They say "the practice is that when a number of lecturers are appointed at the same time, only one draft copy of the letters of appointments which are all exactly similarly worded, is kept in the office, the wording being based on the respective resolutions of Syndicate and Senate." Mr. Rasul's attorney wrote for a copy of the draft and received the following reply from the Registrar, dated the 13th August 1913.

"I find on further enquiry that the draft copy referred to in my letter of yesterday concerns only certain lecturers who were appointed on a fixed monthly salary. No letter of appointment has been sent to the other gentlemen who, with Mr. Rasul, were provisionally appointed on other terms pending the sanction of His Excellency the Governor-General."

Mr. Rasul therefore could not have received a letter of appointment and according to the Registrar of the University his appointment was provisional pending the sanction of His Excellency.

Mr. Rasul's impression seems to be due to some circular letter or communication asking him to appoint the time and place for his lectures.

There being no letter of appointment from the University I cannot hold the Petitioner was appointed. Judging from the Resolutions I have quoted, the Senate did not even formally appoint him pending the sanction of the Governor General.

He has placed himself in an unfortunate position by not requiring a letter of appointment and I quite sympathise with him. I appreciate the spirit in which he took up the work and the sacrifice it involved, but I cannot hold that any legal

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right has been established or exis s by his having lectured last year.

The Syndicate and Senate are only bound by their Resolutions and I do not think that they ever intended to appoint him without the sanction of the Governor-General.

Mr. Rasul apparently did not know the text of the Resolutions, but he was dealing with a Corporation whose rights are defined by Statute. He ought to have informed himself of them and thus his present trouble might have been avoided. If he came to know, and he must be deemed to have had notice that his appointment was dependent upon the sanction of the Governor-General, he could not be heard to say, upon refusal of such sanction, that he still held the appointment. When the duty is conditional on the approval of another person or body being obtained there is no right to the writ until such appproval has been given [*R.* v. *St. Luke's, Chelsea* (1), Cockburn, C. J.]. There is no evidence of any personal right having been created such as enables me to interfere under the provisions of sec. 45. The true principle underlying the jurisdiction in these cases is that the proceeding can confer no title not already existing, though it may affect the consummation of the relator's title, if he have one: but it gives him none: See Lord Kenyon, C. J., in *R.* v. *Clarke* (2), see *Ex-parte Napier* (3), where Lord Campbell, L. C. J., said: "The existence of a legal right is the foundation of every Writ of Mandamus." It is only issued to place a person in possession of office but confers no right. It merely places him in possession to enable him to assert his right, which in some cases he could not otherwise do. In all cases where the validity of an appointment is the main point in dispute the writ is not granted until the controversy has been tried at law and an adjudication had in favour of relator. (Spelling on Injunction, p. 1365, 2nd Ed.) In other words, the writ does not lie to try the title. Here apparently there is no title. There is no letter of appointment. If such title is based upon the Resolutions, the utmost that can be said is that he held the office only provisionally and the condition having failed, he is not now legally in a position to assert that he holds the office as of right. It is said that the University is estopped from denying his title having availed itself of his services. If there is such an estoppel, the right ought to be declared in a suit instituted for that purpose. It is contended that the sanction of the Governor-General in Council under sec. 12, Chap. XI of the University Regulations is *ultra vires*. It may be so, but if that is the issue it cannot be tried in these proceedings. The Government is not a party to these proceedings and cannot be made parties under the express provisions of the section. I do not think any authority can be found for trying an issue of this character in these proceedings. It would be to decide a question of jurisdiction which arises as between the University and the Governor General in Council. It may be tried in a properly constituted suit, but not in summary proceedings of this nature. The Court has always refused to allow an application for Mandamus to be made the occasion or excuse for obtaining the opinion of the Court on some doubtful question of law. One portion of the application is that "the Senate be required, if sanction is necessary, to apply for such sanction to

(1) 31 L. J. Q. B. 50 at p. 53 (1862).
(2) 2 East. 75 at p. 83 (1801).
(3) 18 Q. B. 692 at p. 695 (1852).

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His Excellency the Governor of Fort William in Bengal," which means that in these proceedings it has got to be determined as to whether the Regulation I have referred to is *ultra vires* or not, and in addition thereto to hold that the sanction intended, was to be obtained from the Governor of Bengal in Council. If sec. 12 is *ultra vires* so far as the Governor-General in Council is concerned it would also be *ultra vires* with regard to the Governor of Bengal in Council, and I do not think the applicant can ask me to replace, if his contention is correct, the Governor-General in Council, by the Governor of Bengal in Council. That clearly I cannot do. I was at one time inclined to think that the right of a lecturer to lecture, who is not remunerated for his services, is not a personal right to which an injury can be said to have been caused by the refusal of the Senate to give him facilities for delivering lectures. A clear distinction has been made in England between endowed lectureships, and lectureships not carrying fees or emoluments. Tapping in his work on Mandamus, p. 176, says "there must also be annexed to or issued out of the office fixed fees or emolument or a salary. The office must be an office of consequence or value, for which there does not exist any specific legal remedy. The value, however, is not scrupulously weighed." Stated in this broad form the proposition does not seem to be quite correct. The writ has been issued in respect of offices carrying no emolument as pointed out by Shortt on Mandamus, p. 274. Ordinarily there are certain fees attached to the office of a University Lecturer, but the appplicant from a sense of public duty accepted the office without fees. The office is undoubtedly an office of consequence, though it may not be of any pecuniary value. The injury to the office is said to be that no arrangements are being made for lectures to be delivered. I am not quite clear in my mind that such refusal is an injury to the personal right of the Lecturer. *In re Rustom Jamshed Irani* (4), it was considered by Russell, J., that the personal right mentioned in the section referred to *rights in rem*, "such as every human being in a civilized society possesses independently of any act of his own" (p. 655). This proposition does not seem to be supported by authority. The rule on the other hand appears to be that he alone is a competent relator who has some interest other than such as may belong to the community at large, in the question to be tried. See *R.* v. *Brown* (5). The Appeal Court did not sanction the definition given by the learned Judge in the Original Court, *Jamshed Irani* v. *Kennedy* (6). It also seems to me that if a mandatory order was made actually in favour of the applicant in this case it could be easily nullified by the University authorities, if they chose. The Regulation relating to the arrangements for lectures runs as follows:—"Such lectures shall be delivered and classes held in the College to which the Lecturer belongs or any such other place as the Syndicate in consultation with the Lecturer may determine." The applicant does not belong to any College and therefore in his case the place is to be determined by the Syndicate in consultation with him. There is nothing said about appointing the time for lectures. If an order was made upon the Syndicate to appoint a place for the lectures they might easily

(4) 3 Bom. L. R. 653 (1901).
(5) 3 T. R. 574 note (b) (1760).
(6) I. L. R. 26 Bom. 403 (1901).

nullify it, by appointing a place, but not appointing any time for the lectures. The section provides that the remedy shall be complete and effectual: such clearly would not be the case, if the University did not fix any hours for the lectures. I think, however, that these are matters of internal arrangement with which the Courts are unwilling to interfere, unless under clear obligation. I cannot accede to the prayer of the application, as it seems to me that the applicant has not shown that he has a complete specific legal right, such as I hold must pre-exist. It seems to me that the question of *ultra vires* cannot be litigated upon in these proceedings. It is a clear principle that no order affecting the status or rights of the parties concerned, ought to be determined in proceedings of this nature or of any proceedings whatsoever, unless they are parties therein.

The Petitioner further contends that his application may be treated as one by a person interested to enforce a statutory duty imposed upon the University "to make provision for the instruction of students" under sec. 3 of Act VIII of 1904. Before dealing with the question of the statutory duty if, any, involved in this case I have to see what the personal right is. Sec. 45 requires some right in the person applying. It must be some interest in him other than such as may belong to the community at large. If, however, it be said that his personal right is by virtue of his appointment, I have already dealt with the matter and have held that the appointment has not been established. Sec. 3 of Act VIII of 1904 merely says the University "shall be and shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University Professors and Lecturers." It is merely an empowering section. It clothes the University with certain powers. They are words merely making that legal and possible which there would otherwise be no right or authority to do. There is no immediate duty imposed by it. Sec. 25 (*e*) has also been referred to. It runs thus:—

"The Senate with the sanction of the Government may from time to time make Regulations consistent with the Act of Incorporation as amended by the Act of 1904 and with the Act of 1904 to provide for all matters relating to the University: in particular, such Regulations may provide for among others (*e*) the appointment and duties of servants of the University and of Professors and Lecturers appointed by the University."

This section gives power to the University to make regulations subject to the sanction of the Government. Such Regulations have been made and my attention has been called to sec. 1 of Chap. XI of the Regulations.

"1. The University shall provide for post graduate teaching, study and research in the faculties of arts and science."

Chaps. IX and X deal with University Professors and Readers respectively. In the former case when the funds of the University permit, the Senate with the previous consent of the Governor-General, shall found such Professorships, in the latter case, a certain sum whenever practicable, shall be set apart annually for the purpose of providing special courses of lectures on particular subjects. The Lecturers delivering such courses of lectures shall be called University Readers. The appointment of a Reader shall be made by the Senate on the recommendation of th

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Syndicate. It is pointed out that there are distinctions made between the appointment of University Professors, University Readers and University Lecturers. In the case of the first two, the appointment is made contingent upon the provision for funds. In the case of University Lecturers there is no such provision. It is to be noticed, however, that in each case the Regulations provide that no one shall be appointed without the sanction of the Governor-General in Council. I am not prepared to hold that although it may be said that sec. 1 of Chap. XI imposes an obligation on the University to provide for post-graduate teaching by appointing University Lecturers, it is therefore to be construed that the duty is not only imperative but immediate. I do not think that the statute imposes any obligation that such Lecturers are to be forthwith appointed. Sec. 4 of the same chapter runs thus—"The Senate shall have power upon the recommendation of the Syndicate to appoint Lecturers who shall be called University Lecturers." It is merely an empowering section. The words "shall have power" do not signify any obligation, but are potential. There is no compulsion upon them to appoint. There is no obligation upon them to exercise that power. Sec. 1 is controlled and modified by sec. 4. These sections are to be read together. It is said, however, that even if it be held that Mr. Rasul was appointed provisionally, yet the University having availed itself of his services, it is an executed contract, and it must be taken that the contract is still subsisting, as the appointment was for a period of two years. *York and North Midland Railway Co.* v. *The Queen* (7) has been cited in support of the proposition that even if the appointment of University Lecturers is merely discretionary, it may become obligatory under certain circumstances. It was argued that it was decided in that case that "a work which in its inception is permissive only becomes obligatory by part performance." The question in that case arose as regards the liability of a Ry. Co. to complete a Railway line which the Company was empowered to construct by a Railway Act. I find that Jervis, C. J., expressly stated in that case that it was unnecessary for the Court to determine the abstract proposition, that a work, which if before it is begun was permissive, after it had been begun became obligatory or not (p. 870). They did not desire to be understood as assenting to the proposition of Justice Erle in the same case on p. 207 "that many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by Mandamus." Justice Erle held that if there are no words in the Act that could be justly construed to create a duty, the Court was not authorised to decide that such a duty was created. Jervis, C. J., emphasised the same principle and said, Courts of Justice ought not to depart from the plain meaning of words used in Acts of Parliament, when they do so, they make, but do not construe the law; that Courts are not to construe Acts by their own notions of what ought to have been enacted upon the subject.

There is nothing to show that Mr. Rasul accepted his appointment for the period of two years. There is no writing to that effect. He undoubtedly intended to continue. It is after all, if anything, a contract of service: but where are the terms to be found? The Resolution of the Syndicate merely speaks of a recommenda-

(7) 1 El. and B. 860 (1853).

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tion for appointment. The University cannot be bound by any representations made by any individual officer without the authority or sanction of the University, or by any act of his not within the scope of his authority. No such communication has been shown to have been made by any authorised person. No doubt the doctrines of estoppel and part performance apply to corporations. The principles applied in such cases are said to be independent of contract. But no sort of estoppel, part performance, or ratification, can bind a corporation to a transaction which the Legislature has in substance forbidden it to undertake: such restriction is to be found in Chap. XI, sec. 12, and a question has been raised whether the restriction is *ultra vires* or not. The constitution of the University is embodied in special Statutes. All persons dealing with the University or its Agents are deemed to have notice of the limits publicly set to their authority, and it is well-accepted law that such a corporation is not bound by anything done by its agents in its name when the transaction is on the face of it in excess of the powers defined by Statute. Mr. Rasul must be deemed to have known the conditions imposed upon the Senate by its Regulations as to its power of appointment, and to have accepted the office with knowledge of such limitation, and I am not disposed to say that he is entitled in this application to rely upon any estoppel on the part of the University such as validates his appointment. It is argued that the appointment must be held to be valid inasmuch as the stipulation for sanction of the Government is *ultra vires*, and that the Resolution of the University stands good, if the sanction of the Governor General is not necessary according to the law. The Resolution of the Senate in this case is merely that the Governor-General be moved to sanction the appointment, not even that the Lecturers are appointed subject to the sanction of the Governor-General. Even if it be conceded for purposes of this application that the sanction of the Governor-General is not necessary, it does not better the position of the Petitioner. *Ex parte Brown, In re Master* (8) has been relied upon in support of the proposition that if the condition about the sanction of the Governor-General is *ultra vires* it is of no effect and the appointment stands. That was a case arising upon a bankruptcy and a certain Resolution of the creditors authorising trustees amongst other things to agree to a composition, was held to be *ultra vires* and void, and inasmuch as the creditors had no power at the meeting held to pass any resolution respecting the administration of the estate by trustees, as being opposed to sec. 20 of the Bankruptcy Act of 1869: but the contention that because that clause was void all the clauses of the Resolution were void, was held not to be sound, inasmuch as the other Resolutions had been registered under sec. 127. That was a special case depending upon the construction of special sections of the Bankruptcy Act, and cannot be accepted as laying down a proposition for universal acceptance. This case has been cited in Maxwell on Statute, p. 649, 5th Ed., in connection with the validity of instruments, part being invalid. The question of *ultra vires* raised in this case is, I understand to be, that under the Act the Senate has the power to appoint, and therefore no restriction can be imposed by the Government upon the Senate's power of appointment. The Act makes however an imperative condi-

(8) 9 Ch. A. 783 (1877)

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tion that the Regulations are to be framed, by the University with the sanction of the Government. Sec. 26 of the Act of 1904 empowers the Government to add to or alter the draft Regulations submitted by the Senate after consulting that body and make such additions and alterations as appear to the Government to be necessary. It further provides that in default of the Senate submitting the draft Regulations within a limited period, the Government may make Regulations. The contention is that the Regulations, before they are made, require the sanction of the Government. But that the Government is not by Statute vested with any powers to impose conditions or limitations on the powers given to the Senate. This is a difficult and doubtful point such as in my view cannot be decided as a side issue in proceedings of a summary character.

Application refused.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 14 OF 1912.

JENKINS, C. J.
MOOKERJEE, J.
1913,
9, July.

PUCHHA LAL and anr., Defendants, 1st Party, Appellants,

v.

KUNJ BEHARI LAL MONDAL and others, Plaintiffs, Respondents.

Transfer of Property Act (IV of 1882), sec. 54—Registration Act (XVI of 1908), secs. 17 and 49—Sale, compulsorily registrable, to Defendant by unregistered kobala*—Part performance—Payment of purchase money and delivery of possession—Subsequent sale by registered* kobala *to Plaintiff with notice of Defendant's rights—Plaintiff if may recover—Equity—Specific performance.*

Where a purchaser of immoveable property under an unregistered **kobala** ***paid*** *Rs. 500, the agreed price, to his vendor and was placed in possession :*

Held—*That in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover possession of the property from the former purchaser.*

The Defendant is entitled, apart from the provisions of the Registration Act, to resist such a suit, and to permit such a defence to be taken does not amount to an invasion or evasion of the Registration Act.

WALSH *v.* LONSDALE (1) *followed.*

This was an Appeal preferred on the 20th of February 1912 against the decree of the Hon'ble Mr. Justice H. R. H. Coxe, dated the 23rd of January 1912, in Appeal from Appellate Decree No. 852 of 1910, reversing on appeal the decree of F. S. Hamilton, Esq., District Judge of District Purneah, dated the 18th of December 1909, reversing the decree of S. M. Zarif, Esq., Officiating Munsif of Purneah, dated the 7th of September 1909.

The material facts of the case will appear from the judgment of COXE, J.

COXE, J.—The facts found in this case are that the Defendants, second party, executed an unregistered *kobala* with respect to 14 bighas of land in favour of the Defendants, first party, in April 1, 1906. The price was Rs. 500. In the following year, the Defendant, second party, sold 40 bighas of land, including the 14 bighas already referred to, to the Plaintiff by a registered conveyance, the Plaintiff know-

(1) L. R. 21 Ch. D. 9 (1882).

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'ing, at the time, of the former transaction. The Plaintiff has sued to recover possession and on these facts the lower Appellate Court has held that he is not entitled to succeed and has dismissed the suit.

It appears to me that this decision cannot be sustained.

The transaction in favour of the Defendants, first party, was evidently a nullity under sec. 54 of the Transfer of Property Act. I am inclined to think that even the Defendants, second party, themselves would not have been estopped from disputing the validity of that transaction. Such an estoppel would evidently defeat the provisions of sec. 54 of the Transfer of Property Act and secs. 17 and 49 of the Registration Act; but whether that be so or not, I am satisfied that the Plaintiff was in no way debarred from buying the property which still belonged to the Defendants, second party, by reason of the fact that he knew of the transaction in favour of the Defendants, first party. Even assuming that he knew that the Defendants, second party, had cheated the Defendants, first party, still he knew that the Defendants, second party, were still the owners of the land, and that being so, I can see no reason why he should not be entitled to buy the property from them.

No doubt, there are cases which lay down that when a man by a registered conveyance purchases property which, he knows, has already been validily transferred by another conveyance of which registration is not compulsory, he obtains no priority: but that is quite different from the present case in which the sale to the Defendants, first party, was absolutely null and void. It appears to me that the Plaintiff is fully entitled to succeed.

The appeal will accordingly be allowed, the decision of the lower Appellate Court will be set aside and that of the first Court restored with costs in all Courts.

[On further Appeal under the Letters Patent]

Babu Jogendra Chandra Mukherjee for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Kshetra Mohun Sen* for the Respondents.

The Judgment of the Court was as follows:—

Jenkins, C. J.—This is an Appeal from a judgment of Mr. Justice Coxe who has set aside the decree of the lower Appellate Court and restored that of the first Court with costs.

The suit is brought for *khas* possession of certain lands, and the facts with regard to those lands that have been established in the evidence are these: The Plaintiff's title to them is by virtue of a transfer in 1907, but at that time the Defendant, 1st party, was in possession of the lands and had paid the purchase-money for them to the Plaintiff's vendor, that payment having been made prior to the purchase by the Plaintiff. In these circumstances, can the Plaintiff's claim prevail? I think not. To begin with, the Plaintiff, apart from such notice as would be imputed to him of the Defendant's right to the land by virtue of his possession, is found as a fact by the lower Appellate Court to have known of the previous sale to the Defendant, and it is further found by the learned Judge of the lower Court of Appeal that he is unable to accept the suggestion that the vendor may have perpetrated an act of bad faith without any collusion on the part of the Plaintiff. He distinctly comes to the conclusion that there was complicity between

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the Plaintiff and the vendor, and that can only mean a deliberate design to defraud the Defendants of such rights as had not been fully completed by reason of failure to comply with all the formal requirements of the law. Now we have the position that the Defendant, 1st party, was in possession of the lands under a contract for sale under which the purchase-money had been paid prior to the transfer to the Plaintiff, and that the Plaintiff was well aware of that position. I cannot see how in these circumstances the Plaintiff can possibly recover the lands from the Defendant, 1st party.

There are cases, of which *Walsh* v. *Lonsdale* (1) is a type, which establish the protection to which in a Court of Equity a person in the position of the Defendants is entitled. It is quite true that the question whether the Defendants, 1st party, were entitled to bring a suit for specific performance in vindication of their rights was not debated before the lower Appellate Court, but there is no matter brought to our notice which can throw any serious doubt upon the Defendant's right to complete their right by such a suit. On these grounds I think that the suit must fail. This is no invasion or evasion of the Registration Act. It is merely securing to a party those rights to which he is entitled apart from the Act—rights to which he has a good title in Courts to which the abiding direction has been given to proceed in all cases according to equity and good conscience. Rights of this class can in the ordinary course only be enforced against a third party, such as the Plaintiff here is, where that party has notice of those rights, so that I feel in no way embarrassed by the suggestion that there is anything in the policy of the Registration Act which stands in the way of the ultimate result at which the District Judge arrived. In the view that I take, it is unnecessary to elaborate the position of the Defendants, but I may point out that if carried to its full extent the doctrine for which the Plaintiff contends would deprive a purchaser of his lien for purchase-money paid by him, even at the instance of one who took with notice.

(1) L. R. 21 Ch. D. 9 (1882).

The result is that the judgment of Mr. Justice Coxe is set aside, and the decree of the lower Appellate Court restored. The Appellants are entitled to their costs throughout.

This decree relates only to the 14 bighas which are claimed by the Defendants. To the rest of the land in suit the Defendants have not made any claim and they are not in possession of it. In regard to that, therefore, there is no cause of action.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2600 OF 1912.

FLETCHER, J.
N. R. CHATTERJEA, J.
1913,
17, December.

KEDAR NATH DAS and ors., Defendants, Appellants,
v.
HEMANTA KUMARI DEBI, Plaintiff, Respondent.

Ex parte *decree, perjured evidence, whether a ground for setting aside—Fraud—Plaintiff knowing evidence to be perjured—Court imposed upon.*

If the case which was placed before the Court was a false one, the Court has jurisdiction in a subsequent suit to set aside the decree which was obtained in the previous suit by fraud practised on the Court.

PUCHHA LAL *v.* KUNJ BEHARI LAL.

ABOULOFF *v.* OPPENHEIMER (4), VADALA *v.* LAWES (5), LAKHMI CHARAN *v.* NUR ALI (1) *followed.*

MOSUFUL HUQ *v.* SURENDRA NATH (2), BAKER *v.* WORDSWORTH (3) *distinguished.*

This was an Appeal against a decree of Babu Bijoy Gopal Bose, Second Subordinate Judge of Burdwan, dated the 9th of August 1912, affirming a decree of Babu Achinta Nath Mitra, 1st Munsif of Burdwan, dated the 29th of November 1911.

The facts of the case were as follows :—

The Defendants instituted a suit in the Small Cause Court of Burdwan for recovery of Rs. 40-13 5 on the 31st August 1910 against the Plaintiff on the allegation that she purchased silk cloths from the Defendants' shop on the 27th Chaitra 1316, corresponding to 10th April 1910, and made part payment on the 13th April 1910 but the balance was not paid for which the suit was brought. The summons in the aforesaid case was alleged to have been served on the 3rd September according to the peon's report and one of the Defendants alleged that he had identified the Plaintiff. An *ex parte* decree was obtained on the 13th September 1910 and was executed on the 1st October 1910 and the decretal amount realised on the same day from the Plaintiff. Plaintiff instituted the present suit on the 28th January 1911 for recovery of the decretal amount on the allegation that the *ex parte* decree was fraudulently obtained by suppressing summons ; that she was not aware of the suit against her, that the suit was instituted maliciously against her and the evidence on which the decree was obtained was perjured.

The Court of first instance found that it was doubtful whether the summons was served, that the suit was due to a quarrel between the Plaintiff and the Defendants, that the *khata* book on which the suit was brought might have been tampered with and as a matter of fact the silk cloths were never sold to the Plaintiff. On the above findings the suit was decreed by the Munsif. There was an appeal by the Defendants before the Subordinate Judge of Burdwan who dismissed the appeal affirming all the findings of the Munsif. The Defendants then preferred this Second Appeal.

Babu Bepin Behary Ghose for the Appellants.—An *ex parte* decree can only be set aside on the ground of fraud ; the lower Courts came to no finding on that point. The lower Courts find that it was doubtful whether the summons was served. Upon this finding the Courts were not entitled to set aside the decree. Mere fact that the suit was false is no ground for setting aside the decree. Refers to *Abdul Huq* v. *Abdul Hafez* (6). The only case that is against me is that of *Lakhmi Charan* v. *Nur Ali* (1), decided by Digamber Chatterjee and N. R. Chatterjea, JJ., but this case was not followed in the subsequent case of *Mosuful Huq* v. *Surendra Nath Ray* (2). Refers to *Mahomed Golab* v. *Mahomed Sulliman* (7). All these cases go to show that a decree cannot be set aside on the ground that the suit on which the decree was

(1) I. L. R. 38 Cal. 936 : s. c. 15 C. W N. 1010 (1911).
(2) 16 C. W. N. 1002 (1912).
(3) 67 L. J. R. Q. B. D. 301 (1898).
(4) 10 Q. B. D. 295 (1882).
(5) 25 Q. B. D. 310 (1890).

(1) I. L. R. 38 Cal. 936 : s. c. 15 C. W. N. 1010 (1911).
(2) 16 C. W. N. 1002 (1912).
(6) 14 C. W. N. 695 (1910).
(7) I. L. R. 21 Cal. 612 (1894).

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based was a false suit and was decided on perjured evidence. The English cases are also in my favour; refers to *Flower* v. *Lloyd* (8), *Baker* v. *Wordsworth* (3).

[FLETCHER, J.—The mere fact that the suit was false may not be a ground for setting aside a decree but could it not be shown that the evidence was perjured and the Defendants knew that the evidence was perjured, and the Court was deceived ?]

The Court simply finds that the suit was false. This is not sufficient; if that be the law there would be no end to litigation. Refers to *Cole* v. *Langford* (9).

Babu Bankim Chandra Mukerjee for the Respondent.—I submit there is really no conflict between the case *Lakhmi Charan Shaha* v. *Nur Ali* (1) and the other cases. The findings go to show that in *Lakhmi Charan Shaha* v. *Nur Ali* (1), the Plaintiffs knew that the suit was false and if knowing the true facts the Plaintiffs instituted the false suit, and obtained a decree thereon by perjured evidence it would be fraud of the grossest kind practised upon the Court and it would be inequitable to allow a party to abuse the process of the Court. The findings in the present case go to show that the suit was the outcome of a quarrel between the Plaintiff and the Defendants and if that be so it is clear that the Defendants knowing full well that they had absolutely no claim against the Plaintiff brought the suit. This is a fraud of the grossest kind that can be practised on a Court. Moreover the finding on the question of service of summons is clear. It is found that there was no service If this finding be taken along with the facts that one of the Defendants is alleged to have identified the Plaintiff, it would be clear that there was deliberate suppression of summons. If this be so, the Defendants clearly imposed upon the Court and fraudulently obtained a decree and in such cases the merits of the case can be gone into. Refers to *Vadala* v. *Lawes* (5) and *Abouloff* v. *Oppenheimer* (4).

Babu Bepin Behary Ghose in reply.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This Appeal, in my opinion, must be dismissed. The suit was brought to set aside an *ex parte* decree which had been obtained against a woman of the town for goods sold and delivered to her. That *ex parte* decree was executed and the money was obtained ; and, subsequently, the Defendant in the first suit brought the present suit against the original Plaintiff to set aside the *ex parte* decree. It seems to me that the judgments of the two lower Courts are conclusive on the matter. The Judge found affirmatively that the fact of the previous suit was not known to the present Plaintiff and he also found that the said suit was, in fact, a false suit. On these allegations, it seems to me that the judgment of the lower Appellate Court is correct. The decisions of this Court on the point to which our attention has been invited are the two latest decisions. One, of my learned brother who is now sitting with me and Mr. Justice D. Chatterjee in the case of *Lakhmi Charan* v. *Nur Ali* (1),

(1) I. L. R. 38 Cal. 936 : s. c. 15 C. W. N. 1010 (1911).
(3) 67 L. J. R. Q. B. D. 301 (1898).
(8) L. R. 10 Ch. D. 327 (1879).
(9) (1898) 2 Q. B. 36 at p. 38.

(1) I. L. R 38 Cal. 936 : s. c. 15 C. W. N 1010 (1911).
(4) 10 Q. B. D. 295 (1882).
(5) 25 Q. B. D 310 at p. 318 (1890).

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and the other, of Carnduff and Champman, JJ., in the case of *Mosuful Huq* v. *Surendra Nath Ray* (2). The decision in *Lakhmi Charan* v. *Nur Ali* (1), it is said, is opposed to the decision in *Mosuful Huq* v. *Surendra Nath Ray* (2). In my opinion when the two cases are closely looked at, the two decisions are not opposed to each other: but the two decisions can be reconciled in the same way as the English decisions which have been cited to us can be reconciled. In *Lakhmi Charan* v. *Nur Ali* (1), the findings of fact which are set out in the judgment show quite clearly that the Plaintiff, that is, a party to the suit knew that the case which was put forward before the Court was, in fact, a false one. It was not a case where an application was made to set aside a judgment on the ground that it was obtained by perjury but it was a case of a party to the suit practising a fraud on the Court by putting forward before the Court a case which was a false one. The case in *Mosuful Huq* v. *Surendra nath Ray* (2), as appears from the head-note, only decides that a decree obtained in a suit cannot be set aside in a subsequent suit brought for that purpose on the mere proof that the previous decree was obtained by perjured evidence. That was exactly the point which was decided in *Baker* v. *Wordswarth* (3). As far as I know, nobody ever challenged the proposition that the mere fact that a decree has been obtained by perjury is not a sufficient ground for setting it aside. A different consideration arises where a false case is placed before the Court. We have got the decisions in *Abouloff* v. *Oppenheimer* (4) and *Vadala* v. *Lawes* (5), which show quite clearly that, if the case which was placed before the Court was a false one, the Court has jurisdiction in a subsequent suit to set aside the decree which was obtained by fraud practised on the Court. It seems to me, on the findings of the lower Appellate Court in this case, that the Plaintiff on the previous suit presented a fraudulent case before the Court and that the learned Judge had jurisdiction to set aside that decree. The present appeal, therefore, fails and must be dismissed with costs.

(1) I. L. R. 38 Cal. 936: s. c. 15 C. W. N. 1010 (1911).
(2) 16 C. W. N. 1002 (1912).
(3) 67 L. J. R. Q. B. D. 301 (1898).
(4) 10 Q. B. D. 295 (1882).
(5) 25 Q. B. D. 310 (1890).

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 203 OF 1912.

N. R. CHATTERJEA, J. | WALMSLEY, J.

1913, Heard, 18, 21 and 22, April. Judgment, 4, July.

PRASANNO KUMAR PANJA and ors., Opposite Party, Appellants, *v.* ASHUTOSH RAY, Applicant, Respondent.

Civil Procedure Code, Or. 20, r. 12; Or. 22, r. 10—Limitation Act (IX of 1908), Art. 181—Decree for mesne profits, application for execution of by assignee—Right of assignee to apply for substitution in pending suit, nature of—Application for ascertainment of mesne profits in pending suit, limitation applicable to—Benamdar, *if may apply—Assignee from assignee of party to suit, application for substitution by—Claim for mesne profits if can be transferred—Stranger if may question assignment.*

A durputni *held by three brothers, D, P and R, was sold for rent and purchased by the* putnidar. *One of the three brothers D brought a suit and obtained a decree for the recovery of possession of the*

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durputni *and mesne profits. After D's death his widow got herself substituted in his place and in execution of the decree took possession of the property and subsequently a deed was executed between herself and the two other brothers P and R in terms that the property belonged to the three brothers and she as the widow of the eldest was entitled to two annas and the remaining 14 annas were divided between her and the two brothers in equal shares as also the mesne profits. The* durputni *was thereafter sold in execution of a money-decree and ultimately passed into the hands of one A. On 21st May 1907 the two brothers P and R by a conveyance assigned their share of the costs and mesne profits under the decree obtained by D to M, a* benamdar *of A, and on the 10th June 1907 D's widow by another conveyance assigned her share of the mesne profits and costs to A. On 22nd February 1909 A applied for execution of the decree and the application was admitted by the Subordinate Judge but under orders of the District Judge in appeal the application was returned for amendment on 4th March 1911 and amended on the same day. On appeal the High Court directed that this application presented by A should be treated as an application under Or. 20, r. 12 and remanded the case whereupon the amended application was placed on the record to be dealt with under Or. 20, r. 12 and A was substituted on the record in place of the original Plaintiff:*

Held—*That the application should be treated as having been made on the date on which it was originally presented and that date being within 3 years of the dates of the conveyances assigning mesne profits and costs to A the application was not barred even if Art. 181 of the Limitation Act was applicable.*

That even if the application was considered as having been made on the date on which it was amended the right of the assignee to apply for substitution in a pending suit is a right which accrues from day to day and is therefore not barred by limitation.

That an application in a pending suit for ascertainment of mesne profits is not barred by the three years' rule of limitation contained in Art. 181 corresponding to Art. 178 of the old Limitation Act. The law has not been changed by the new Limitation Act or the new Code of Civil Procedure.

PURAN CHAND *v.* RAI RADHA KISHEN (1) *followed.*

Held (*as to the contention that A could not be substituted when his two assignees P and R were not parties to the suit*)—*That the property being the joint property of the three brothers and the suit having been brought by D as the eldest member of the family he might be taken to have represented the other two brothers also.*

That even if P and R were considered as assignees from D's widow the position was that A was an assignee from D's widow who was a party to the suit with respec to one-third of the property and an assignee from P and R who in their turn were assignees from D's widow with respect to two thirds, and Or. 22, r. 10 was applicable to an application made by a person who has not obtained an assignment directly from a party to the suit but who has obtained an assignment derivatively from a party to the suit.

That a right to sue for damages cannot be transferred but in the present case the claim for mesne profits had already

(1) I. L. R. 19 Cal. 132 (1891).

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merged in a judgment before the assignment and the right under the judgment was assignable although the original cause of action was not.

There is nothing in law to prevent a benamdar *from applying to the Court for ascertainment of mesne profits.*

A stranger cannot take exception to an assignment on the ground of inadequacy of consideration, that being a matter between the assignor and assignee.

BHAGWAT DAYAL *v.* DEBI DAYAL (2) *relied on.*

This was an Appeal preferred on the 29th of April 1912 against an order of Babu M. M. Dutt, Subordinate Judge of Zillah Bankura, dated the 20th of March 1912.

The facts of the case will appear from the judgment.

Babus Umakali Mukherjee, Mohini Mohun Chatterjee and *Peary Mohun Chatterjee* for the Appellants.

Babus Harendra Narayan Mitra, Hirendra Nath Ganguly and *Biraj Mohun Majumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This Appeal arises out of an application by the Respondent, Ashutosh Ray, for ascertainment of mesne profits after being substituted in the place of the original Plaintiff in a suit for possession and mesne profits. The facts are these:—The Appellants who are the descendants of one Raghunath Panja are the *putnidars* of Mehal Lot Arjunbari. It appears that the *durputni* interest in the said Lot was purchased by three brothers, Dhon Krista, Pran Krista and Ram Kalpa, in the name of Defendant No. 1.

(2) I. L. R. 35 Cal. 420: s. c. 12 C. W. N. 393 (1908).

Raghunath sued the Defendant No. 1 for rent of the *durputni* and in execution purchased it himself. Dhon Krista alone thereupon brought a suit on the 25th October 1895, for recovery of possession of the *durputni* and for mesne profits. It was decreed by the Court of first instance on the 23rd November 1896. On appeal the District Judge dismissed the suit. But on second appeal the High Court remanded the case and on remand the District Judge affirmed the decree of the lower Court on the 3rd January 1902. The Appellants thereupon preferred an appeal to the High Court which was dismissed on the 25th May 1904. Then the Appellants preferred an appeal to the Privy Council which was also dismissed on the 15th May 1907. Shortly after the decree made by the District Judge after remand, Dhon Krista having died, his widow Prosanno Moyee got herself substituted in his place and in execution of the decree took possession of the property on the 12th February 1902. After the decree was passed by the High Court a deed (*mimansa-patra*) was executed between Dhon Krista's widow Prasanno Moyee and his two brothers Pran Krista and Ram Kalpa in which it was stated that the property belonged to the three brothers, but that Dhon Krista being the eldest she was entitled to get two annas to which her husband was entitled as the *jesthansa* (eldest brother's share) and the remaining 14 annas were divided between her and the two brothers in equal shares as also the mesne profits. In the meantime the *durputni* was sold in execution of a money-decree. One Mrigendra Nath Mandal purchased 10 as. as being the shares of Pran Krista and Ram Kalpa on the 4th March 1907, and one Haradhan Chatterjee, on the 25th April 1907, pur-

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chased 6 annas as Prasanno Moyee's interest. Mrigendra Mandal sold the interest purchased by him to Haradhan, who in his turn executed a conveyance in favour of Ashutosh in respect of the entire property for a sum of Rs. 14,999, so that Ashutosh claims to be entitled to the entire property. On the 21st May 1907, Pran Krista and Ram Kalpa by a conveyance assigned 10 as. share of the costs and mesne profits under the decree obtained by Dhon Krista to Mrigendra Mandal, a *benamdar* of Ashutosh Ray, for Rs. 4,400, and Prasanno Moyee by another conveyance, dated the 10th June 1907, assigned her share of the mesne profits and costs to Ashutosh Ray for Rs. 4,480. On the 12th February 1909, Pran Krista and Ram Kalpa executed another deed by which the 10 annas share mentioned in the conveyance of the 21st May 1907, was corrected into 10 as. 13 gundas and odd.

On the 22nd February 1909, Ashutosh applied for execution of the decree. The application was admitted by the Subordinate Judge on the 23rd June 1910, but on appeal the Judge sent back the case for a finding whether the application was according to law. On the 28th January 1911, the Subordinate Judge found that the application was not in accordance with law, and accordingly returned his finding to the Appellate Court. On the 22nd February 1911, the Appellate Court sent back the record to the first Court directing the application to be returned to the applicant for amendment. On the 4th March 1911, it was returned for amendment and it was amended on the same date.

On appeal to the High Court it was held that the application was not an application for execution of a decree but was one in a pending suit in order that the final decree for mesne profits may be made therein, and that in fact the application was one under r. 12, Or. XX of the Code. Consequently what the assignee of the Plaintiff ought to have done was to get himself substituted in the suit itself and he ought to have invited the Court to assess mesne profits as directed in the preliminary decree of the 3rd January 1902. It was brought to the notice of the High Court that the decree-holder had carried out the order of the Court and amended the petition which he had originally presented. The High Court then said as follows:—"In order to validate the proceedings it is necessary that the matter should go back to the Court of the first instance, that the application presented by the Respondent should be treated as an application under r. 12, Or. XX of the Code, and that on the basis thereof mesne profits should be assessed by the Court as directed in the original decree of the 3rd January 1902. As the application has been made by an alleged assignee of the original Plaintiff, it would be open to the Court to consider whether the application can be entertained at his instance." On the 15th July 1911, the Subordinate Judge made the following order:—"In accordance with the order of the High Court, dated the 2nd June 1911, the amended application for ascertainment of mesne profits in execution case No. 45 of 1909, is placed on the record of this case to be dealt with under Or. XX, r. 12." Notice was issued to the Defendants to show cause why the applicant should not be substituted on the record in the place of the original Plaintiff and why further proceedings in the case should not go on at his instance. Objections were taken by the Appellants

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but they were overruled by the Subordinate Judge and they have appealed to this Court, and the following contentions have been raised on their behalf.

First, that the application for substitution by Ashutosh Ray not having been made within three years from the dates of the conveyances, namely, the 21st May and 19th June 1907, it was barred by Art. 181 of the Limitation Act: *secondly*, that Pran Krista and Ram Kalpa, two of the assignors, not having got themselves substituted in the suit, Ashutosh cannot be substituted in the suit: *thirdly*, that a claim for mesne profits cannot be transferred: and, *fourthly*, that Ashutosh Ray was not the real purchaser and having regard to all the circumstances of the case, leave ought not to be granted to him to carry on the proceedings for ascertainment of mesne profits.

As regards the first contention it appears that the Court below treated the original application for execution which was filed on the 22nd February 1909 (which was subsequently amended on the 4th March 1911) as the date of the application made in the suit and that date being within 3 years of the date of the conveyances, namely, 21st May 1907 and 19th June 1907, the Court below held that the application was not barred even if Art. 181 was applicable to the case. The order of the High Court does not expressly state, whether the date on which the application was originally presented or the date on which it was amended, should be treated as the date of an application under Or. XX, r. 12 of the Code But if the application for execution of the decree was to be treated as an application for ascertainment of mesne profits under the order of the High Court, we do not see any reason why it should not be treated as an application for such purpose when it was originally presented on the 22nd February 1909. The original application also contained the prayers for substitution and for assessment of mesne profits. Under the circumstances we think that application should be treated as having been made on the date it was originally presented, *i.e.*, on the 22nd February 1909, and that date being within 3 years of the dates of the conveyances, the application is not barred even if Art. 181 of the Limitation Act is applicable. But even if the application in the suit be considered as having been made on the 4th March 1911, on which date the application was amended, we think that the right of the assignee to apply for substitution in a pending suit is a right which accrues from day to day, and is therefore not barred by limitation. So far as an application in a pending suit for ascertainment of mesne profits is concerned, it is not barred by three years' limitation contained in Art. 181, corresponding to Art. 178 of the old Limitation Act (XV of 1877). The Full Bench decision in the case of *Puran Chand* v. *Rai Radha Kishen* (1) is conclusive upon the point, and we do not think that the law has been changed by the new Limitation Act or the new Code of Civil Procedure.

The next contention on behalf of the Appellant is that assuming that an application by the assignee for substitution can be made more than 3 years after the date of assignment, such an application cannot be made when the assignor is not himself a party to the suit. In the present case, two of the assignors, namely, Pran Krista and Ram Kalpa were never parties to the suit. Their elder brother Dhon Krista alone was the Plaintiff and

(1) I. L. R. 19 Cal. 132 (1891).

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on his death his widow Prasanno Moyee was substituted in his place. It is contended, therefore, that the Respondent Ashutosh Ray cannot be substituted when his assignors Pran Krista and Ram Kalpa were not parties to the suit. It appears however that Lot Arjunbari was a joint property of the three brothers, Dhone Krista, Pran Krista and Ram Kalpa: and Dhone Krista being the eldest member of the family brought the suit, and he therefore may be taken to have represented the other two brothers also. The *mimansa-patra* executed by Prasanno Moyee, Pran Krista and Ram Kalpa shows that the property belonged to the three brothers and it appears that the Defendants also admitted the fact in their plaint in Rent Suit No. 7 of 1907. Even if Pran Krista and Ram Kalpa are considered as assignees from Prasanno Moyee, the position is that Ashutosh is an assignee from Prasanno Moyee who is a party to the suit with respect to one-third and an assignee from Pran Krista and Ram Kalpa who, in their turn, are assignees from Prasanno Moyee with respect to two-thirds. We do not think that Or. XXII, r. 10 is inapplicable to an application made by a person who has not obtained an assignment directly from a party to the suit but who has obtained an assignment derivatively from a party to the suit.

The third question is whether a claim for mesne profits can be transferred. A right to sue for damages cannot be transferred: but in the present case the claim for mesne profits had already merged in a judgment before the assignment. The right under the judgment was, therefore, assignable, although the original cause of action was not. The amount of mesne profits had not been ascertained but the judgment declared the Plaintiff entitled to mesne profits, and it only remained to be completed by ascertaining the amount of the mesne profits. We are, therefore, of opinion that the right to the mesne profits under the decree was assignable.

The last question is whether Ashutosh Roy is a real purchaser or merely *benamdar* for the assignors, and whether the assignment was a *bonâ fide* one and for consideration.

The *kobala* executed by Pran Krista and Ram Kalpa purported to be for a consideration of Rs. 4,400 and that by Prasanno Moyee for Rs. 4,486; Rs. 900 is said to have been paid in cash to Pran Krista and Ram Kalpa and Rs. 1,303 to Prasanno Moyee and the balance was to be paid to certain creditors mentioned in the *kobalas* after accurate information of success of the case in the Privy Council was received.

As regards the payment of Rs. 1,303 to Prasanno Moyee there is an endorsement in the *kobala* by the Registrar that the said sum was paid in his presence to her and the receipt thereof was acknowledged by her. Then there is a registered Ekrar by Prasanno Moyee in which it is stated that a portion of the debts assigned over had been paid by the assignee, but that the other creditors having claimed more than the amount assigned for the payment of their debts, the balance in the hand of the assignee, namely, Rs. 1,373-9 was received by her. As for the consideration of the *kobala* by Pran Krista and Ram Kalpa, they admit in their deposition that they received Rs. 900 in cash on the date of the *kobala* and Rs. 1,166 subsequently, and the balance is said to have been paid to their creditors. The learned Subordinate Judge in his judgment has pointed out that the

money said to have been paid by Ashutosh to the creditors exceeds the amount which he undertook to pay. That certainly is suspicious: Ashutosh admittedly has account books and they have not been produced. The assignors were indebted at the time. Ashutosh was the son-in-law of Ram Kalpa. Some only of the debts were mentioned in the *kobala* and a few of them are said to have been paid and the balance of the consideration money is said to have been returned to the assignors on the ground that the creditors refused to accept payment. This story of return of a large portion of the consideration money has not been believed by the lower Court.

It was stated in the *kobala* by Prasanno Moyee that the assignee was to pay the creditors after accurate information of the success in the Privy Council was received. The amount of mesne profits claimed by Ashutosh is about 2 lacs of rupees and a portion of Lot Arjunbari together with the claim for mesne profits and costs of the case up to the High Court and the costs which might be awarded by the Privy Council together with the arrears of rents due from the tenants of Lot Arjunbari and share of crops were purchased by Ashutosh for Rs. 8,800 odd. But the mesne profits have not yet been assessed. The assignors appear to have been in straitened circumstances and the amount claimed by Ashutosh (*viz.* 2 lacs of rupees) probably is a grossly exaggerated one, having regard to the fact that the property itself of which the mesne profits are claimed was valued at Rs. 1,436 only. It is true Pran Krista states that at the time of the sale they estimated the *wasilat* at a lac or a lac and a half rupees. But it appears to have been a mere guess and not an estimate upon any basis, the difference between the two figures being fifty thousand rupees. However that may be, we have to see whether we can refuse to give effect to the assignment.

If the transaction is considered as *benami*, there is nothing in law to prevent a *benamdar* from applying to the Court for ascertainment of mesne profits.

As there are not sufficient materials on the record to show the extent of the entire debts of the assignors, and how far they are secured, we are unable to say whether the assignments were in fraud of creditors. Having regard to the fact that at least a part of the consideration is proved to have been paid and that the assignors admit receipt at any rate of a part of the consideration we do not think that the Appellants can challenge the assignment on the ground that the whole of the consideration was not paid to the assignors by Ashutosh. That is a matter between the assignors and the assignee, and so far as the inadequacy of the consideration goes, that is also a question between the assignors and the assignee (see *Bhagwat Dayal* v. *Debi Dayal* (2), and the assignors have put in a petition to give effect to the assignment.

Under these circumstances we are unable to hold that effect should not be given to the assignment or that his application for substitution should be refused.

The Appeal is accordingly dismissed We make no order as to costs.

Let the records be sent down to the lower Court without delay, if there is no objection.

Appeal dismissed.

(2) I. L. R 35 Cal. 420 : s. c. 12 C W. N. 393 1908).

THE

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Contents.

NOTES.

High Court Long Vacation and other Holidays.

The Council of Judges in England have agreed to the curtailment of the Long Vacation to two months or ten weeks, as it may annually be fixed at the discretion of the Lord Chancellor. But the Judges have imposed a condition that the number of the Judges of the King's Bench Division should be maintained at eighteen. This proposal is evidently directed against the Judges being overtaxed with work by reason of the curtailment of the Long Vacation. We have noticed in a previous issue that the holidays observed in the Calcutta High Court are altogether about six weeks less in the aggregate than in the High Court of Judicature in England. Even after the length of the Long Vacation is curtailed in England, the High Court in England will enjoy much longer holidays than we do here, by reason of the Christmas, Easter and Whitsuntide vacations being much longer in duration than the corresponding vacations here.

With regard to the Long Vacation as observed in the Calcutta High Court we have only one suggestion to offer. If the vacation commences every year on the second Friday or, in other words, about the middle of September, as is provided for in the Rules and Orders on the Original Side of the High Court (see Hechle's R. & O., p. 131), and the Court reopens in the third week of November, junior members of the Bar, Vakils, Attorneys and their clerks, who have to remain on duty till the commencement of the executive Poojah holidays, will get more real respite from work. Business becomes slack after the Dashera and it is only after the Durga Poojah that the classes referred to can avail themselves of the Long Vacation. In this connection we may also mention that a holiday for at least one day should be observed on account of the *Ratha Jatra*, which in Bengal and Orissa is as important and popular a festival as Durga Poojah and the *Dole Jatra* which is certainly of very ancient origin.

Saturday Sittings.

We have always been opposed to Saturday sittings. We are glad to observe that the legal journals in England are also of the same opinion. In fact it is being said that the Saturday sittings are merely observed in form and hardly any important business or progress is made on that day. We have always objected to Saturday sittings on the ground of costs being incurred by parties without any corresponding progress being made at such sittings. The Judges and the members of the Bar also avail themselves of an off-day in the week for writing judgments or reading the papers. But in exceptional cases such as pending criminal trials or matters of urgency a departure from the rule is certainly commendable.

Contempt of Court.

We have always been of opinion that the English law of contempt has to be accepted in this country with considerable qualifications. In England even civil cases are tried in the King's Bench and the Probate and Divorce Divisions before a jury. Comments therefore on pending cases which are likely to prejudice a party in the eyes of a jury come under the category of contempt of Court. But when a case or an appeal is being heard before a Judge or bench of Judges, they cannot be supposed to pay any heed to any matter or comment published in the newspaper press since they are

supposed not to take notice of any matter outside the record or not disclosed at the trial The contingency of prejudicing the trial in the *Amrita Bazar* case (17 C. W. N. 1253), therefore, seemed to us to be too remote and the decision of the Calcutta High Court in that case, although it proceeded on other grounds as well, seemed to us to be unexceptionable on this ground. An article in the English *Law Journal* of the 7th February last commenting on the recent committal of the Managing Director of a Society paper for comments in connection with a pending divorce proceeding, takes a very sensible view of the law relating to contempt. We have taken the liberty of reproducing the article in another column especially as the view expressed there is in substantial agreement with the view often expressed by us in these columns.

The South African deportation is continuing to engage the attention of the legal profession in England and the following extract from the English *Law Journal* fore-shadows some litigation in its connection at which some interesting questions of constitutional and civil law are likely to come up before the English Law Courts for decision.

The South African Government is cheerfully engaged in raising as many as possible of the yet undecided points in constitutional law, and to the jurist many fascinating problems arise out of its latest action. The deportation of ten Labour leaders, without trial under martial law or under the ordinary law of the country, actually carried out by decree of the Executive while a judge had cognizance of this proposed illegal step is certainly a very grave infringement both of constitutional law and of the respect due to civil Courts. But, so far as the South African Government is directly concerned, no doubt a local Act of Indemnity passed by the Union Parliament at the Cape will relieve them of all liability. But how stands it with the owners and master of the good ship *Umgeni*, which took the exiles on board and is carrying them on a journey to London? This acceptance of the agitators on board against their will is an assault and false imprisonment; as such it is both a tort and a crime. The *Umgeni* is a vessel of the Natal Line and flies the English flag; in other words, she is British territory and, as was decided in *Davidson* v. *Hill*, only a few years ago (1901), the English Courts have jurisdiction to try all torts committed on board such a ship. If, then, the master and his owners are sued in England, have they any answer? A local Act of Indemnity cannot protect the master except so far as his illegal actions took place in a South African port or within the territorial waters—*i.e.*, three miles off the South African shores; for on the high seas the Union Parliament has no jurisdiction. But the false imprisonment is a continuing tort; it is not completed with the first act of assault, but with the final act of detention preceding release. Hence a tort has been committed on the high seas, and so is outside any Act of Indemnity of the Cape Legislature. Again, can the master of the ship plead duress—that his hand was forced by the South African Government? Duress is a question of fact, and, according to the *Times*, there is reason to believe that the ship was specially chartered to the Cape Government by its Natal agents for this service—in which case any plea of duress is beside the question. But even in the absence of such an agreement, and even if the master acted under pressure, such conduct as is suggested on the part of the South African Executive seems scarcely 'duress' sufficient to excuse a tort or a crime. The whole situation promises a series of interesting problems in practical jurisprudence for the edification of our Courts.

HINDU LAW *V.* HINDU SOCIETY.

We have frequently had occasion to complain of the rigidity imparted to Hindu law by the manner in which many of its rules have been interpreted and enforced by Anglo-Indian law Courts, since the establishment of British rule in India. The distinction between rules of law proper and directions of merely ritualistic significance was until recently not clearly apprehended, and some rules of the latter description hardened into rules of law before the Courts became accustomed to distinguishing rules which are merely "recommendatory" from those which are "mandatory." Nowhere in Hindu law has this process operated to greater prejudice to the Hindu community than in the law relating to intermarriage amongst castes. Although ancient Indian history is replete with instances of such intermarriages and although the only Mahomedan dynasty which endured in India for any considerable period owed its strength chiefly to its intermarriage with Hindu royal houses, these instances have failed to impress themselves as precedents in Anglo-Indian Jurisprudence, and no Anglo Indian Court has had the boldness, in the absence of special customs, to recognise the legality of intermarriages between Hindus and Mahomedans or even between members of the principal Hindu castes. Marriages amongst sub castes have been recognised only with reluctance. Thus it has come to pass that at the very moment when western education working on individuals within the castes is making for further expansion and tending to snap the bonds of orthodoxy, the decisions of the law Courts have had the opposite tendency of tightening these very bonds from outside.

The position thus created is an untenable one and Hindu society has only been paving its way to annihilation by waging a war against time and tide. It would not even so much as suffer those who may marry outside their own caste call themselves Hindus. It may socially outcaste them but what social, legal or moral right has it to deny to such couples their just right of being called husband and wife? It is contrary to all rational principles of morality, law and justice that when persons, between whom no question of consanguinity or prohibited degree can possibly arise, become wedded even by the most solemn and sacred rites of matrimony, they should be condemned to a life of concubinage and their children branded with the ignominy of illegitimacy, because they are supposed to offend against some fanciful rules of Hindu social system which in

the past were more respected in their breach than in their observance. Let those who wish to make out that the modern Hindu law is something unchangeable like the law of the ancient Medes and Persians persevere in their own suicidal isolation. But what right have they to put those who happen to differ from them outside the pale of civil law and deny them even the most elementary and fundamental civil rights? Had our forefathers been as short-sighted as the wiseacres of to-day, the dissenting Hindu sects, such as the Vaisnabas in Bengal or the Sikhs in the Punjab, would have long before this been lost to the Hindu community, and that would have obliterated the glory of Hinduism from the face of the earth.

But though the blind and unreasoned orthodoxy of modern Hindu society may die hard and deliberately discard from it the vitalizing forces of nature and its moral laws, yet it is powerless to beat back the world-force which invests it on all sides and sooner or later, (and the sooner the better), it will have to make truce with the latter, by the recognition of its dissenting members' civil rights, for its very existence. There is enough of internal evidence to show that it is already powerless to resist the forces operating more or less slowly but surely within society itself.

Bhaiya Sher Bahadur v. *Bhaiya Ganga Bukhsh*, the Privy Council case recently reported in our columns (*ante*, p. 401), is an instance in point. There a Hindu of position and influence, a Raja of Chhatri caste who had a son born to him of a Mahomedan mistress, formed a resolution to get him admitted into society as a Hindu and as the first step towards accomplishment of the scheme, arranged that the infant "got his suck from Hindu women." The boy was given a Hindu name (Jang Bahadur Singh) and brought up in all respects as a Hindu and when only 15 years of age solemnly married according to Hindu rites to a lady belonging to a very high caste Chhatri family. The son too appeared to have wholeheartedly followed up the father's efforts by making a parade of his Hindu predilections. He ostentatiously wore the *tilak* on his forehead, and regularly participated in the numerous rites and ceremonies of the Hindu religion. He wore the sacred thread and even "kept a Hindu cook to cook his food." But inspite of all this, he yielded to the weakness of his Hindu father, by himself keeping a Mahomedan mistress by whom he had several illegitimate issues.

By his Chhatri wife he had a son, and it is noteworthy that when the lady died he performed her obsequies according to Hindu ceremonies. He married again and this time too a Chhatri wife by whom he had a daughter. The Raja in whose lifetime all these children were born, made a testamentary disposition of certain properties for the maintenance of Jang Bahadur (whom he described in the document as "born of an unmarried *mahal*") and his "aulad"—an expression which, the Courts in India and the Privy Council agreed, meant "legitimate issue." Therefore the question arose whether Jang Bahadur's son Gunga Bukhsh by the Chhatri wife was legitimate and as such entitled to the legacy on his father's death or whether Gunga Bukhsh was only entitled to share equally with Jang Bahadur's other children by his Mahomedan mistress.

The Subordinate Judge, himself a Hindu, boldly grappled with the question, but the difficulties he had to face might well have made a less courageous heart than his quail. The marriage being in form a Hindu marriage, the two parties to it, according to the rules laid down by the Courts, had to be found to be Hindus, and not merely Hindus but Hindus belonging to the same caste. Was Jang Bahadur a Hindu when he married? The Subordinate Judge held, no doubt, upon the authority of the researches embodied in the works of Sir Alfred Lyall, Sir George Campbell, Sir Monier Williams, Col. Todd of Rajasthan fame and other writers (direct judicial authority being wanting) that "Hindu society is a vast hospitable mansion which has opened its doors to all comers." Having regard to this and to the laxity in matrimonial alliances amongst the Chhatris in particular, he found that Jang Bahadur had by treatment and user, so to speak, succeeded in becoming a Hindu. But he had still to get over the principle laid down by Mr. Justice Banerjee in his book on Marriage and Stridhan that Hindu law has obligatory force only on those who are Hindus by birth as well as by religion. Jang Bahadur though he was suckled by Hindu foster mothers was not born a Hindu. In fact according to Mahomedan law he was ushered into the world as a Mahomedan.

One other difficulty which apparently faced the Subordinate Judge was that of assigning Jang Bahadur to some caste. But this he disposed of by stating on the authority of Col. Todd and other historians that even the proudest of the Kshatriya princes of the Udaipur family, the oldest of all the royal families in the world, needed a Christian princess to revitalize its blue Aryan blood. Who amongst the cultured Hindus of to-day would seriously dispute the Scythian origin of Rajputs and the intermixture at any rate of non-Hindu and even Mahomedan blood amongst them? The Kathiwar princes descended from Mahomedan mothers to this day are regarded as Chhatris by caste and freely intermarry in Rajput or Chhattri families. The learned Subordinate Judge was in such view thoroughly justified in discarding scholastic refinements and viewing facts boldly in the light of "justice, equity and good conscience." In the result he very properly held that the marriages

of Jang Bahadur with his Chhatri wives were legal Hindu marriages and that the law of his choice, the Hindu Law, applied and the son of this marriage succeeded to his properties according to so much of the Hindu law as was applicable to the case. The view of the learned Subordinate Judge thus marks an advance over that of Mr. Justice Abdur Rahim who decided in a Madras case that a reconvert from Christianity to Hinduism became a Sudra and that her marriage with a Hindu Sudra was valid.

It is to be regretted that both the Judicial Commissioner's Court and the Privy Council found it unnecessary to record any definite decision in this connection. They held that by his Will, the Raja meant to designate as beneficiary that one of the issues of Jang Bahadur whom he wished to be considered as his legitimate issue. It is satisfactory to find however that their Lordships' inclination was distinctly in favour of holding with the Sub-Judge that a person not born a Hindu may become a Hindu and may validly contract a marriage according to Hindu rites with a person born a Hindu. On this point their Lordships observed: "Sir Robert Finlay insists that the law for many centuries has been that a Hindu must be born not made, and he cited several authorities in support of that proposition. On the other hand, the treatises referred to by the Subordinate Judge appear to tend in an opposite direction and the facts of this case show that on this matter of marriage the rules both of Hinduism and of caste were not in this instance at all events, strictly applied." Referring to the evidence of several Hindu witnesses who deposed that they would not eat with Jang Bahadur, or take betel leaves from him or recognise him as a member of that caste or of the Hindu religion—and to the argument that the Subordinate Judge had not paid sufficient attention to this evidence, their Lordships observed that from the mere fact that the Subordinate Judge had commented on this evidence at great length, it was unreasonable to conclude that he had not fully considered it. Taken with the facts found in the case their Lordships' view, though inconclusive, is yet strongly in favour of the Subordinate Judge's view that Jang Bahadur's marriage with a Chhatri lady was a valid marriage and the issue of the marriage was a legitimate one as would appear from the following extract from their Lordships' judgment:—

"No doubt the Maharaja did not attend the ceremony himself. He allowed certain priests to perform for him those ceremonies properly performable on such occasions by a father, but the marriage cannot but be regarded as a somewhat bold attempt to force, as far as possible, the son's entrance into the ranks of a high (twice-born) caste, and it might well be that the father, as the Subordinate Judge thought, may have absented himself from the ceremony from motives of prudence. On the other hand it is difficult to believe that all the parties concerned, Sheo Dial with his own sons and his daughters to get married, the Maharajah with his position and distinction, the priests with their duties to their religion and office, and all those who assisted at the ceremony with their notions of what was due to their creed, would have promoted, or taken part in an elaborate public function if they knew that it could at best create only a relation of permanent concubinage, without hope or prospect of elevation into a worthier and more respected state."

Their Lordships' opinion on the legitimacy of the issue of this marriage was also, reading their Lordships' judgment between the lines, distinctly in favour of the view advanced by the learned Subordinate Judge. If Ganga Bukhsh had been named by the testator or if there was anything definite in the Will to point to him and to no one else, we would have been disposed to regard this decision as being based on a mere construction of a Will. But their Lordships say that the only indication given as to who was to succeed Jang Bahadur as proprietor had to be ascertained by the expression "on whom the right may devolve." The estate could not possibly devolve except on a legitimate issue. The use of the expression "aulad" also meant as much. So the only answer to Sir Robert Finlay's argument was to point to somebody who in the contemplation of the Hindu law would be legitimate. The intention of the testator could not make one, in the eye of the law, legitimate if he was not so in fact. But their Lordships held that as a matter of fact "the testator must have had in his mind some law or rule which would apply to fix the succession. What law could this high caste Hindu possibly have had in mind for such purpose other than the Hindu law? That law, however, in the matter of succession to property, takes no account, in the three higher classes, of illegitimate descendants." Thus in fact their Lordships' decision amounts to declaring Gunga Bukhsh as legitimate, and we have no hesitation in endorsing it as a very just and proper decision.

It should be observed in conclusion that Ganga Bukhsh, the son of Jang Bahadur, and his step-sister by Jang Bahadur's second Chhatri wife had, long before the case came before the Courts, been accepted as good Chhatris and had without objection married into respectable Chhatri families. Their status as lawfully born Chhatri Hindus had been established in fact however it may be open to question from the point of view of what is supposed to be strict law. And the case of Ganga Bukhsh is not singular in this respect. Cases of this kind only illustrate with greater force the modern theory of jurisprudence that the "law as it is should always give way, as it

does give way in every progressive society, to law as it should be."

What we have always maintained with regard to cases of this nature is that if parties purport to marry in Hindu form and intend that the issues should be treated as legitimate and that in the matter of bequest or succession they should be governed by rules of Hindu law, the Court should hold, as it has in this case, that they are so governed. Hindu society may or may not admit them within its sacrosanct precincts and the members of that society may or may not intermarry or interdine with such dissenting members but it can advance no valid reason for puttiug them outside the pale of civil law. We also believe it to be consonant with the principle of toleration, which has been characteristic of Hindu society at all times, not to deny them the title of Hindus although it may keep them at arm's length in the matter of social privileges for a time and that too only until they have formed a class by themselves or been admitted by any of the recognised classes as belonging to it. But the denial of such social amenities by a section of the society would certainly be no justifiable ground for withholding from them the most elementary and fundamental civil rights to which they are entitled as citizens.

CONTEMPT OF COURT.

Great uncertainty has long prevailed as to the precise limits of the offence known as contempt of Court when committed by the publication in the press of matter affecting the trial of a pending action. It is generally agreed that the publication of comments which tend to prejudice the fair trial of any action is a serious contempt, but three points remain in great doubt. First, as to what trials the principle extends. Criminal trials, of course, are protected; so are civil trials by jury whether in the King's Bench or the Probate Division of the High Court, but how far comment is forbidden upon pending litigation in Chancery or before a judge, unassisted by a jury, in other Divisions, is still not a settled point. On an application last Tuesday in the case of *Leslie-Melville* v. *Leslie-Melville, Platt and Fitzwilliam*, a pending divorce trial, Mr. Justice Horridge (sitting as an additional judge of the Probate, Divorce and Admiralty Division) applied this principle to a cause entered in the special jury list of the Divorce Court. Secondly, to what extent is the publication of collateral matter about a party to a pending action, without direct reference to the subject matter of the litigation, a contempt? In the case in question a society newspaper published a 'smart paragraph' about a peer well known to be the co-respondent in the pending divorce suit, and gave a picturesque account of his career certainly calculated to impress any juryman who happened to read the article with an unfavourable view of that nobleman's moral standard. Mr. Justice Horridge held that such an article, being undoubtedly calculated to prejudice the fair trial of the case, amounted to a serious interference with the course of justice, and was a contempt. Again, it is well settled that in cases of this kind there must be a serious, and not merely a technical, interference with justice before the Court will intervene and treat such interference as a contempt (per Lord Justice Collins in *Hunt* v. *Clarke*, 58 L. J., Q. B. 490). The liberty of the Press would be unduly fettered if frivolous applications were encouraged in merely nominal contempts. But it is not always easy to say what is a serious interference with the course of justice. In the present case the co-respondent held a high station in society, so that comments upon his pending case would naturally be widely read by the public at large, including possible jurymen. And Mr. Justice Horridge, taking a most serious view of the contempt, committed the director of the paper, whom he regarded as personally responsible for the article, to prison *sine die*, until he should satisfy the Court that he had purged his contempt.—The (English) *Law Journal*.

CURRENT INDIAN CASES.

(CIVIL.)

Contract of sale by certificated guardian of minor's property.

BABU RAM *v.* SAIDUNNISSA, I. L. R. 35 All. 499.

The Defendant entered into a contract with the certificated guardian who had obtained the District Judge's sanction to the sale to purchase certain properties belonging to the minors but failed to carry out the contract and was sued by the certificated guardian for breach thereof

Held—That the certificated guardian could enter into a valid contract for sale of the minor's immoveable property. The ruling in *Mr. Sarwarjan* v. *Fakruddin Mahomed Chowdhury*, I. L. R. 39 Cal. 232, did not apply to guardians appointed by statute.

Family settlement—Registration

KOKIA *v* PEARI LAL, I. L. R. 35 All. 502.

The brother and the widow of a deceased person jointly applied to the Revenue Court that half of the property of the deceased should be recorded in the name of each. The brother sold away his share and the widow sued to recover that share,

Held—That the application in the Revenue Court was a family settlement and did not require registration and it was evidence of the agreement between the parties.

Security for rent—Hypothecation of property.

SRI KISHANDAS *v.* YAKUB KHAN, I. L. R. 35 All. 505.

The Defendants were in possession of the property leased to them by the Plaintiffs. To secure the rent which he agreed to pay for such use and occupation they hypothecated their property. The Plaintiff sued to enforce the hypothecation.

Held—That the suit was maintainable.

Civil Procedure Code (1908), Or. 34, r. 14—Attachment of equity of redemption.

HARIBANS *v.* SRI NIWAS, I. L. R. 35 All. 518.

The mortgagees under a usufructuary mortgage obtained a decree for possession as stipulated in the mortgage and for costs. In execution of the decree for costn they applied for attachment of the equity of redemptios of the mortgagors in respect of the said property.

Held—That the attachment did not contravene Or. 34, r. 14, C. P. C.

Registration Act—Deed transferring decree of compulsorily registrable.

MUMTAJ *v.* SRIRAM, I. L R. 35 All. 524.

A deed transferring a decree of sale of mortgaged property is not compulsorily registrable. 6 C. W. N. 5 followed.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Gray* v. *Marie Correllie.* Before the MASTER OF THE ROLLS AND LORDS JUSTICES SWINFEN EADY AND PHILLIMORE. 20th November 1913.

Infringement of a copyright—Great proportion of similarities not due to chance coincidences—Combination of ordinary materials may be original.

This was an appeal from an order of Sargant, J. The Appellant was the composer of a play named "The People's King" which the Respondent contended was an infringement of her novel "Temporal Power," and the Court below held that it was and granted an injunction. The Appellant challenged that finding and urged that a number of his incidents were really original. The appeal was dismissed. In the course of his judgment the MASTER OF THE ROLLS said :—

The learned Judge (Sargant, J.) in a clear and exhaustive judgment, had dealt with six incidents which were to be found in the sketch and also in "Temporal Power," and said that not only were they to be found in both works, but that there were most remarkable similarities or identities of language between the two documents. After going through these matters in detail the learned Judge had said that there was nothing very striking or original in either the novel or the sketch.

"But the combination of these ordinary materials may nevertheless be original, and when such a combination has arrived at a certain degree of complexity it becomes practically impossible that it should have been arrived at independently by a second individual. . . . In my judgment the similarities and coincidences in this case are such as, when taken in combination, to be entirely inexplicable as the result of mere chance coincidence."

He accepted that passage as an unanswerable statement of the position in the present case, and he thought that they must approach this case on the footing that the Defendant Gray had the book "Temporal Power" either under his eyes or in his memory when he wrote his sketch. No doubt it was still open to the Defendant to say that he had not infringed the copyright, because he had only taken from the book something which was not the subject of copyright; but when it appeared that not merely one, two, or three stock incidents had been used, but a combination of stock incidents, every one of which had been taken from the Plaintiff's book, it would be narrowing the law beyond what was reasonable to say that the Plaintiff was not entitled to be protected.

Submit was found that a series of incidents in combination had been taken from the Plaintiff's book his Lordship thought she might obtain an injunction, even though not one sentence used in the sketch was similar to one used in the book. The result of the new Act was to give protection not merely to the form of the words in a novel but to the situations contained in it. He did not, however, accept the view that all the situations taken were stock situations. He thought that some of them were very original indeed, but it was not necessary to go into that. The mere fact that in a sketch of six scenes there were five scenes which were also in the Plaintiff's book and were not found in any other book was quite enough to justify a decision that the case came within sec. 1 of the Act.

Messrs. Clauson, K. C., and Centeno for the Appellant.

Messrs. Romer, K. C., and Macgillivray for the Respondent.

B. D. *Appeal dismissed.*

KING'S BENCH DIVISION.—*Dobson* v. *Horsley and another.* Before MR. JUSTICE RIDLEY. 6th December 1913.

Landlords' liability for injury caused by letting defective premises.

The Plaintiff's father rented a room on the ground floor. There were some railings outside which were defective owing to gaps. The Plaintiff fell down through a gap and was injured. The jury found that the railings were dangerous at the time of letting but there was no finding that the landlord was given notice to repair them. The learned Judge dismissed the claim. He said—It had been distinctly established by *Cavalier* v. *Pope*, 1906, A. C. 428, that in cases where there was a letting between people without any obligation to repair, an action could not be brought in respect of damages accruing to persons owing to the improper condition of the premises except by those who were parties to the agreement. That was established beyond the possibility of doubt. It had been argued on behalf of the Plaintiff that there was an exception to this rule, and that *Cavalier* v. *Pope* (*supra*), did not apply where there was some part of the premises which was kept under the control of the landlord. and in such cases there was an obligation on the part of the landlord for the benefit of all the tenants in the house that he should keep that portion of the premises in good repair and there being that implied obligation, he was answerable as in the present case for damages happening to people because he had not fulfilled it. The authority relied on in support of that proposition was *Miller* v. *Hancock*, (1893) 2 Q. B. 177. After considering the decision in *Hugget* v. *Miers*, 24 T. L. R. 582, and the observations by

ord Atkinson in *Cavalier* v. *Pope* (*supra*), he had come to the conclusion that he ought to decide n favour of the Defendants.

Mr. Ashby for the Plaintiff.

Mr. Lane for the Defendants.

B. D.

PROBATE AND MATRIMONIAL COURT.

–*Cleland* v. *Cleland and McLeod.* Before MR. USTICE BARGRAVE DEANE. 5th December 1913

Case when the Court ought to exercise a discretion in favour of an erring wife seeking divorce.

This was a wife's petition for divorce on the round of very gross misconduct. The husband eplied by charging the wife with adultery. The Court found both parties guilty of adultery. But he learned Judge nevertheless exercised his discretion in favour of the wife and pronounced a ecree *nisi* for divorce. His Lordship said—I m of opinion, after carefully considering the hole of the facts, and especially the wife's evience, that I am justified in giving her the relief nd pronouncing a decree. I do it on this ground, hich I think is the only sound material ground n which discretion can be exercised; although is quite true that my discretion is unfettered, ut yet still the Judge has to go into the evidence mewhat carefully to arrive at the material rounds in each case on which he exercises that iscretion. There can be no fixed rule; it must every case depend upon its facts. In this case am satisfied that but for the husband's gross isconduct the wife probably would not have llen. She was subjected to such conduct on s part that I believe her sense of duty was eakened, and she was rendered absolutely miserle and reckless. At that time she knew the Respondent; he deeply sympathized with her, d probably through that sympathy the trouble me which ended in her fall. I think the whole it is due to the husband's misconduct.

Messrs. F. E. Smith, K. C., and Spokes for the e.

Mr. Willcok for the husband.

B. D.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

E LORD CHANCELLOR. D DUNEDIN. D PARKER. D SUMNER. 1914. 5, February.	MOHUNT KUMARANAND GIRI GOSWAMI *v.* SRI NATH PARBAT and others.

Privy Council—Dismissal of appeal for non-protion—Restoration, application for.

his was an applicatian for restoration of an al and for permission to prosecute it in *forma pauperis.* The Petitioner sued as a *pauper* for possession of an estate alleging himself to be the disciple of a deceased Mohunt. The Court of first instance rejected his claim. He applied to the High Court of Calcutta for permission to appeal in *forma pauperis* under sec. 592, Civil Procedure Code, 1882. The Court permitted him on condition of his depositing security for the Respondents' costs. Subsequeutly on the Petitioner's application for review the Court rescinded the order altogether and ruled that it was not a case in which the Court would permit him to appeal in *forma pauperis.* The Petitioner thereupon asked for a certificate to appeal to His Majesty in Council against the said orders, and the same was granted to him. After the arrival of the record the appeal was dismissed for non-prosecution.

Mr. Lowndes (with him *Mr. J. M. Parikh*) submitted that the Petitioner, who was a *pauper*, could not be called upon to furnish security and that the conditional permission and its subsequent withdrawal were bad.

Their Lordships, without hearing Counsel (*Mr. Bhugwandin Dube*) for the Respondents, rejected the petition.

B. D. *Application refused.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD AND SHARFUDDIN, JJ. IN THE MATTER OF THE PETITION OF CHANDRA KUMAR DAS AND ANOTHER, 2nd Party, Petitioners. 23rd February 1914.

Criminal Procedure Code (Act V of 1898), sec. 145—Excess land shewn in Commissioner's map not covered by proceeding—Land outside proceedings not affected—Further identification necessary—Directions by High Court—Omission to make tenants in possession parties to proceeding, effect of—Tenants, possession not affected.

On the report of the Sub-Inspector of Kalia in Jessore, dated the 21st March 1913, proceedings under sec. 145 were drawn up by the Sub-Divisional Magistrate of Narail making one Jahara Debya as 1st party and the Petitioner as 2nd party. The subject of dispute as stated in the Police report was "for the possession of Jaleswari Beel in Kismat Bagberia as alleged by 1st party and Tapsidanga Beel in Kismat Uthali as alleged by second party." The 1st party held lands called Beel Jaleswari and the 2nd party held lands called Tapsidanga. The lands of both parties lay side by side being on the west and east respectively.

In the proceeding the boundaris of the disputed land were given and its area was stated to be about 3 *khadas*. The 1st party stated in her written statement that she had been all along in possession of the land covered by the proceeding by virtue of a Civil Court decree passed about 50 years ago. By that decree it appeared that the right of the predecessor in interest of the 1st party to 3 *khadas* of land in Mouzah Tapsidanga was declared and it was ordered to have the Thak map of Mouzah Tapsidanga (which showed the above 3 *khadas* of land to be included in that mouzah) corrected which however was not done.

The second party stated in their written statement that the boundaries given by the 1st party of the lands in dispute as mentioned in the proceeding were incorrect.

A Pleader Commissioner was deputed by the Sub-Divisional Magistrate to hold a local investigation and by a reference to the report and map submitted by him it appeared that the Commissioner had shewn the disputed land to be more than 9 *khadas* much in excess of the area of the land covered by the proceeding which was stated to be only 3 *khadas*. The Commissioner measured the lands in dispute by reference to the boundaries of Mouzah Tapsidanga according to the statement contained in the thak.

Both parties stated in their written statements that they possessed their lands through their tenants who were actually in occupation of the lands and the 2nd party further stated that the tenants not having been made parties the proceedings could not go on.

The Sub-Divisional Magistrate on the 23rd December 1913 passed an order declaring possession in favour of the 1st party. What was stated in that order in respect to the lands in dispute was simply "concerning certain lands in dispute covered by the proceedings."

Against the above order the 2nd party moved the High Court. It was contended *inter alia* that the Sub-Divisional Magistrate acted without jurisdiction in making the order in respect to lands in excess of those referred to in his proceedings and in not making the tenants in actual occupation parties to the proceeding. The Petitioners prayed for the issue of a Rule why an order should not be passed by the Sub-Divisional Magistrate to demarcate the land of about 3 *khadas* covered by the procceding, therby excluding the excess lands not covered by the proceeding.

'Their Lordships passed the following order:—

"The findings of the Magistrate appear to us not to be open to revision But we would point out say with reference to a report of the Pleader Com- unprotected." to which our attention has been drawn Subdiv. was found cannot affect any land outside the gs, and that if the lands which in the proceedings were stated to be about 3 *khadas* have now been measured as 9 *khadas* it would be necessary to further identify the lands in the proceedings. The breach of the peace is clearly shewn. The tenants in possession are not in any way affected and there is a clear finding as to possession as between two zemindars which is all that is necessary.

"The application is rejected."

Babus Atulya Charan Bose and *Hemendra Chandra Sen* for the Petitioners.

CIVIL APPELLATE JURISDICTION. Before COXE AND D. CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE No. 2669 OF 1911. HAJI HEYAT BAKSH, Appellant *v.* MUSAMMAT LACHMANIA AND OTHERS, Respondents. Heard, 6th February. Judgment 17th February 1914.

Way, right of, whether of public or appertaining to a certain section of the public—Special damage when to be proved.

The appeal arose out of a suit brought by 1[illegible] persons owning houses and property in a certain *mahalla* for a declaration that a certain way was a public (literally, common) way for the egress and ingress of the people of the *mahalla* for the removal of certain obstructions placed by Defendant No. 1 in collusion and concert with the other Defendants and for an order upon them to repair a bridge at one end of the way. Along with the plaint was filed an application under Or. 1, r. 8 of the Code of Civil Procedure, and an order was duly made and notice served.

The Court of first instance dismissed the suit holding that no public way had been made out and that in any case, no special damage had been shown as incurred by the Plaintiffs.

There were two appeals against that decision one by Defendant No. 4 and another by the Plaintiff, and both the appeals were decreed.

The Defendant No. 1 appealed to the High Court.

Held, that the question whether the disputed way was one in which the rights belonged [illegible] certain portion of the public or one existing for the benefit of all the subjects of the Crown, was a question of fact that should be decided on evidence. If the road came under the former description, no special damage need be proved; and if under the latter, then the Court should find whether special damage alleged in the plaint was proved or not.

Babu Umakali Mukherjee and *Moulvis Mohamed Ishaq, Soughat Ali, Mohamed Mustafa Khan* and *Khursed Hossein* for the Appellant.

Dr. Dwarka Nath Mitra, Babus Baikunth Nath Mitter, Nalini Nath Nath Sen and *Harihar Persad Singh* for the Respondents.

Appeal allowed;
A. T. M. *Case remanded.*

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD SHAW. LORD MOULTON. MR. AMEER ALI. 1913, Heard, 4 & 8, December. Judgment, 8, December.	T. S. NATCHEAPPA CHETTY and others, Appellants, *v.* THE IRRAWADDY FLOTILLA COMPANY, LIMITED, Respondents.

Transfer of Property Act (IV of 1882), sec. 137—Document of title, "mate's receipt" for goods shipped by inland steamer, if negotiable—Bill of lading—Assignment in usual form—Notice to shipowner of assignment—Rule and practice of shipowner intended for his own protection, "mate's receipt" if—Contract implied—Endorsee of "mate's receipt" if may sue shipowner for damages for delivering goods to shipper without taking "mate's receipt"—Tort—Breach of duty.

A trader who was being financed by the Plaintiffs (a firm of money-lenders) shipped a consignment of paddy by a steamer belonging to the Defendants who were a company of inland waters carriers, getting from the latter's agent a signed receipt described in the document itself as a "mate's receipt" and being in the following form: "Received from A the undermentioned quantity of paddy to be forwarded by steamer X., with liberty to tranship to other vessels." The document bore a note that risks of certain descriptions were to be borne by the shipper. Amongst the rules issued by the company in the course of their business was one which provided that "mate's receipts must be given up before discharge is allowed to commence, or in the event of mate's receipt not having come to hand the company's usual guarantee must be signed." The company made over the consignment at the port of delivery to the shipper without taking the mate's receipt, which the shipper had in fact previously endorsed and delivered to the Plaintiffs. Plaintiffs sued the company for damages, claiming title in the goods under the endorsed "mate's receipt" and also for tort. Before the Judicial Committee Plaintiffs' counsel admitted that the document was not a bill of lading and negotiable as such and that it would not negotiable if it was only a "mate's receipt:"

Held—*That it was not a document of title of any other description within the meaning of sec. 137 of the Transfer of Property Act, but a simple ordinary receipt for goods. The rights of the shipper in the goods would have to be assigned in the usual form and the assignment must be accompanied by notice to the shipowner charging him with the fact of assignment and making him responsible to the assignee instead of to the original shipper.*

That the company's rule requiring production of the "mate's receipt" before delivery merely set forth a mode of business by which the company sought to protect themselves against their customers and which it was open to them to follow or not in any case, and it did not impose upon them an obligation not to deliver the goods except on production of the "mate's receipt" or otherwise unless a guarantee could be obtained.

That having regard to the facts found in the case, viz., *that the general course of business was open to exception at the will of the traders, the question whether the public at large were apprised that they too were protected by the manner of negotiating the "mate's receipts" did not arise.*

That the Plaintiffs' action as based on any contract embodied in the document or implied from any course of business failed, as also their action on an alleged tort as the evidence in the case did not point to

any failure of duty on the part of the company.

This was an Appeal from a Judgment delivered by Fox, Chief Judge and Twomey, Judge of the Chief Court of Lower Burma, who reversed the judgment of the Additional District Judge of Henzada.

The facts of the case sufficiently appear from their Lordships' judgment and from that of the Chief Court which was as follows :—

"The Plaintiffs advanced monies to the first Defendant on promissory notes and under an agreement by which the money was to be employed in purchasing paddy which was to be stored in a godown at Dounggyi under the control of the Plaintiffs. The agreement contemplated that the paddy might be taken to Rangoon for sale, and in such case it was stipluated that a receipt should be given to the Plaintiffs for what should be taken and that on the arrival of it at Rangoon money for it should be paid to the Plaintiffs and then the receipt should be delivered up to the first Defendant.

"The first Defendant's agent at Dounggy induced the Plaintiffs' agent to allow the paddy to be shipped to Rangoon in boats of the second Defendant Company in the name of the first Defendant as shipper. Eleven boat loads in all were sent. In respect of eight boat loads the first Defendant paid monies to the Plaintiffs' nominee in Rangoon. In respect of the cargoes of the last three boats, the first Defendant's agent endorsed and delivered to the Plaintiffs what purport to be Mates' Receipts for the cargo loaded. The first Defendant sold the cargoes to a firm of millers, obtained delivery of the paddy from the second Defendant Company without producing to it the so-called Mates' Receipts its agent had given for the paddy, and delivered it to the millers, but paid nothing to the Plaintiffs out of what he received for the paddy.

"At the time when the suit was instituted the first Defendant owed the Plaintiffs over Rs. 21,000 in respect of their advances.

"The Plaintiffs sued him for the debt and sued the second Defendant Company for damages to the amount of the debt. The ground on which the Plaintiffs sought to make the Company liable was that its agents had delivered the paddy to the first Defendant without production by him of the so-called Mates' Receipts, and that this was in breach of a representation which the Company made to the public by a printed Rate Circular or Notice, and by its usual course of business, that delivery of cargo carried by its boats would only be made to persons holding Mates' Receipts for the cargo. The Company has been held liable and it appeals.

"These Mates' Receipts are sometimes referred to as bills-of-lading.

"This they clearly are not. A Bill of Lading is a mercantile document in use in connection with carriage of goods in a sea-going vessel. The learned Judge overlooked the fact that the definition of the term in *Lickbarrow* v. *Mason* (1), which he referred to, states that it refers to a document regarding carriage by sea. Nothing further need be said about bills-of-lading in connection with the case.

"The so-called Mates' Receipts are in a form of which the following, which is the one given for one of the cargoes in question in the suit, is an example.

(1) 2 T. R. 63 ; 4 Bro. P. C. 57 (1793).

Irrawaddy Flotilla Company, Limited.

Mate's receipt.

No. 2,182.

Trip No. The 12th October 1906.

Received from Obedhur Rahman the under-mentioned quantity of paddy to be forwarded by Cargo Boat No. 128 in tow of Steamer Gyne from Doungyi to Rangoon with liberty to tranship to other vessel.

No. of Baskets.	Contents said to be
5,000	C. B. 128. Five thousand baskets paddy more or less. (Sd) ALEX. WINGATE, Agent.

N. B—All risks of navigation, loading and unloading goods, destruction or damage by fire, robbery, weather, wreck of boat, separation of flat from steamer or any other cause of whatever nature or kind soever to be borne by the shipper. Freight payable before delivery.

"It is obvious that the document is not a Mate's Receipt. Such a document also is a document used in connection with shipment of goods by sea-going vessels, and is given by a Mate, that is to say, an officer on a sea-going vessel. To no document given by an officer of an inland waters carrier could the term and the incidents of Mates' Receipts as known to mercantile law be properly applied. The object of the attempt to apply such law to the receipts in question was apparently to endeavour to get a decision that they are negotiable instruments. The rule by which negotiability of a document is determined is clearly laid down in the notes to *Miller* v. *Race* (2), and it is that where an instrument is by the custom of trade transferable like cash by delivery, and is capable of being sued on by the person holding it *pro tempore*, it is entitled to the name of a negotiable instrument, and the property in it passes to a *bonâ fide* transferee for value. The Company's receipt cannot be held to fulfil these conditions. Questions as to the Plaintiffs' right to the paddy however scarcely arise in the case. They held the paddy in their possession, and had a lien over it previous to their agent allowing the first Defendant's agent to ship it in the first Defendant's name. They had an equitable right to it as between them and the first Defendant subsequently.

"The substantial question is whether the Defendant Company came under any legal obligation or duty towards them for breach of which the Company is liable in damages. The Company made no contract with them and if it is liable, it must be liable for a tort. The tort alleged is that it held out to the public that he did not give delivery of cargo shipped by its boats unless Mates' Receipts were delivered up, and relying on this representation the Plaintiffs agreed to part with their property.

"The actual representation in the Rate Circular or notice issued by the Company was:—

"'Flats, barges, and boats will be moored at Mills in accordance with instructions received from holders of mates' receipts which must previously have been presented at Rangoon Office for verification. Mates' Receipts must, however, be given up before discharge is allowed to commence, or in the event of Mate's Receipts not having come to hand, the Company's usual guarantee must be signed.'"

"The guarantee referred to is an idemnity bond (wrongly termed a guarantee

(2) 1 Sm. L. C. 447; reported 1 Burr. 452 (1758)

bond), in the form in which Exhibit 7 is. The Rate Circular gives notice of the terms on which the Company is prepared to carry goods for any member of the public, that is to say, of the terms on which it is prepared to contract with any person who may wish to send paddy by its boats. If a person sends paddy by one of its boats without any special contract and relying on the terms stated in the Circular, the Company would undoubtedly be bound by the terms.

"But the circular does not state, and it is unreasonable that any member of the public should believe that the Company bound itself to carry only on such terms, and that by issuing such Circular it relinquishes all right to relax the terms in any way it pleases in any individual case.

"The words as to Mates' Receipts are obviously entered as a precaution for the Company's own protection, and to ensure that the paddy should be delivered to or to the nominee of the person with whom they contracted to carry it.

"The words themselves indicate the possibility of the Company delivering without production of the receipt. No member of the public who had not contracted with the Company could reasonably believe that it would not under any circumstances deliver to the person with whom it had contracted to carry without production of the receipt. The Circular and its wording, in my opinion, did not put the Company under any legal obligation or duty to any one except the persons with whom it contracted. Consequently the Plaintiffs had no right of action against it.

"It was argued that the Company's agent at Henzada knew that the paddy was under lien to the Plaintiffs, and his letter Exhibit 8 was strongly relied on as showing this. Whether he knew it or not, he received the paddy as the property of the first Defendant, and contracted to carry it as his paddy and for him. The Plaintiffs' agent allowed this to be done, and the Company was bound to carry for the first Defendant and to deliver to him or as he should direct. Even if the Plaintiffs had given notice of their claim to the paddy, the so-called Mate's Receipt not being a negotiable instrument, the Company would not have been bound to deliver to them."

Mr. Roskill, K. C., and *Mr. J. W. McCarthy* for the Appellants submitted that the lower Court was wrong in holding that the so-called mate's receipt was not negotiable. Reference was made to sec. 137, Transfer of Property Act, 1882. The Appellants had an equitable charge on the cargoes to secure the amounts advanced thereon. In any case in view of the terms of the circular issued by the Company and on which the public acted the Respondents were under an obligation of not delivering the cargoes except upon production of the mate's receipts. They delivered the cargoes inspite of their circular and of the knowledge of the fact that the Appellants had advanced moneys to Chowdhry on the security of the cargoes.

Mr. L. DeGruyther, K. C., and *Mr. Eddis*, Counsel for the Respondents, were not heard.

Their LORDSHIPS' JUDGEMENT was delivered by

LORD SHAW.—The Respondents in this case are the Irrawaddy Flotilla Company, and their vessels ply in the inland waters of Burma. The Appellants, who were the original Plaintiffs in the suit, are money-

lenders, and they carry on their business in Henzada, and in other places, in Lower Burma. On the 13th, 20th, and 23rd October 1906, there having been eight other shipments in similar terms, there were the three shipments of paddy which are in dispute in this case. They were sent by ship from Henzada to Rangoon.

The document which accompanied their transmission is in each case similar in terms to the one which is now to be quoted. It is dated 12th October 1906, and it is headed as follows:—"Irrawaddy Flotilla Company, Limited." It is denominated plainly in the document as a "Mate's receipt." The document then proceeds in these terms:—"Received from O. Rahman" (who in this Judgment is called, for brevity, "Chowdhry"), "the undermentioned quantity of paddy to be forwarded per cargo boat 128 in tow of steamer," and then the denomination is given, and then follows this expression "with liberty to tranship to other vessel. Number of baskets 5,000--five thousand baskets paddy, more or less." That document is signed "Alex. Wingate, Agent." He was, in point of fact, the ship's agent acting at Henzada for the Irrawaddy Flotilla Company, the Respondents in this Appeal. Chowdhry was, as the document bears, the shipper. It appears to be the fact that in this year 1906 the Appellants had advanced monies to Chowdhry for the purchase of the paddy so shipped.

It might be a question under what legal category this document fell. It is manifest that the parties to it were not at all assured in their own minds as to what that category was, because although the document was headed "Mate's receipt" there were appended to it certain terms which were more suitable to bills of lading. The document says:—"N. B. All risk of navigation, loading and unloading goods, destruction or damage by fire, robbery, weather, wreck of boat, separation of flat from steamer, or any other cause of whatever nature or kind soever to be borne by the shipper. Freight payable before delivery."

It is in these circumstances that their Lordships have before them two Judgments of the Courts of Lower Burma. The present Appeal is from a Decree of the Chief Court, dated the 22nd November 1910, and that reversed a Decree of the District Court of Henzada, dated the 17th December 1908. They have no difficulty in pronouncing that in their opinion the Judgment of the Chief Court of Lower Burma is a correct judgment, and that the Appeal fails.

Two points upon this Appeal have been carefully argued by Mr. Roskill. With reference, in the first place, to the document itself, it is pleaded as a document of title. It is admitted, however, in argument, that it is not a bill of lading, and therefore not *eo nomine* a negotiable instrument.

In the second place, it is admitted that if, as it denominates itself, it is a Mate's receipt, then also it must fall under the category of documents which are not negotiable.

But Mr. McCarthy supplemented the argument by saying that notwithstanding that it could not claim negotiability as a bill of lading, and notwithstanding that if it were a mere "Mate's receipt," it would be non-negotiable, yet this document falls under sec. 137, the concluding section, of the Transfer of Property Act, 1882, Act IV. The language which is there adopted is:—"And any other document used in the ordinary course of

business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement, or by delivery, the possessor of the document to transfer or receive goods thereby represented."

Their Lordships are of opinion that this document was not a negotiable document in the sense of this section of the Statute. It was not a document of title. There was no authority by law to give to an assignee by transfer of that document any right as against the shipowner except upon the usual form of an assignment as between the shipper and his assignee. That usual form must be accompanied by notice to the shipowner which charges him with the fact of the assignment, and makes him responsible to the assignee instead of the original shipper. There is great difficulty in cases of this kind, in avoiding being misled by terminology. Each of the categories attempted has failed. The document is not a bill of lading, not a Mate's receipt, and not a statutory negotiable instrument. The simple fact remains that this is a document which charges the Respondents with receipt of certain goods from Chowdhry, under a bargain to convey them by ship to Rangoon for a stipulated freight and on certain conditions, and the duty arising from it was to deliver the goods to Chowdhry, or to his nominee at Rangoon. In complete compliance with that duty the goods so placed in the possession of the shipowner for carriage were duly delivered.

In these circumstances their Lordships see no reason to doubt that the Judgment reached in the Court appealed from is correct. It is a simple ordinary receipt for goods. Why should these goods not be delivered to the person who is said to have handed them to the shipowner? Assuming the "Mate's receipt," as it is called, to have been lost, was the owner of the goods, who then handed them to the shipowner, not to be entitled, because the receipt had disappeared, to possession of his own goods from the carrier whose freight he was willing to pay?

Their Lordships are of opinion that that simple statement of the point shews that there is no legal foundation for the position that this was a document of title, and that the goods passed upon the transfer of it.

The second point which was taken by Mr. Roskill is, that whatever be the name under which this document might be classed, the Respondents themselves are charged with a duty and have come under an obligation to deliver to no one except upon the Mate's receipt. The argument is an astute one, and it is founded upon the circular, dated 1st January 1907, which their Lordships presume is a sample of what was usually issued in the course of the Respondents' business. That circular is headed :—"Rates for paddy in bulk by the Company's barges and cargo boats in Rangoon," and it contains these two clauses: "That the barges and boats will be moored at mills in accordance with instructions received from holders of Mate's receipts, which must previously have been presented at Rangoon office for verification." In terms the circumstances do not demand any application of that rule.

But the next rule is said to be square with the situation in the present case. The clause is: "Mate's receipts must, however, be given up before discharge is allowed to commence, or in the event of Mate's receipts not having come to hand, the Company's usual guarantee

must be signed." In the opinion of their Lordships the sentences now qouted from the circular of the Respondent Company merely set forth a mode in which in conducting their own business, the Respondent Company would protect themselves in the course of their trade. But they cannot be founded upon by other parties as forming any part of an obligation to them restrictive of their freedom or methods of action in conducting their own affairs. As against customers they afford protection to the Irrawaddy Flotilla Company, and they give an intimation or warning that they shall not part with the goods unless Mate's receipts are given up, or otherwise unless a guarantee be obtained. But this protection of themselves they could freely give up if satisfied of the identity and solvency of the owner or nominee of the owner who demanded the goods at the port of delivery. And it is wholly *jus tertii* for any person in the position of the Appellants (who are money-lenders who had made certain trading advances to Chowdhry and make claims against him for the paddy) to plead that that clause of the shipowners' circular constitutes an obligation upon which they as outside parties are entitled to found.

Failing these clauses as constituting a contract with the Appellants, the next argument presented was that there was a course of business on the part of the Irrawaddy Flotilla Company which showed that they did protect themselves, and apprised the public at large that they, the public, were also protected by the manner of negotiating the Mate's receipts. Their Lordships are of opinion that this point in the abstract does not fall to be determined, because upon the facts it entirely fails. The judgment of the Judge who framed these issues is a merely apparent affirmative or negative, in fact, a most indefinite answer, to the two issues which he has himself written out. "Was it," says the seventh issue, "the usual course of business of the second "Defendant not to recognise any person as entitled to the paddy shipped without his giving up the Mate's receipts, and not to discharge the paddy without the production of such Mate's receipts?" It follows on the judgment of the learned Judge that this might have been what he describes as a general course of business which is open to exception at the will of the traders themselves. In such circumstances the question of fact really does not arise.

Their Lordships therefore think that the point as to any contract in this case fails. There is no document constituting such a contract, and there was no course of business from which a contract could be inferred. And accordingly the learned Counsel for the Appellants puts his case upon tort. It is difficult to figure it; but the thing upon which tort was founded was some failure of duty. The failure of duty apparently was this: that the Irrawaddy Flotilla Company had suspicions raised in their minds, or might have had suspicions raised in their minds, as to the expediency of parting with these goods unless on production of the Mate's receipt to Chowdhry, who himself handed them over to them, because some financiers like the Appellants might have claims upon them. Their Lordships are surprised to find what is put forward as in any respect a communication upon which the Appellants are entitled to found. Wingate, the shipowners' agent, gave evidence, and his evidence, instead of being to the effect

cited, is of a completely different character. It is necessary, however, to see what Wingate says upon the subject. Wingate does admit that it was known, at a certain stage of the proceedings, to him, that Chowdhry was having advances for the purchase of the paddy which was being shipped, and that the Chetty from whom advances had been given might have had certain rights. Then Wingate in his evidence proceeds thus:—"I refused to give him the Mate's receipt in first Defendant's name until I got the sanction of the Chetty. He then brought the Chetty to my office. The Chetty then agreed to have the Mate's receipt in first Defendant's name. I did so accordingly. They told me that the differences had been settled."

In these circumstances their Lordships think it unnecessary to pursue this point further, because, so far as evidence stands, instead of the shipping Company being charged with the knowledge that there was any danger on account of rights possessed by the Chetty, in this case it turns out upon the evidence that those rights had been the subject of negotiation and settlement, and that the settlement having been achieved the goods were forwarded in the name of Chowdhry himself. This being so, there was no duty left in the circumstances except of course to deliver to Chowdhry, or to his order, and this was done. The failure of duty pleaded completely disappears, the Respondents having fulfilled all the duties resting upon them, either by contract, or under the Common Law.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed, and the Respondents are entitled to costs.

Solicitors: *Messrs. Bramall & White* for the Appellants.

Solicitors: *Messrs. Sanderson, Adkin, Lee & Eddis* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1989 OF 1910.

RICHARDSON, J.
NEWBOULD, J.
1913,
Heard, 23 & 24, April.
Judgment, 15, May.

AMBIKA CHARAN GUHA, Plaintiff, Appellant,
v.
TARINI CHARAN CHANDA and others, Defendants, Respondents.

Limitation Act (IX of 1908), sec. 22, Art. 106—Partnership, suit for accounts of—Necessary parties—Representative of deceased partner, addition of one after period of limitation—Whole suit if barred.

The Plaintiff brought a suit for the accounts of a partnership making parties thereto his other partners and one only of the two sons of a deceased partner who died after the partnership business came to an end but before the suit was instituted. On objection being taken the other son of the deceased partner was brought on the record after the expiration of the period of limitation:

Held—*That inasmuch as all the partners or their representatives were necessary parties and inasmuch as under sec. 22 of the Limitation Act the suit must as regards the added Defendant be deemed to have been instituted when he was made a party the whole suit was barred by limitation.*

That in a partnership suit the partners must be made parties or the suit will fail.

This was an Appeal preferred on the 29th of July 1911 against a decree of

AMBIKA CHARAN GUHA *v.* TARINI CHARAN CHANDA.

Babu S. K. Nag, Subordinate Judge of Zillah Pabna and Bogra, dated the 11th of April 1911, affirming a decree of Babu Ashutosh Mitra, 1st Munsif of Pabna, dated the 2nd of September 1910.

The Plaintiff brought a suit for the adjustment of the accounts of a partnership *karbar* on a declaration that the said *karbar* was closed and for winding up the same by ascertaining the assets and the liabilities thereof. The Plaintiff and the Defendants Nos. 1, 2, 4 and one Chandra Nath, father of the Defendants Nos. 3 and 5, were the partners of the firm. Chandra Nath died before the institution of the suit leaving him surviving two sons, namely, the Defendant No. 3 and the Defendant No. 5. Defendant No. 3 only was made a party to the suit as representing the estate of his deceased father and in the written statement the objection was taken that the suit was untenable on the ground of want of parties inasmuch as both the sons of Chandra Nath were not made parties to the suit. Defendant No. 5, a minor, was afterwards added as party to the suit more than 3 years after the termination of the partnership business. Both the Courts below dismissed the Plaintiff's suit as being barred by limitation.

Babu Girija Prasunno Roy Chowdhury for the Appellant.

Babu Krishna Kamal Maitra for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff brought this suit for the accounts of a partnership of which he and the Defendants Nos. 1, 2 and 4 were members, and for other incidental reliefs. The remaining partner died after the partnership business came to an end but before the suit was brought. It appears that he left two sons, the Defendant No. 3 and the Defendant No. 5. Of these two sons only the Defendant No. 3 was originally impleaded. Objection was taken in the written statement (filed on the 9th August 1909) that the deceased partner was not properly represented. The Plaintiff seems to have been very dilatory and the Defendant No. 5 was not brought on the record till the 29th June 1910. At that date the period of limitation prescribed for such a suit as this had expired. The Courts below have held that inasmuch as all the partners or their representatives were necessary parties and inasmuch as under sec. 22 of the Limitation Act, the suit must, as regards the Defendant No. 5, be deemed to have been instituted when he was made a party, the whole suit is barred by limitation. The short question which arises is whether this view of the matter is correct.

We are disposed to agree that in a partnership suit the partners must be made parties or the suit will fail [*Ramdoyal* v. *Junmejoy* (1), *Srinath* v. *Hari Charan* (2)]. On behalf of the Plaintiff, who is the Appellant before us, reference was made at the bar to Rule 9 of Order I of the Civil Procedure Code. That Rule however, properly understood, does not do away with the necessity for bringing a necessary party on the record [*Jogendra* v. *Secretary of State* (3)]. If a necessary party is not on the record the proper course is to apply to have him joined. If he is not brought on the record at all, or if when he is brought on the record the suit as against him is barred by limitation, the suit will be dismissed.

(1) I. L. R. 14 Cal. 791 (1887).
(2) 7 C. L. J. 266 (1907).
(3) 16 C. L. J. 385 (1912).

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It was argued that the deceased partner or his estate was represented, if imperfectly by the Defendant No. 3, that the Defendant No. 5 was brought on the record merely to complete the representation and that in such a case sec. 22 of the Limitation Act would not operate to bar the suit. Reference was made to the case of *Peary Mohun* v. *Narendra Nath* (4). In that case all the living descendants of the original testator were on the record from the commencement. The question arose which of them should be considered *shebait* of the debutter estate to which the suit related. That question was determined after the plaint had been amended and the suit proceeded against the Defendant who was found to be *shebait.* It was held that what was done did not amount to the addition of a new Defendant.

We are of opinion with the learned Subordinate Judge that the case is distinguishable from the present case on the facts. The Plaintiff here ought to have impleaded all the legal representatives of the deceased Defendant. He connot plead ignorance of the existence of the Defendant No. 5. In the absence of that Defendant the estate of the deceased partner was not fully represented.

The Courts below appear to us to have taken a correct view of the law and this Appeal must be dismissed with costs.

Appeal dismissed.

(4) 9 C. W. N. 421 : s. c. I. L. R. 32 Cal. 582 (1905) : on appeal to P. C. 14 C. W. N. 261 : s. c. I. L. R. 37 Cal. 229 (1909).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 2089 & 2589 TO 2591 OF 1911.

RICHARDSON, J. NEWBOULD, J. 1913, Heard, 28, April. Judgment, 2, July.

BERHAMDUT MISSER and others, Defendants, Appellants,

v.

RAMJI RAM, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 105, 106, 158—Limitation Act (IX of 1908), Sch. I, Art. 181—Record-of-rights, alteration by Revenue officer more than two months after final publication—Civil suit by proprietor to assess fair and equitable rent, if maintainable—Limitation—Correctness of Revenue officer's decision if can be challenged in civil suit—Record-of-rights if can be referred to to ascertain rent of contiguous land.

In a proceeding under sec. 106 of the Bengal Tenancy Act the Revenue officer directed that certain lands entered in the record-of-rights as held rent-free be recorded as liable to payment of rent. This order was made more than two months after the date of the certificate of final publication of the record. The Plaintiff, the proprietor, thereupon instituted a suit in the Civil Court for the assessment of fair rent, it being too late for him to apply under sec. 105 of the Act:

Held—*That the suit was maintainable, if not under the general law, as a suit in the nature of a declaratory suit, then as an application under sec. 158.*

That sec. 109 did not stand in the way of the suit, no proceeding having been taken under sec. 105 for the fixation of a fair and equitable rent.

The cause of action in the suit arose after the decree under sec. 106 of the Bengal Tenancy Act was passed.

Quære :— *Whether Art. 131 read with*

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sec. 23 or Art. 120 of the Limitation Act applied.

Held—*That applications under sec. 158 of the Bengal Tenancy Act are not governed by Art. 181 of Sch. I of the Limitation Act.*

That it was not open to the Defendants to contest in the civil suit the correctness of the decision of the Revenue officer and to raise again the question of their liability to pay rent.

That the lower Appellate Court was not wrong in law in referring to the record-of-rights for the purpose of ascertaining the rents payable in respect of lands in the vicinity similar to those in suit.

The scheme of secs. 105, 106, etc., of the Bengal Tenancy Act seems to be that matters brought at once or within a strictly limited time before the Revenue officer are to be dealt with by him while matters not so brought before the Revenue officer are left to the ordinary law and the Civil Courts.

This was an Appeal preferred on the 7th of September 1911 against the decree of T. S. Macpherson, Esq., District Judge of Zilla Patna, dated the 25th of March 1911, modifying the decree on Babu Kali Kumar Sarkar, Subordinate Judge, 1st Court of that District, dated the 31st of August 1910.

The facts of the case will appear from the judgment.

Babu Jyotish Chandra Hazra and *Dr. Sarat Chandra Basak* for *Babu Chander Sekhar Prosad Singh* for the Appellants.

Mr. Jackson and *Babu Luchmi Narain Singh* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

These four second appeals arise out of four suits brought by the same Plaintiffs for the assessment of fair rent upon lands held by the Defendants in the different suits. It appears that the lands appertain to an estate in respect of which a record-of-rights was made under Chap. X of the Bengal Tenancy Act. The record was finally published in September 1903, these lands being entered therein as *brahmatter* lands held rent-free. The entries were contested by the late proprietor in proceedings taken by him under sec. 106 of the Act. The proceedings terminated on the 29th April 1904 when the Revenue Officer directed "that the lands of Defendants be recorded as liable to payment of rent." From that decision no appeal was preferred. It was then too late for the proprietor to apply under sec. 105 for the settlement of fair rents because more than two months had elapsed from the date of the certificate of final publication of the record. He accordingly, on the 13th of June 1908, instituted these suits in the ordinary Civil Court and on his death his place was taken by the present Plaintiffs who have been duly appointed Receivers of his estate. The Subordinate Judge before whom the suits first came and the Additional District Judge before whom they came in appeal have concurred in holding that the Plaintiffs are entitled to have a fair rent assessed and they have accordingly determined the rent payable. Various objections with which we have to deal have been taken to the suit and to the conclusion arrived at.

As to the suit it was said that it was not maintainable and that a record-of-rights having been prepared the only remedy of the late proprietor was to apply under sec. 105 of the Tenancy Act.

As to that argument it has to be observed in the first place that, at the

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period in question, before sec. 105A was introduced into the Act, issues which might be raised in proceedings taken under sec. 106 could not be raised in proceedings under sec. 105. The scope of the latter section was, strictly speaking, limited to the question of fair and equitable rent [*Pandab* v. *Ananda* (1)]. It is true that the late proprietor might have instituted proceedings under sec. 105 and sec. 106 at the same time, and then applied for the postponement of the proceedings under sec. 105 until the termination of the proceedings under sec. 106. But he did not take that course. He proceeded only under sec. 106, and the question is whether the Plaintiffs are now debarred from having fair rents determined for lands which in the proceedings under sec. 106 were declared liable to be assessed with rent.

As it seems to us, sec. 109 of the Act does not stand in the way of these suits. As pointed out in the case to which we have already referred, sec. 109 merely prohibits suits regarding matters which are or already have been the subject of proceedings under sec. 105 or sec. 106. Here no proceedings have been taken under sec. 105 for the fixation of a fair and equitable rent. It may be added that proceedings under secs. 105 and 106 have to be commenced within two months of the date of the certificate of final publication of the record-of-rights, and that under cl. (b) of sec. 111, Civil Courts are debarred until three months after final publication from entertaining any suit or application for the alteration of the rent or the determination of the status of any tenant in the area to which the record-of-rights applies. There is a similar provision in sec. 111B. The scheme seems to be that matters brought at once (or within a strictly limited time) before the Revenue Officer are to be dealt with by him while matters not so brought before the Revenue Officer are left to the ordinary law and the Civil Courts. It may, however, be that Revenue Officers have powers under secs. 105 and 106 which are not possessed by the Civil Courts. That brings us to the next point.

It is clear that under sec. 105 a Revenue Officer has power to fix a fair and equitable rent. Has a Civil Court power to entertain such suits as the present?

It was said with much force that these suits cannot be regarded as suits for enhancement of rent under sec 30, because no rent has hitherto been paid and there is nothing to enhance. They are certainly not suits under sec. 52 for alteration of rent on alteration of area. It was further argued that sec. 157 does not apply because these suits are not suits for the ejectment of trespassers. As to sec. 158, reference was made to the case of *Debendra* v. *Bhupendra* (2), which was decided by a Full Bench. It was observed in that case that "the object of this section is to enable the Court to ascertain what are the existing arrangements between a landlord and his tenant and not to enable the Court in effect to make a new contract for parties between whom no contract was in existence at and before the date of the application." The facts, however, with reference to which that observation was made were very different from the facts of the present case. It appears that the suit was brought or the application made merely under colour of sec. 158, the real object being to have the lease set aside under which the tenant came into possession. That accounts for

(1) 14 C. W. N. 897 (1910).

(2) I. L. R. 19 Cal. 182 (1891).

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the remark that the Court was being asked to make a new contract for the parties. The case turned on an express contract, which, it was held, could not be set aside under sec. 158. But the relationship of landlord and tenant under the Bengal Tenancy Act is or may be governed not only by contract but by status. In essence the difference may be merely the difference between a contract made by the parties for themselves and a contract made by the law for them. But the existence of rights by way of status is important, because it disposes of the argument that there is nothing here on which the law can operate. Here the question is mainly one of status. The Defendants possess a status which entitles them to occupy the land and the Plaintiffs a status which entitles them to a fair and equitable rent. What is a fair and equitable rent in circumstances such as the present seems to us to be a question which it is open to the Courts to determine under sec. 158. It was said that cl. (b) of the section admits only of the determination of the rent payable by the tenant at the time the application under the section is made, and that when these suits were instituted no rent was payable. The answer to that argument is that the rent payable when these suits were brought was a fair and equitable rent, that is, a rent capable of being ascertained by evidence.

In our opinion these suits are maintainable, if not under the general law, as suits in the nature of declaratory suits, then as applications under sec. 158.

We may add that before the Bengal Tenancy Act, suits of this kind were known as suits for *kabuliyats*. An instance will be found in the case of *Ramnidhee* v. *Parbutty* (3). That such suits are now brought without any question being raised will appear from the case of *Harihar Pande* v. *Karamat Hossain* (4). The opening words of the judgment delivered in that case describe the suit as one "for assessment of rent and for recovery of such rent for a certain period."

It was somewhat faintly suggested that if these suits were maintainable either as applications under sec. 158 or under the general law they were barred by limitation. We cannot accept the suggestion. For the purposes of the contention we have already rejected—that the suits are not maintainable—and for the purposes of applying the law of limitation, it must be assumed that the decision pronounced in the proceedings under sec. 106 was correct. The decrees declared the late proprietor to be entitled to have fair rents assessed. The effect as against him of any previous refusal of the Defendants to pay rent was cured by the decrees. The Defendants cannot go behind the decrees to find a starting point for limitation. If inspite of the decrees they still refuse to pay rent, their occupation of the land, coupled with the denial of their liability to pay rent, may perhaps be regarded as a kind of trespass or continuing wrong within the meaning of sec. 23 of the Limitation Act. Or possibly, the right to have rent assessed is a periodically recurring right which may be exercised, whenever necessary, subject to the period of limitation prescribed by Art. 131, *Jotindra* v. *Chandra* (5). But it is unnecessary to decide whether sec. 23 or Art. 131 applies, because the causes of action must be taken to have arisen after the decrees were passed, and even if

(3) I. L. R. 5 Cal. 823 (1880).

(4) 9 C. L. J. 493 (1907).

(5) 6 C. W. N. 360 (1902).

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the article applicable is Art. 120, the suits are not barred as they were instituted in 1908. It is hardly necessary to add, as regards applications under sec. 158 that they are not governed by Art. 181, *Tiluck* v. *Parsotein* (6), *Hatem* v. *Abdul* (7).

Under the old law, it may be mentioned, a suit for a *pattah kabuliyat* might be instituted at any time during the tenancy (Act X of 1859, sec. 31 : Act VIII B. C. of 1869, sec. 28).

It was next contended that the lower Courts were wrong in holding that it was not open to the Defendants to raise again in these suits the question of their liability to rent. Reference was made to the case of *Gokul* v. *Pudmanand* (8). That case came before the Privy Council and though the appeal failed on the merits and their Lordships expressly refrained from deciding the point, they indicated something more than a doubt whether the decision of the Revenue Officer on a question as to the status of a tenant could be pleaded as *res judicata* in a subsequent suit between the landlord and the tenant in the Civil Court. But the observations made were made with reference to the Tenancy Act as it stood before it was amended by Act III (B. C.) of 1898. The latter Act gives to the decision of the Revenue Officer in proceedings under secs. 105 and 106 the force and effect of the decree of a Civil Court and declares that subject to the provisions of secs. 108 and 109A the decision "shall be final." It may be inaccurate to say that the question of the liability of the Defendants in these suits to pay rent is *res judicata*, if the term is used with reference to the provisions of sec. 11 of the Civil Procedure Code. But inasmuch as the decision of the Revenue Officer is made final by sec. 107 of the Tenancy Act as that section now stands, the result is much the same in whatever way it may be expressed, cf. *Nabin Chandra* v. *Moharaja Radha Kishore* (9). It is not open to the Defendants to contest the correctness of the decision of the Revenue Officer. The contention therefore fails.

On the only question which remains we are of opinion that the lower Appellate Court committed no error of law in referring to the record-of-rights for the purpose of ascertaining the rents payable in respect of lands in the vicinity similar to those held by the Defendants and in using the facts thus ascertained as a guide to the rents which the Defendants should pay.

For the reasons we have indicated the Appeals fail and are dismissed with costs.

Appeals dismissed.

(6) I. L. R. 22 Cal. 924 (1895).
(7) 8 C. W. N. 102 (1903).
(8) I. L. R. 29 Cal. 707 (1902).
(9) 11 C. W. N. 859 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 246 OF 1913.

CARNDUFF, J.
RICHARDSON, J.
1913,
15, December.

SHEIKH JAHARUDDI,
Appellant,
v.
HARI CHARAN PODDER,
Respondent.

Civil Procedure Code (Act V of 1908), Or. XXXIX, r. 2, sec. 24—(Act XIV of 1882), sec 493—Temporary injunction by Munsif—Suit transferred to the file of District Judge after injunction by Munsif—Breach of injunction after transfer—Jurisdiction of District Judge to punish for contempt—Bengal Civil Courts Act (XII of 1887).

In case of breach or disobedience of a

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temporary injunction, the Court which actually granted the injunction may punish the contempt under Or. XXXIX, r. 2 (3).

There is nothing in sec. 24 of the Civil Procedure Code or in Chap. IV of the Bengal Civil Courts Act authorising, either expressly or by necessary implication, a Court to which the suit may be transferred but which did not grant the injunction, to exercise the special jurisdiction under Or. XXXIX, r. 2 (3).

This was an Appeal preferred on the 26th of May 1913 against an order of Mr. M. Smither, District Judge of Zillah Dacca, dated the 20th of May 1913.

The facts of the case will appear from the judgment of the District Judge, the material portion of which is as follows :—

"Jaharuddi was Defendant in a case in the Court of the 1st Munsif regarding certain land and an injunction was passed against him not to erect any buildings on the land. These facts are admitted. After the issue of injunction, the case was transferred to this Court. After the case was transferred, a masonry room and a wall were erected on the land. The Plaintiffs contend that they were erected by Jaharuddi in defiance and breach of the injunction. Jaharuddi contends that he had sold the land to one Krishna Kumar and that the latter had erected the room. A question of law has been raised, as to whether under Or. XXXIX, r. 2 (3) this Court has any jurisdiction, or only the Court of 1st Munsif who issued injunction. The breach of injunction was committed, if at all, after the transfer of the case to this Court. I think the transfer of the case brings with it jurisdiction to dispose of the case, jurisdiction to deal with a breach of an injunction found in the case, at any rate, if the breach does not occur till after the transfer.

"As to the facts it is clear that the alleged conveyance to Krishna Kumar was a mere paper transaction, resorted to in order to defeat this injunction. . . .

"It was Jaharuddi's son Dukhi and not the vendee who applied to the Municipality for permission to erect the building. Jaharuddi and his son have been living in it ever since. The vendee does not even know whether the construction of the room is by mats or bamboos. On the evidence of several witnesses, it is apparent that the building was erected at night, in great haste. . .

"On the evidence, Jaharuddi attended and assisted in the construction of the building and wall. I am satisfied that he did so and committed a breach of the injunction, intentionally. Under Or. XXXIX, r. 2 (3) I order the property of Jaharuddi to be attached and also order him to be retained in the civil prison for 6 months unless in the meantime he gets an order from the Court directing his release, which he will get at any time that he satisfies the Court that he has removed the room and wall."

Dr. Sarat Chandra Basak and *Babu Bepin Chandra Bose* for the Appellant.—In this case the Munsif who granted the injunction could alone have punished for the contempt. The District Judge to whom the case was transferred after the issue of injunction has no jurisdiction to punish for contempt. Refers to the language of Or. XXXIX, r. 2 (3), the section is clear. Refers to the corresponding section of the old Code, sec. 493 of Act XIV of 1882. It might have been argued under the old Code that the Court of the District Judge who had seisin of the case, could punish for con-

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tempt; but the wording has now been changed and it is clear that such Court has no jurisdiction to punish.

It is a penal provision and ought to be strictly construed.

Babus Jogesh Chandra Roy and *Brajendra Kumar Chukrabutty* for the Respondent.—I submit that the District Judge had seisin of the whole case and could punish for contempt. Otherwise it would be anomalous. The Court which had seisin over the whole case and better acquainted with the facts cannot punish for contempt and the parties will have to appear before the original Court for this purpose alone. I submit that could never have been the intention of the Legislature. Moreover under sec. 24 of the Civil Procedure Code and Chap. IV of Bengal Civil Courts Act when a suit is transferred to another Court this latter Court is invested with all the powers of the original Court and as such has jurisdiction to punish for contempt.

[CARNDUFF, J.—You could have argued that under the old Code but the words of the present Code are clear. It is a penal legislation and ought to be construed strictly.]

The JUDGMENT OF THE COURT was as follows:—

CARNDUFF, J.—This is an Appeal against an order made by the District Judge of Dacca under Or. XXXIX, r. 2, sub-r. (3) of the Code of Civil Procedure, 1908, for the attachment of the Appellant's property and his imprisonment for six months as the penalty for his having disobeyed a temporary injunction issued in a suit brought against him.

The order for the temporary injunction was passed by the Munsif of Dacca, and, after it had been passed, the suit was, for some reason or other, transferred to the file of the District Judge. The disobedience complained of admittedly occurred after the transfer.

The first point taken on behalf of the Appellant is that the District Judge's order was without jurisdiction, and I am of opinion that the objection must prevail.

R. 2, sub-r. (1) gives a Court power to issue a temporary injunction at any time after the commencement of a suit and sub-r. (3) then enacts that, in case of disobedience or breach, "the Court granting an injunction" may punish the contempt. These words, which are much more explicit than those used in the third paragraph of the corresponding sec. 493 of the Code of 1882, seem to me to be perfectly clear and unequivocal, and I can find nothing either in sec. 24 of the present Code, which provides for the transfer or withdrawal of cases by a District Judge, or in Chap. IV of the Bengal, Agra and Assam Civil Courts Act, 1887, which contains some further provisions on the same subject, to authorise, expressly or by necessary implication, the District Judge, who had not granted this injunction, to exercise the special jurisdiction conferred on the Court that granted it, merely because the suit in which it had been granted, had been transferred to his file.

On this ground alone, the Appeal must, I think, succeed: but I would make no order as to costs.

RICHARDSON, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3164 OF 1909.

MOOKERJEE, J.
BEACHCROFT, J.
1912,
9, May.

NABADIPENDRA MUKERJEE, Plaintiff, Appellant,
v.
MADHU SUDAN MONDAL and others, Defendants, Respondents.

Pleadings—Variance between Plaintiff's allegation and proof, when ground for dismissal of suit—True rule—Its object—Suit for recovery of possession—Mode of ouster and time thereof, allegation as to, if material.

Where an order having been passed in favour of the Defendants under sec. 335 of the Civil Procedure Code of 1882 the decree-holder (now Plaintiff) sued for recovery of possession upon declaration of his title, alleging that the order itself deprived him of possession, but the Courts below dismissed the suit without trial on the merits, on the ground that the order under sec. 335, C. P. C., had not that effect :

Held—*That the suit should have been tried on the merits, as the particular mode in which or the point of time at which the ouster of the Plaintiff took place was not so material that a variance between pleading and proof on such matters would alone be considered a sufficient ground for dismissing the suit.*

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby. It does not follow from this that every variance between pleading and proof is material and justifies a dismissal of the claim.

The rule that the allegations and the proof must correspond is intended to serve a double purpose, viz., *first, to apprise the Defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise ; and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations.*

This was an Appeal preferred on the 17th of December 1909 against the decree of Mr. S. B. Choudhury, District Judge of Zillah Birbhum, dated the 8th of September 1909, affirming the decree of Babu Hriday Nath Majumdar, Munsif at Rampurhat, dated the 7th of January 1909.

The facts of the case will appear from the judgment.

Babus Mahendra Nath Roy and *Krishna Prosad Sarbadhikari* for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Ramani Mohan Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal on behalf of the Plaintiff in a suit for declaration of title to immoveable property and for recovery of possession thereof. The Plaintiff alleges title by purchase at a sale in execution of a mortgage decree. He further states that when he took delivery of possession through Court, he was opposed by the Defendants, which led to a proceeding under sec. 335 of the Code of Civil Procedure of 1882. The Plaintiff interprets the decision in this proceeding as adverse to him and asserts that he lost possession thereby ; he, therefore, claims to recover possession from the Defendants. The Defendants resist the claim on the merits, put the Plaintiff to the proof of his title, and allege that their possession was sustained by virtue of the proceedings under sec. 335 mentioned in the plaint. The Defendants also take the stereotyped objection usually wholly frivolous, that there was no cause of ac-

tion as against them. The Court of first instance proceeded to dismiss the suit without trial on the merits, because in its opinion the effect of the order under sec. 335, C. P. C., was not to dispossess the Plaintiff. Upon appeal, the District Judge has affirmed that order of dismissal. The statement of the history of the case will illustrate how grave injustice may be done to a litigant when the Courts are astute to favour frivolous objections on the part of the defence.

The parties are agreed that the effect of the order in the proceeding under sec. 335, C. P. C., is to deprive the Plaintiff of possession of the disputed property and to secure possession to the Defendants. The question, therefore, whether the order had that effect, does not require examination. But even if it be assumed that the order under sec. 335 had not the effect attributed to it by the Plaintiff, it is clear that the suit cannot be dismissed on that ground. The suit is for declaration of title and for recovery of possession of immoveable property. It is wholly immaterial in what precise manner or on what exact date the dispossession took place. No doubt, as stated by Lord Westbury in *Ashen Chunder* v. *Shama Churn* (1), the determination in a cause should be proceeded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby. It does not follow, however, that every variance between pleading and proof is material and justifies a dismissal of the claim: such an extreme view was not tolerated in England even when rules of pleading were in the highest degree technical and artificial. *Purcell* v. *Macnamara* (2), *Wickes* v. *Gordon* (3). The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the Defendant, distinctly and specifically, of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Tested in the light of these principles, the objection of the Defendant proves wholly unsubstantial. The particular mode in which the ouster of the Plaintiff took place, or the specific point of time when it happened, is really not material. The Plaintiff has to prove his title first; if he does so, he has further to prove his possession within twelve years prior to the suit; on what precise date, within this twelve years, he lost possession, is not a matter of consequence: at any rate, it cannot take the Defendants by surprise, because he at any rate knows when he dispossessed the Plaintiff. From every possible point of view, the objection of the Defendant thus proves groundless and cannot be sustained.

The result is that the Appeal is allowed, the decrees of the Courts below discharged, and the case remanded to the Court of first instance in order that the suit may be tried on the merits. The Plaintiff is entitled to costs in this Court and the Court of Appeal below as also hearing, fees in the Court of first instance. As the objection was of a manifestly frivolous character, we assess the hearing-fee in this Court at five gold mohurs.

Appeal allowed.

(1) 11 M. I. A. 7 (20) (1866).
(2) 9 East, 157 (1807).
(3) 2 B. & Ald. 335 (1819).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 760 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 1 and 2, May. Judgment, 2, May.

TEK LAL SINGH and others, Defendants, Appellants, *v.* SRIPATI CHOWDHURI, Plaintiff, Respondent.

The Indian Registration Act (XV of 1877), sec. 17 (b)—Award, private, if compulsorily registrable—Deed of partition and award, distinction between.

The word 'award' in cl (b) of sec. 17 of the Indian Registration Act is not restricted to awards filed in Court and a private award is not compulsorily registrable. But a document which purports to be an award may amount to something more than an award; if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators the award may thereupon become a deed of partition and may as such become compulsorily registrable.

This was an Appeal preferred on the 29th of March 1911 against the decree of D. H. Kingsford, Esq., District Judge of Chotanagpore, dated the 23rd of December 1910, affirming the decree of Babu Ashutosh Pal, Munsif of Giridih, dated the 29th of April 1910.

The material facts will appear from the judgment.

Babu Baranashibasi Mookerjee for the Appellants.

Babu Hira Prosad Chatterjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the Defendants in a suit for declaration of title to immoveable property and for recovery of possession thereof. The subject-matter of the litigation originally formed part of joint property held by the Plaintiff and his brother, the father of the Defendants. At the trial, the Plaintiff produced an unregistered private award which, he contended, conclusively established that the joint properties had been divided and that the disputed land had been allotted to his share. The Courts below have acted upon this award and founded their decision thereon, though it had not been previously enforced in Court, *Bhajahari* v. *Behary Lal* (1). On the present appeal, it has been argued that the unregistered award was not admissible in evidence, because it was in essence a deed of partition and as such was compulsorily registrable under sec. 17 (*b*) of the Indian Registration Act, 1877. It has also been contended that there is no evidence to show that two of the Defendants ever agreed to the arbitration.

In so far as the first of these points is concerned, reliance has been placed by the Appellants upon the case of *Upendra Nath* v. *Umesh* (2) to show that a partition deed is compulsorily registrable, if it affects title to the property of more than the statutory value. This has not been disputed by the Respondent. It has been argued, however, on their behalf that the instrument now before us, is an award and not a deed of partition, and that as an award, it is not compulsorily registrable as pointed out in *Golab Singh* v. *Mohor Singh* (3). The determination of this question depends upon the construction of cl. (*b*) of sec. 17 of the Indian Registration Act, 1877, which lays down that decrees and orders of Court and awards are not compulsorily registrable. On behalf of the Appellants, it has been

(1) I. L. R. 33 Cal. 881 (1906).

(2) 12 C. L. J. 25 (1910).

(3) 7 P. L. R. 532.

argued that the collocation of the words of this clause indicates that its application is restricted to awards filed in Court. This contention is not supported by the language used by the Legislature and is opposed to the decision of this Court in the case of *Tarakant* v. *Raj Kishore* (4). If the term 'Award' was intended to be restricted in cl. (1) to awards which have been filed in Court, the provision for exclusion of awards would be needless, because if a proceeding has been taken in Court to enforce an award, such proceeding would terminate in a decree or order in which the award itself would be merged; consequently, a provision to the effect that decrees and orders of Courts are not compulsorily registrable would completely cover the case in point. We are consequently not prepared to accept the interpretation put upon cl. (1) of sec. 17 by the learned Vakil for the Appellant. We are fortified in this view by an examination of the language of cl. (*b*) of sub sec. 2 of sec. 17 of the Indian Registration Act of 1908. That clause now provides that any decree or order of a Court and any award is not compulsorily registrable; so that whatever doubt might have been possible as to the true meaning of the provision contained in the statute of 1887, that doubt has now been removed by the Legislature. We hold accordingly that the award in this case was not compulsorily registrable. We may add, however, that a document which purports to be an award may amount to something more than an award; if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators, the award may thereupon become a deed of partition, and may as such become compulsorily registrable. The distinction between an award and a deed of partition to which we have just adverted, was explained by Mr. Justice West in the case of *Amarsi* v. *Dayal* (5), and it was recognised in the cases of *Ratan Chand* v. *Sitaram* (6) and *Azmiat Singh* v. *Kulwant* (7). See also *Bhagat Ram* v. *Paras Ram* (8). The first contention of the Appellant must consequently be overruled.

As regards the second point, we are of opinion that it is entirely unsubstantial. It does not appear from the proceedings in the Court below that any attempt was made by the second and the third Defendants to repudiate the award on the ground that the arbitrators had not been duly authorised by them to effect the partition. On the other hand, they made common case with their eldest brother who was the head of their branch of the family, and we observe that the present appeal has been jointly preferred by all the three brothers. Under these circumstances, they cannot be allowed to raise a question of fact which was not really in controversy in the primary Court, though it may be conceded that the point was sought to be raised before the Judicial Commissioner.

The result is that the decree of the Court of Appeal below is confirmed and this Appeal dismissed; but there will be no order as to costs.

Appeal dismissed.

(4) I. L. J. 168 (1910).

(5) I. L. R. 9 Bom. 50 (1884).
(6) 1 P. L. R. 459.
(7) 8 P. L. R. 584; 1906 P. P. R. 71.
(8) 1907 P. R. 84.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2979 OF 1910.

N. R. CHATTERJEA, J.
WALMSLEY, J.
1913,
Heard, 4, April.
Judgment, 11, April.

KAILASH CHUNDRA ADHIKARI, Defendant No. 3, Appellant,
v.
KARUNA NATH CHOWDHRY, Plaintiff, Respondent.

Hindu Law—Dayabhaga School—Succession—Doctrine of spiritual benefit—Paternal great-grandfather's son's daughter's son and maternal uncle, who is preferable.

Under the Dayabhaga School of Hindu Law, the paternal great-grandfather's son's daughter's son of a deceased Hindu is preferable to his mother's brother as heir, even though the latter is specifically mentioned in the Dayabhaga as an heir and the former is not, and his precise position in the category of heirs is not laid down in the case of GURU GOBIND *v.* ANANDA LAL (1).

BRAJA LAL *v.* JIBAN KRISHNA (4) *referred to.*

This was an Appeal preferred on the 5th of September 1910 against a decree of Babu Bepin Behary Dey, Subordinate Judge of Zillah Mymensingh, dated the 2nd of June 1910, confirming a decree of Babu Rai Mohan Kormokar, Munsif of that place, dated the 1st of September 1909.

The material facts will appear from the judgment.

Babu Debendra Nath Bagchi for the Appellant.

Babu Gobinda Chandra Dey Roy for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

The main question involved in this Appeal is whether a paternal great-grandfather's son's daughter's son (*i.e.*, a granduncle's daughter's son), or a mother's brother (*i.e.*, a maternal uncle) is the preferable heir according to the Dayabhaga School of Hindu Law. The Plaintiff brought a suit for rent of certain property which he claimed to have inherited from one Sarat Chandra, the last male owner, on the death of his mother Kunjamoni, as his granduncle's daughter's son The Defendants Nos. 1 and 2 (the tenants) raised the objection that he was not entitled to the rent on the ground that the Defendant No. 3 was the heir of Sarat Chandra. The Defendant No. 3 thereupon was added as a party to the suit and he pleaded that he as the maternal uncle of Sarat Chandra was his heir in preference to the Plaintiff. The Courts below have held that the Plaintiff is he preferential heir and have decreed the suit for rent in his favour. The Defendant No. 3 has appealed to this Court.

According to the doctrine of spiritual benefit the Plaintiff is the preferential heir, being competent to offer funeral cakes to the paternal great-grandfather of the last male owner in which he participates, whereas the Defendant is competent to offer such cakes to his maternal ancestors only, and the first kind of cakes are of superior religious efficacy in comparison to the second. The view that the principle of spiritual benefit governs the law of inheritance in the Dayabhaga was authoritatively laid down by the Full Bench in the case of *Guru Gobind* v. *Ananda Lal* (1), and again by another Full Bench in the case of *Digumbar Ray* v. *Moti Lal* (2). It has been contended on behalf of the Appellant that the principle of spiritual benefit

(1) 13 W. R. F. B. 49 (1870).
(4) I. L. R. 26 Cal. 285 (1898).

(1) 13 W. R. F. B. 49 (1870).
(2) I. L. R. 9 Cal. 563 (1883).

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is no test of heirship, at any rate, not the sole test, and that the doctrine has been misunderstood by Mitter, J., in the Full Bench case of *Guru Gobind* v. *Ananda Lal* (1), and reliance has been placed on certain observations made by Shastri Golap Chandra Sarkar in his work on Hindu Law, 4th Ed., p. 323. An attempt was made in a recent case, *Kedar Nath* v. *Amrita Lal* (3), to induce the Court to have the matter reconsidered by the Full Court on the ground that the Full Bench took an erroneous view of the fundamental principles which underlie the Dayabhaga and consequently arrived at incorrect conclusions, but it was unsuccessful. The learned Judges (Mookerjee and Carnduff, JJ.) expressed the opinion that had the matter been *res integra* the view put forward by the Appellant would deserve consideration, but that on well-established principles the matter should not be re-opened, the law on the subject having been authoritatively laid down by two successive Full Benches, once in 1870 and again in 1883, and previous attempts to re-open the matter having never been successful. We agree with the opinion expressed in that case, and must treat the law as settled by the Full Bench decisions.

It is contended, however, that the precise position of the paternal uncle's daughter's son in the category of heirs was not determined in the case of *Guru Gobind* v. *Ananda Lal* (1) and that the fact that the mother's brother is expressly named as an heir in the Dayabhaga and the great-grandfather's son's daughter's son is not mentioned, goes to show that the former is entitled to succeed in preference to the the latter. It is further contended that the funeral cake offered by the granduncle's daughter's son although offered to a paternal ancestor of the deceased, coming as it does through a maternal line, is not preferable to that given by the Defendants. It is true the oblations offered by the Plaintiff to the great-grandfather of the deceased come through a maternal line, but oblations offered to a paternal ancestor of the deceased in which he participates, although coming through a maternal line, are of superior efficacy to those offered to maternal ancestors of the deceased.

The argument based upon the ground that the maternal uncle is expressly mentioned and the granduncle's daughter's son is not mentioned in the Dayabhaga has no force. As pointed out by D. N. Mitter, J., in the Full Bench case "every one who has gone through the Dayabhaga must have perceived that the specific enumeration of each individual heir was not the object which the author had in view. It is perfectly true that a few of the heirs have been mentioned by name here and there: but the great majority of them have been left to be determined by the application of the principle of spiritual benefit. Thus, of the numerous relations who are entitled to come in as *sapindas* by virtue of their right to offer oblations to the maternal ancestors of the deceased proprietor, the maternal uncle is the only one who has been mentioned by name. Then, again, among the *sakulyas* or kinsmen connected by divided oblations, the grandson's grandson is the only person who has been specifically enumerated: and of the *samanodakas*, or kinsmen connected by libations of water, not one even has been so enumerated. In the

(1) 13 W. R. F. B. 49 (1870).

(3) 16 C. L. J. 342: s. c. 17 C. W. N. 492 (1912).

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face of all these facts, it is impossible to contend that the mere absence of specific enumeration is any ground whatever for excluding one single individual who is really competent to fulfil the conditions of heirship laid down in the Dayabhaga itself."

No doubt the precise position of the paternal uncle's daughter's son in the category of heirs was not laid down in that case but in the subsequent case of *Braja Lal* v. *Jiban Krishna* (4), the precise position of the father's brother's daughter's son in the line of heirs was considered and it was held that there could be no doubt that he comes before the *sapinda* relations in the maternal line. The learned Judges in that case (Maclean, C. J., and Banerjee, J.) observed as follows :—"This will be seen from the Dayabhaga, Chap. XI, s. vi, paras. 13 and 20, in the former of which the author indicates the reason for the succession of maternal kinsmen and for the preference of *sapindas* in the paternal over those in the maternal line, according to the doctrine of spiritual benefit. That reason is shortly this. The wealth of a deceased person, who can no longer have temporal enjoyment, should devolve on those who can confer spiritual benefit on him. Now the *sapindas* in the paternal line offer oblations to the paternal ancestors which the deceased was bound to offer, and in which he participates, and the *sapindas* in the maternal line offer oblations to the maternal ancestors, which the deceased was bound to offer, but in which he does not participate ; so that, while they both confer spiritual benefit on the deceased the former benefit him doubly by enabling him to participate in the oblations offered by them and by discharging a duty that was incumbent on him of offering libations to certain ancestors, and the latter benefit him only in one way, namely, by offering certain oblations which he was bound to offer ; and therefore while both are entitled to inherit his estate, the latter succeed only on failure of the former. After showing that his doctrine is in conformity with the texts of Manu, the author of the Dayabhaga states his conclusion in para. 20."

The granduncle's daughter's son would on the same principles succeed in preference to the maternal uncle. Dayabhaga, Ch. XI, sec. 6, verse 9, says :—"The succession of the grandfather and great-grandfather's lineal descendants including the daughter's sons, must be understood in a similar manner according to the proximity of the funeral offering ;" and verse 12 says "on failure of any lineal descendants of the paternal great-grandfather down to the daughter's son who might present oblations in which the deceased would participate," the property devolves on the maternal kindred. And in the Dayakrama Sangraha, Ch. I, sec. x, verse 13, it is stated "(In default of paternal great-grandfather's son) the succession devolves on the paternal grandfather's brother's daughter's son, who presents an oblation in which the deceased owner participates, namely, to the owner's paternal great-grandfather [*i.e.*, his maternal great-grandfather]."

We are accordingly of opinion that the Courts below are right in holding that the Plaintiff is the preferable heir.

It was next contended that the Court of Appeal below ought to have come to a finding whether the ⅓rd share of one Nilmony (Plaintiff's mother) constituted the *stridhan* of Kunjamoni, the mother of Sarat Chandra, because if it was her

(4) I. L. R. 26 Cal. 285 (1898)

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stridhan, it passed to her brother Defendant No. 3. But the question was not raised in the lower Appellate Court. It is said that it is a pure question of law, but the decision of it depends upon questions of fact. For instance, it will have to be found whether the possession of Kunjamoni was adverse to Nilmony, a cosharer, and if so, whether Nilmony died within 12 years of the suit, in which case the Plaintiff being the reversioner, will not be bound by any adverse possession by Kunjamoni against Nilmony. The Defendant No. 3 cannot complain that no findings were arrived at on these points, as he did not raise the question at all in the lower Appellate Court, and we cannot allow him to raise the point now. The Appeal is accordingly dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES NOS. 397 AND 480 OF 1909.

N. R. CHATTERJEA, J. WALMSLEY, J.	JANKI KORR and others, Defendants, Appellants,
1913,	*v.*
Heard, 23 and 24, April	DOMI LAL, Plaintiff,
Judgment, 24, April.	Respondent.

Limitation Act (IX of 1908), sch. I, Arts. 61, 99, 120—Contribution suit—Limitation when begins to run—Date of payment.

One R. B. deposited a certain sum of money in a Bank owned by R and his two brothers S and G. R. B. brought a suit and obtained a decree for the money deposited against R and the representatives of his brothers S and G. On Appeal the High Court exempted G's representatives from liability under the decree in so far as they inherited the share of the family property from G. R. B. executed his decree against R and advertised some properties exclusively belonging to R for sale. On the 8th December 1900 one Raja S as the purchaser of certain mehals belonging to R and his son (the Plaintiff) paid in the decretal amount and the execution case was finally struck off. R put in an application stating that the petition filed by the decree-holder stating satisfaction of the decree was without his knowledge and that the negotiations between Raja S and himself regarding the sale of the properties had not been concluded. Raja S sued R for specific performance of the contract to sell and ultimately the High Court held that he could not get a decree for specific performance but was only entitled to get back the money advanced with interest from the 8th December 1900. On 11th January 1906, Raja S in execution of this decree sold certain properties belonging to the Plaintiff, the sale being confirmed on 21st June 1906, when Raja S obtained payment. On 3rd February 1908 the Plaintiff instituted a suit for contribution against the legal representatives of R's brother S.

Held—*That it was doubtful whether Arts. 61 and 99, Sch. I of the Limitation Act were applicable to the present case and under Art. 120 the period of limitation was six years from the time when the right to sue accrued.*

The date of payment by Raja S was not the date of payment by R within the meaning of Art. 99 of the Limitation Act. The Plaintiff's right to sue accrued when the decree obtained by Raja S was satisfied by sale of Plaintiff's property and the suit being brought within two years from the date of that payment was not barred by limitation.

These were Appeals preferred on the

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1st of September 1909 and 15th of November 1909 respectively against the decree of Babu Pankaja Kumar Chatterjee, Subordinate Judge of Zillah Mozufferpur, dated the 24th of June 1909.

The facts of the case will appear from the judgment

Babus Umakali Mukherjee and *Shoroshi Charan Mitra* for the Appellants.

Babus Mahendra Nath Roy, *Kulwant Sahay* and *Chandra Sekhar Banerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These two Appeals arise out of a suit for contribution and the facts which gave rise to the litigation are these :—One Ram Bhatta deposited a certain sum of money in a Bank owned by the Plaintiff's father Ram Lal and his two brothers Sudhist Lal and Gopal Lal. As Ram Bhatta did not get his money, he brought a suit and obtained a decree for the sum deposited by him against Ram Lal, one Janki Koer representing the estate of Sudhist Lal and the representatives of Gopal Lal. This decree was passed on the 30th August 1898. On appeal, the High Court exempted Gopal Lal's branch, namely, Jagannath and Baijnath, in so far as they inherited the share of the family property from Gopal Lal, from liability under the decree. This decree of the High Court was passed on the 4th August 1904. In the meantime, Ram Bhatta having executed his decree against Ram Lal advertised certain properties belonging exclusively to Ram Lal for sale. Thereupon one Raja Shib Chandra Banerjee paid in the decretal amount due to the decree-holder Ram Bhatta on the 8th December 1900 and a petition was put in by the latter in the executing Court to the effect that the decretal amount Rs. 7,263-5 had been realised by him on that date through Raja Shib Chandra Banerjee, the purchaser of certain mehals belonging to the judgment-debtor Ram Lal and his son. The Court thereupon ordered that the case be finally disposed of. On the very same day, however, Ram Lal put in an application before the Court stating that the petition filed on behalf of the decree-holder was without his knowledge and that in fact the negotiations between the Raja and the Petitioner regarding the sale of the Petitioner's properties had not been concluded and that, on the contrary, the Petitioner had concluded negotiations as regards the sale of his properties with another person who had advanced a certain sum of money and had brought it to Court for payment to the decree-holder. The Court, thereupon, made an order to the effect that, as the execution case has already been disposed of, no orders were necessary to be passed on the application of the judgment-debtor Then began litigation between Raja Shib Chandra Banerjee and Ram Lal . The former sued the latter for specific performance of a contract to sell certain properties. The suit was decreed by the Court of first instance but, on appeal, the High Court held that the Raja could not get a decree for specific performance but was only entitled to get back the money advanced, namely, Rs. 7,263-5 with interest at 6 per cent. per annum from the 8th December 1900 up to the date of realisation. In execution of this decree, Raja Shib Chandra sold certain properties belonging to the Plaintiff on the 11th January 1906 and the sale was confirmed on the 21st June 1906, on which date Raja Shib Chandra obtained payment of Rs. 9,518. The present suit was instituted

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on the 3rd February 1908 by the Plaintiff for contribution against his co-sharers, the legal representatives of Sudhist Lal.

The defence was mainly based on the plea of limitation; but the Court below overruled it and gave a decree to the Plaintiff in a modified form against the three sets of Defendants and the Defendants have preferred these two appeals to this Court.

It has been contended on behalf of the Appellant, first, that the cause of action for this suit arose on the 8th December 1900 when the joint decree obtained by Ram Bhatta was paid off, that three years having passed from that date, this suit is barred by limitation; and that the realisation of Raja Shib Chandra's decree by sale of the Plaintiff's property did not give the Plaintiff any cause of action against the Defendants; and, secondly, that no interest ought to have been allowed: at any rate, the interest allowed is excessive.

The Court below has held that Art. 99 of the first schedule of the Indian Limitation Act is applicable to the present case. That article runs as follows:—"For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers, the period of limitation is three years from the date of the payment in excess of the Plaintiff's own share." It is argued that the payment of the amount due under the joint decree was the payment made on the 8th December 1900 by Raja Shib Chandra Banerjee and that, although the payment was not made by the Plaintiff's father it must be taken as if it was made by him through Raja Shib Chandra, having regard to the fact, as found by the High Court, that he had had the benefit of it. But the payment by the Raja was not made under any contract with the Plaintiff's father nor at his request, and, when the payment was made, the Plaintiff's father at once repudiated it by a petition presented to the Court. The payment by the Raja could not give the Plaintiff's father (Ram Lal) any right to sue his co-sharers unless and until he was compelled to pay the money to the Raja. If the Raja did not sue Ram Lal for the money, the latter would have had no right to sue his co-sharers for contribution. Any suit by Ram Lal before he paid the money to the Raja might have been met by the plea that there was no payment by him, much less any payment in excess of his share which alone would have given him a right of suit for contribution. We think therefore that the date of payment by Raja Shib Chandra was not the date of payment by Ram Lal within the meaning of Art. 99. If that article applies, the date on which Raja Shib Chandra's decree was realised by sale of Ram Lal's property should be treated as the date of payment in excess of Ram Lal's share within the meaning of Art. 99. It is very doubtful, however, whether Art. 99 applies to the present case, because the amount due under the joint decree was not paid in the first instance by Ram Lal and it has been doubted in this Court whether money realised by sale of Plaintiff's property in execution of a joint decree against the Plaintiff and his co-sharers is money paid within the meaning of this article, see *Fockeruddin Mahomed* v. *Mahima Chandra* (1), though in the Madras High Court it has been held that the word "paid" in Arts. 99 and 61 would include

(1) I. L. R. 4 Cal. 529 (1878).

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payments derived out of the sale proceeds of the property of the person seeking contribution [see *Raja of Vizianagram* v. *Raja Satrucharlu* (2)].

Next, we have to see if the suit is barred under Art. 61. That article prescribes a period of three years for a suit for money payable to Plaintiff for money paid for the Defendant, from the date when the money is paid. It has been contended on behalf of the Appellant that the article merely says 'money paid for the Defendants" not that it should be paid by the 'Plaintiff' and that, therefore, the date on which Raja Shib Chandra paid the money must be taken as the date on which the money was paid. But we are of opinion that the article contemplates a payment by the Plaintiff and not by a third person and, as we have already said, the payment by the Raja would not have given Ram Lal any right to sue his co-sharers, so long as he had not to pay the Raja. If the article applies, we think the date on which the Raja's decree was realised by sale of Ram Lal's property should be treated as the date when the money was paid within the meaning of Art. 61. But, as we have already pointed out, it has been doubted whether the word 'paid' includes realisation of money by sale of Plaintiff's property.

The circumstances of the case are peculiar. The decree under which Ram Lal and his co-sharers were jointly liable was paid off by a third party Raja Shib Chandra without any request on the part of Ram Lal. Ram Lal, however, was held liable to pay the amount so paid by the Raja on the ground that he was benefited by the payment. But the payment did not benefit Ram Lal alone. The payment benefited his co-sharers as much as it benefited Ram Lal. Under the circumstances, when the amount paid by the Raja was realised from Ram Lal alone by the sale of his properties, he was equitably entitled to obtain from his co-sharers their proportionate share of the original debt which had in this manner been discharged.

If the Plaintiff has the right to recover the money, as we think he has, and if the claim does not fall under Art. 99 or Art. 61, the case must come under Art. 120. As the Privy Council pointed out in the case of *Reasat Ali* v. *Hosin Banu* (3), Art. 120 would apply unless it is clear that the suit is under some other article. Under Art. 120, a suit can be brought within six years from the time when the right to sue accrues. We think the Plaintiff's right to sue accrued when Raja Shib Chandra's decree was satisfied by sale of Plaintiff's property and the suit was brought within two years from the date of that payment. We are accordingly of opinion that the suit is not barred by limitation.

The next question is as regards the interest. The Court below has awarded interest at the rate of 12 per cent.: but no reasons have been assigned why the Plaintiff should get interest at a higher rate than that allowed in the suit of Raja Shib Chandra. We also think that the Plaintiff ought not to get any costs of the suit brought by Raja Shib Chandra and that the liability of the Defendants ought to be determined upon the basis of the amount decreed in the suit of Ram Bhatta together with interest at six per cent. per annum up to the date of the decree in this case.

The result therefore is that the Plaintiff will get a decree for 6½ annas share of

(2) I. L. R 26 Mad. 686 (1908).

(3) I. L. R. 21 Cal. 157 at p. 163 (1893).

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Rs. 7,263-5 with interest thereon at 6 per cent. per annum from the 8th December 1900 up to this date. On the total amount thus decreed, interest at the ordinary rate of six per cent. will run up to realisation. The Defendants, 1st, 2nd and 3rd parties respectively, will contribute according to their share.

Under the circumstances of the case, each party is to bear his own costs in both the Courts.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. MIS. No. 165 OF 1913.

IMAM, J.	MRS. ANNE ELIZABETH
CHAPMAN, J.	BARTHWICK, Petitioner,
1913,	v.
Heard,	MR. HERBERT CHARLES
15, December.	BARTHWICK, Opposite
Judgment,	Party.
16, December.	

Indian Penal Code (Act XLV of 1860), sec. 363—Kidnapping—Indian Divorce Act (III of 1869)—Decree nisi *by District Judge for dissolution of marriage—Direction to deliver up child to husband—Removal of child from husband's custody before confirmation of decree by High Court, if offence.*

Where on an application by the husband for divorce the District Judge made a decree nisi *for dissolution of marriage and also directed the Petitioner (the wife) to deliver up to the husband the son born of the marriage and subsequent to the decree the husband without the assistance of the Court obtained the custody of the son but before the confirmation of the decree by the High Court under sec. 17 of the Indian Divorce Act the Petitioner removed the boy from the father's custody and was charged under sec. 363, I. P. C.:*

Held—*That the order for custody which was made, not being intended to be an ad interim order which it is open to a District Judge to make at any time while a case is pending, was an order* nisi *without legal effect until confirmed by the High Court, and the Petitioner committed no offence under sec. 363, I. P. C., in removing the boy from the father's custody.*

This was a Rule granted on the 25th of November 1913 against the proceedings taken in connection with a charge under sec. 363, I. P. C., pending in the Court of the Sub-Divisional Magistrate of Dinapur.

The facts of the case material to this report will appear from the judgment.

Babu Satindra Nath Mukerjee for the Petitioner.

Babu Mohini Mohan Chatterjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner, Mrs. Anne Elizabeth Barthwick, was arrested on the 8th October 1913, in execution of a warrant issued by the Sub-Divisional Magistrate of Dinapur, the charge against her being that she had kidnapped her child from the lawful guardianship of the father, Mr. Herbert Charles Barthwick. It appears that the parties were married in 1905. Eight years later Mr. Barthwick filed a petition for divorce in the Court of the District Judge, Patna, on the ground of adultery and obtained a decree *nisi* on the 18th August 1913. In that decree it was directed that Mrs. Barthwick do deliver up to Mr. Barthwick the son born of the marriage. Subsequent to the decree Mr. Barthwick without the assistance of the Court obtained custody of the boy. On the 10th October 1913, the present Petitioner, Mrs. Barthwick, removed the child from Mr. Barthwick's house. Mr. Barthwick informed the Police and after en-

quiry the present case was instituted upon a police-report charging the Petitioner, Mrs. Barthwick, under sec. 363 of the Indian Penal Code, with the offence of kidnapping the child from the lawful guardianship of Mr. Barthwick.

The decree *nisi* for divorce, dated the 18th August 1913, was sent by the District Judge to the High Court for confirmation. The decree has not yet been confirmed by the High Court and in fact the minimum period prescribed by sec. 17 of the Indian Divorce Act has not yet expired. The parties are therefore still man and wife [*Warter* v. *Warter* (1)].

The case against the Petitioner however is that her act of removing the child from Mr. Barthwick's custody in October amounted to an offence by reason of the order of the District Judge in August to the effect that Mrs. Barthwick should have the custody of the child. The question for decision is whether this order by the District Judge was of immediate effect or whether it was merely an order *nisi* subject to confirmation by the High Court and is therefore not yet in force. The material portion of the District Judge's judgment is as follows :—"The following decree is accordingly made (*a*) that the marriage be dissolved, (*b*) that the Respondent Anne Barthwick do deliver up to the Petitioner the son born of the marriage . . . (*c*) that the co-Respondent do pay the Petitioner Rs. 3,000 as the costs of this suit. It is ordered that the above decree be forwarded under sec. 17 of Act III of 1869 to the High Court for confirmation." The order for custody of the child formed part of the decree and we interpret the decree to mean that the order was not to be of effect until confirmed by the High Court. There has been no such confirmation.

We observe that Mr. Barthwick's petition for divorce contained no prayer for the custody of the child or any notice that application for custody would be made. The divorce proceedings were *ex parte*. It does not even appear that the custody of the child was asked for at the hearing. Now, according to the practice in England if the custody of a child is not prayed for in the petition, it is necessary to file a separate petition for that purpose which must be filed and served in the same way as an ordinary petition. A similar practice prevails in this Court [*Ledlie* v. *Ledlie* (2)]. Mrs. Barthwick was never served with any notice informing her that application for custody of the child would be made, and she had no opportunity of showing cause why such an order should not be made. We cannot think that the District Judge can have intended to make such an order absolute without notice to her. This confirms us in our view that the order for custody of the child was not intended to be an order absolute.

Where the custody of the children is asked for at the hearing of a petition for divorce, the order for such custody forms part of the decree *nisi* (Brown and Powles on Divorce, 7th Ed., p. 413), and is not absolute until confirmed. No doubt it is open to a District Judge to make an *ad interim* order for custody at any time while a case is pending, but no application for an *ad interim* order was made in the present case and we are satisfied that the order that was made was not contended to be an *ad interim* order. It was an order *nisi* without legal effect until con-

(1) 15 Pro. Div. 152 (1890).

(2) I. L. R. 18 Cal. 473 (1891).

firmed by the High Court. It has not been so confirmed.

This being so, Mrs. Barthwick committed no offence punishable under the Penal Code when she removed the boy from Mr. Barthwick's custody. The Rule is made absolute. We direct that the proceedings against the Petitioner be stayed.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 384 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 23, 24 & 25, July.
Judgment, 11, December.

U. N. BISWAS
v.
KING-EMPEROR.

Bengal Excise Act (V, B. C., of 1909), sec. 2, cls. 6, 7, 14, 15, secs. 46, 48—Elements necessary for conviction under sec. 48—"Denatured," definition of—"Manufacture," definition of—Criminal Procedure Code (Act V of 1898), sec. 410, if controlled by secs. 75, 81, of the Excise Act—Sec. 233, Cr. P. C.—Misjoinder of charges—Same transaction—Applicability of sec. 233 to summons cases.

Where the accused was charged with having in his possession perfumed spirit made with denatured spirit rendered fit for human consumption, with having manufactured and sold such spirit from time to time, with having attempted to render fit for human consumption denatured spirit and keeping in possession and holding the same and was convicted by a Presidency Magistrate under secs 46, 48 of the Bengal Excise Act:

Held—***That to support a conviction under sec. 48 two elements must be established, namely, first, that the spirit is denatured spirit and, secondly, that the accused has attempted to render such spirit fit for human consumption.***

The fact that the Act whilst providing for the punishment of an attempt to render fit for human consumption denatured spirit does not provide any punishment for a successful attempt, suggests that the definition of "denatured" as given in cl. (6) of sec. 2 contemplates such a process as will defy any chemical treatment.

That as it was not shown that the total quantity of denatured spirit in the possession of the accused exceeded one imperial gallon the accused was not proved to possess excisable article in contravention of the Act or of a rule made under the Act.

That the term "manufacture" as defined in cl. 15 of sec. 2 includes every process whether natural or artificial by which any excisable article is produced or prepared as also every process for the rectification, flavouring, blending or colouring of liquor. The essence of "manufacture" consequently is that it is a process and the mere dilution of denatured spirit with water is not a process for the manufacture of an excisable article.

That secs. 75 and 81 of the Excise Act only applied to proceedings before a Collector and did not stand in the way of the order of the Magistrate convicting the accused from being challenged by way of appeal under sec. 410, Cr. P. C.

That the acts imputed to the accused could not be held to constitute the same transaction and the trial was vitiated by misjoinder of charges in contravention of sec. 233, Cr. P. C. The fact that the trial took place as in a summons case did not exclude the application of sec. 233, Cr. P. C.

Quære—***Whether spirit diluted with water is excisable article or intoxicating liquor within the meaning of cls. 7 and 14 of sec. 2.***

U. N. BISWAS *v.* KING-EMPEROR.

This was an Appeal presented on 22nd of April 1913 from a sentence of Mr. Nanda Lal Bagchi, Presidency Magistrate, Calcutta, dated the 25th of March 1913.

The facts of the case will appear from the judgment

Babus Monmatha Nath Mukherjee and *Probodh Chandra Chatterjee* for the Appellant.

Mr. Bagram for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Appellant Biswas has been convicted, by the Fourth Presidency Magistrate of Calcutta, of offences under secs. 46 and 48 of the Bengal Excise Act, 1909, and sentenced to pay a fine of Rs. 210 under the latter section ; no separate sentence has been passed under the former section. The circumstances antecedent to the prosecution, as established by the evidence, may be briefly narrated.

On the 12th October 1912, the Deputy Inspector of Excise at Calcutta, upon information received, searched the premises of the accused and found 32 boxes each containing 6 bottles and an isolated bottle of Eau-de-Cologne and also 23 long-shaped Eau-de-Cologne phials all containing similar liquid. On examination the contents were found to be perfumed denatured spirit. The Deputy Inspector also found two boxes of labels similar to those affixed to the phials. The accused was thereupon prosecuted and charged with possessing, without license, 193 bottles and 23 long-shaped phials containing perfumed spirit made with denatured spirit which had been rendered fit for human consumption ; he was also charged with having manufactured and sold such spirit from time to time, with attempting to render denatured spirit fit for human consumption, with having in his possession such spirit, and with bottling such spirit for the purpose of sale. The accused repudiated all these charges, and asserted that the liquid contained in the bottles and phials was intended to be used as a furniture-wash and not as liquor to be consumed. The prosecution has resulted in the conviction of the accused as already stated.

On the present appeal, the propriety of the conviction has been assailed on the ground that the elements necessary to constitute an offence under secs. 46 and 48 have not been established on the evidence. We shall examine separately the arguments in relation to the two sections named, and as the sentence has been passed only on the basis of the conviction under sec. 48, we shall first consider the scope and effect of that section in relation to the facts elicited at the trial.

Sec. 48, in so far as it is sought to be made applicable to the case before us, provides that if any person attempts to render fit for human consumption any spirit which has been denatured, he shall be liable to be punished in the prescribed manner. To support a conviction under sec. 48 two elements must consequently be established, namely, first, that the spirit is denatured spirit, and, secondly, that the accused has attempted to render such spirit fit for human consumption. Now, cl. (6) of sec. 2 defines the term "denatured" to mean "effectually and permanently rendered unfit for human consumption." A very serious difficulty is raised by this definition. The words "unfit for human consumption" may perhaps be paraphrased as "liable to be injurious to health, but what is mean by the words "effectually and permanently?" The Legislature cannot have intended to

U. N. Biswas *v.* King-Emperor.

mean by "dena ured spirit" such as would remain unfit for human consumption inspite of dilution with water, as even the most poisonous substances can be rendered not only harmless, but in some cases beneficial by sufficient dilution. Then, is the definition intended to meet the case of spirit so treated that no chemical process which does not substantially increase the bulk of the liquor, can render it fit for human consumption, or, did the Legislature contemplate some process which in the absence of some chemical treatment would render it effectually and permanently unfi for consumption; in other words, did the Legislature contemplate some denaturing process which would be proof against any process intended to alter the nature of the spirit, or only a process which would be permanently effective in the absence of some chemical treatment or proc ss of filtration? On the one hand, it is difficult to imagine a denaturing process which would preserve its effect in the face of every possible chemical treatment of the liquor; on the other hand, it is singular that while the Act provides for the punishment of an attempt to render fit for consumption denatured spirit, it does not provide any punishment for a successful attempt, or, in other words, the completed act; and the absence of such a provision suggests that the definition of "denatured" contemplates such a process as will defy any chemical treatment. If that be the meaning, it is clear that in the present case the spirit was not denatured, for the witness Jinks speaks of the liquid as having been "so manipulated that it no longer possesses the characteristics of denatured spirit," and the Magistrate finds that the accused not only attempted to render the spirit fit for human sumption but actually succeeded in his attempt. If the other meaning be the correct one, it is sufficient to state that there is no evidence on the side of the prosecution or admission by the accused that the spirit was in fact ever denatured. Consequently the conviction under sec. 48 of the Bengal Excise Act cannot be supported.

As regards the conviction under sec. 46, reliance has been placed only upon cls. (*a*) and (*d*). These clauses, in so far as they have any possible application to the facts of the present case, render a person liable to the prescribed punishment, if, in contravention of the Act or of any rule, notification or order made, issued or given under the Act, he manufactures, possesses or sells any excisable article or bottles any liquor for purposes of sale. Before we examine the scope and effect of these provisions it is necessary to premise that under the rules made by the Excise authorities, every person is entitled to keep in his possession without a license or a pass, one imperial gallon of what is technically called denatured spirit. Let it be assumed for the purposes of argument—and for that purpose alone—that of the liquid contained in the bottles and phials found on the premises of the accused, there was a quantity of such spirit as would be excisable article within the meaning of that term as defined in cl. (7) of sec. 2 of the Bengal Excise Act. It is plain that the accused has not been proved to possess excisable article in contravention of the Act or of a rule made under the Act; for it has not been shown that the total quantity of "denatured spirit" in his possession exceeded one imperial gallon. It is equally plain that the accused has not been proved to have sold an excisable article, because no evidence has been adduced to prove any

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NOTES.

Prison Reform in India.

The resolution which Mr. Rayaningar moved in the Supreme Legislative Council on the subject of prison reform was a very important one, and we are pleased to find that it has been accepted by the Government. The mover and his supporters made out a strong case for the appointment of a commission of enquiry into the administration of jails in this country and there does not seem to be any great difference between official and non-official views on the subject.

If the object of punishment is primarily the prevention of crime the question of reforming the convict and bringing him back to the life of an honest citizen can legitimately claim precedence to many other minor matters and the solution of the problem is an ultimate gain to the State and to society at large. It must be admitted that Government has all along been alive to the importance of jail reform but much remains to be done in order to arrive at a practical solution of the whole question which involves sociological problems connected with jail administration. Local Governments have been from time to time adopting measures to remedy grievances known to exist in jails but it is necessary and desirable that reformation should go on uniformly throughout the country instead of there being isolated experiments here and there and the work properly falls within the province of the Government of India. One important matter, as pointed out by the mover, should always be borne in mind. No doubt the system of jail administration prevailing in European countries affords a good model, but "the reforms whether partially carried out or only suggested by the various public bodies in the West, have, before adoption in India, to be carefully scrutinised in the light of local conditions."

The well-reasoned reply of the Hon'ble the Home Member who has got considerable experience in matters connected with the jails in this country lays down the line of action which under the circumstances of the case is necessary to be taken by Government. In the course of his speech in Council, he said: "Nothing has struck me so forcibly as the fact that our penal system is still far too rigid and makes no sufficient attempts to differentiate between crimes committed in the heat of passion and cold calculating crimes implying a vicious and degenerate nature. The compartments into which criminals are kept are still far too few. The diagnosis is too rough and ready and treatment too uniform. We have to devise separate treatment for the confirmed criminal and the hardened miscreant and the seemingly hopeless degenerate, and separate treatment for the criminal who though he offended against the laws in a moment of passion or sudden temptation is still left with self-respect which may deter him from sinning again. We have to aim at providing a probation during which a man who appears desirous of reform may have the chance of proving his sincerity under conditions which remove him from further contamination or tempt him to lapses. We have to try and remove as far as possible those causes which tend to make him immoral and corrupt and we have to try to awaken in him those incentives which make men honest and keep them so."

It seems to be absolutely necessary that hardened criminals should be kept separate from impressionable youths for whom there is still a chance of reformation, and the success of the

Borstal system, under which convicts between the ages of 16 and 21 are placed in settlements in which prison discipline is kept in the back-ground and education and general reformation are placed in the forefront, is well worth enquiring into.

Another matter with regard to which complaints are too frequent is the dietry arrangement in Jails. So far as this question is concerned, it is much easier for the Government to take remedial steps than with reference to the broad question of the reformation of the convict which involves larger issues and necessarily requires greater time and reflection.

CURRENT INDIAN CASES.

(CIVIL.)

Hindu widow—Suit for partition.

PEMA *v.* JAS KUNWAR, I. L. R. 35 All. 527.

The mere fact that a widow is recorded in the Khewat as a co-sharer under a family arrangement does not make her a co-sharer and this alone cannot entitle her to sue for partition.

Mortgage—Post diem *interest.*

BALWANT SINGH *v.* GAJJAN SINGH, I. L. R. 35 All. 534.

A mortgage provided for the payment of the sum of Rs. 300 with interest at a certain rate per cent per mensem in one lump sum on a certain specified date, four years from the date of the mortgage. It was further provided that if the money was not paid on that date the property should be the absolute property of the mortgagee. There was no stipulation of any interest after the fixed date.

Held—That *post diem* interest was not recoverable.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Oram* v. *Hutt.* Before LORDS PARKER AND SUMNER AND MR. JUSTICE WARRINGTON. 5th November 1913.

Payments made by a corporation in pursuance of an agreement for maintenance of an action are void.

This was an appeal from a decision of Swinfen Eady, J. Messrs. Johnson and Davis were two officials of a Miners' Association. The Executive Committee of the Association passed a resolution which [illegible] indemnity in respect of the costs of an action for slander which Messrs. Johnson and Davis were to institute against a third person. [illegible] the said Executive Committee [illegible] paid the solicitors' costs. A [illegible] the association now claimed their repayment [illegible] that the action of the Executive Committee was *ultra vires*, and the Court below so held. The appeal was dismissed. In the course of his judgment Lord Parker said :—

The first question for decision, was whether the agreement by the Association to indemnify any of its officers who took proceedings against McNicholas for libel was void on the ground of maintenance. In his opinion Mr. Justice Swinfen Eady was bound and that Court was bound to hold that agreement void unless the case could be distinguished from the case of *Alabaster* v. *Harness*, [1895] 1 Q. B., 339. Several grounds of distinction were suggested in argument, but upon consideration he thought that there was little substance in them. A person who maintained the action of another could only justify by proving the existence of a common interest or bringing himself within certain recognised exceptions of the common law rule. A common interest meant an interest recognized by law in the subject-matter of the action or some issue between the parties to the action. It was decided in the case in question that a libel action was a personal action which in point of law concerned only the parties to it and the matters legally at issue were merely whether the Plaintiff had been libelled, and if so to what damages he was entitled. The mere circumstance that in the libel action there must or might arise questions of fact in the determination of which a third party had an interest would not constitute a common interest sufficient to justify maintenance by such third party. In the libel action by Tibbits which Harness maintained there might arise, and did in fact arise, a question as to the efficiency of the electric belt in which Harness was interested. Indeed, the libel on Tibbits consisted in charging him with professional incompetence on the ground that he had reported favourably on a belt which was alleged to be worthless. From a business point of view it was vital to Harness after the publication of that libel to prove that the belt had the merits appearing in Tibbits's report. That, however, was held insufficient to justify his maintaining the libel action. Similarly in the present case it might have been vital for the association from a business point of view to controvert certain of the allegations made by McNicholas against their officers the truth of which would be in issue in the libel action by Johnson. Nevertheless, according to the case in question, that would not constitute a common interest justifying the Association in maintaining such actions, the matters legally at issue being merely whether the Plaintiffs in those actions had been libelled, and to what damages they were entitled. He did not, therefore, see how this case could be distinguished from the case of *Alabaster* v. *Harness*, [1895] 1 Q. B., 339, nor did he think that the association could be brought within any of the recognized exceptions.

The question remained whether the payments were justified on any other ground. As pointed out by Lord Alverstone, C. J., in *Greig* v. *National Amalgamated Union of Shop Assistants, Warehouse-*

men, and Clerks, 22 T. L. R. 274, a mere power to give legal aid to its members in protection of their interests could not justify an act which would be otherwise illegal. But even if the objection based on maintenance were out of the way in the present case, he was of opinion that the payments could not be justified. Such payments were certainly not justified by express words of the rules of the association.

Hon. F. Russell, K. C., and *Mr. Manning* for the Appellants.

Sir C. Macnaghten, K. C., and *Mr. Pollock* for the Respondents.

B. D. *Appeal dismissed.*

KING'S BENCH DIVISION.—*Papworth* v. *Battersea Borough Council* Before MR. JUSTICE HORRIDGE. 20th December 1913.

Liability of the Borough Council for injury caused by defect in the road—Negligence in not repairing it.

The Plaintiff, a lady, was injured while cycling. She sued for damages alleging that the accident was caused by a sewer grating in the road which was allowed to get out of its position by the negligence of the Defendants. The jury found that the gully was negligently constructed and that the Defendants were negligent in not remedying or repairing the defect which caused the accident. The learned Judge gave judgment for the Plaintiff. He said it was contended before him that the principle of *Cowley* v. *Newmarket Local Board* ([1892] App. Case, 345) applied to a local authority in respect of whatever duties they were exercising, but he did not think this was the correct view, as that decision was strictly limited to their position as highway authority and ought not to be extended to their position when acting as other than highway authority. The true view of the position of a public authority which undertakes statutory duties was correctly laid down by Mr. Justice Lush in *McClelland* v. *Manchester Corporation* ([1912] 1 K. B., at page 133), where he says:—"If a duty is undertaken and improperly performed and actual damage is occasioned thereby the person injured has, as I have already stated, a perfectly good cause of action. The cases of *Meet* v. *Whitechapel Board of works* (2 F. and F, 144), *White* v. *Hindley Local Board of Health* (L. R., 10 Q. B., 219), and *Blackmore* v. *Vestry of Mile end* (9 Q. B. D., 451) seem to me clearly to show that the Defendants are liable as sewer authority for not seeing that the inequality caused owing to their gully being so much below the roadway was remedied, and the jury having found against the Defendants on this question the Plaintiff was entitled to judgment upon it.

Mr. Fitch for the Plaintiff.

Messrs. Campbell, K. C., and *Warren* for the defence.

B. D.

PRIVY COUNCIL.

[APPEAL FROM PUNJAB.]

THE LORD CHANCELLOR
LORD DUNEDIN.
LORD PARKER.
LORD SUMNER.
1914,
6, February.

HAJI ALLAH BAKHSH and others,
v.
ABDUL KARIM and ors.

Special leave to appeal—Test cases, not by themselves involving statutory value—Leave upon conditions.

This was a petition for special leave to appeal. The Petitioners instituted suits against the several Respondents for ejectment and recovery of rent. The Defendants pleaded that they were permanent tenants holding at a fixed rent. The Subordinate Judge dismissed the suits except as regards arrears of rent. This decree was varied by the Divisional Judge, but the Chief Court of the Punjab on appeal restored the decree of the Subordinate Judge. The Petitioners' application for leave to appeal was refused on the ground that the consolidated value of the suits was less than Rs. 10,000.

Mr. Arthur Grey for the Petitioners submitted that the present suits were test cases and that the value of the property indirectly affected thereby would exceed the statutory amount.

Their Lordships granted special leave on the condition that the Appellants paid the costs of the Respondents unless otherwise ordered.

Solicitors: *Messrs. T. L. Wilson & Co.*

B. D.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

THE LORD CHANCELLOR
LORD DUNEDIN.
LORD PARKER.
LORD SUMNER.
1914,
6, February.

THE BANK OF INDIA LIMITED
v.
THE NADIAD SWADESHI SPINNING WEAVING and MANUFACTURING CO., LD. and others.

Special leave—Substantial question of law—Undue or fraudulent preference, finding of.

This was an application for special leave to appeal against the decision of the Bombay High Court, dated the 2nd July 1913. In 1910 the District Court at Ahmedabad ordered that the said Company be wound up and the Respondents were appointed official liquidators thereof.

In the course of the liquidation proceedings the liquidators applied to the said Court to have it declared that certain debentures and trust deed were invalid as constituting undue or fraudulent preference of the said Bank and the other creditors

of the Company to whom the debentures were issued within the meaning of sec. 213 of the Indian Companies Act (VI of 1882) and sec. 37 of the Provincial Insolvency Act (III of 1907).

Both the lower Courts found against the Bank and the High Court refused leave to appeal on the ground that it did not involve any substantial question of law.

Mr. G. R. Lowndes for the Appellants submitted that the appeal raised substantial and important questions of law and that the value exceeded by far the statutory amount.

Their Lordships granted special leave on the usual terms.

Solicitors: *Messrs. E. F. Turner & Sons.*

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE AND BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 1392 OF 1912. BEPIN BIHARY BHATTACHARJEE, Plaintiff, Appellant *v.* PANCHANON BHATTACHARJEE AND OTHERS, Defendants, Respondents. 19th February 1914.

Estoppel—Sale by heir of real owner, as administrator of a stranger, if passes title—Bengal Tenancy Act, sec. 103B—Presumption, rebuttal of—Evidence taken on second appeal—C. P. C., Or. 41, r. 24.

The Plaintiff's allegation was that after the death of one Ram Kumar Bhattacharjee he was in possession of the disputed plot of land as his heir, and further that as one Rash Behary Bhattacharjee took out letters of administration in the estate of Ram Kumar, he also took a *kobala* from the above Rash Behary Bhattacharjee to avoid litigation. Further that he was in possession of the land in suit by letting it out to tenants ever since.

The Defendants alleged that the land in dispute belonged to one Rajbulluv Bhattacharjee, a predecessor of Abhoy Charan Bhattacharjee, father of Rash Behary and that he held a *kobala* from Abhoy from 1268, B. S., and was in possession of the land by letting out to tenants ever since.

In 1898 there was a record-of-rights which was finally published under sec. 103B, Bengal Tenancy Act, on 12th October 1898, and in which the Defendants were recorded as proprietors of the land.

Against the above entry, Plaintiff appealed before the Settlement Officer who transferred the case to the Civil Bench.

The Munsif held that the *kobala* of the Defendant of 1268, B. S., was not genuine but the *kobala* of the Plaintiff was and decreed the suit. He held that Raj Bullav was the real owner.

The Subordinate Judge in appeal by the Defendants held that that the *kobala* executed by Rash Behary passed no title to the Plaintiff as he gave the *kobala* as administrator to the estate of Ram Kumar who was not the owner of the disputed land, the owner being one Raj Bulluv, a predecessor of Rash Behary.

He further held that as the Plaintiff had failed to rebut the presumption arising from the entry in the record-of-rights under sec. 103B, (Bengal Tenancy Act), by satisfactory evidence of title his suit must fail.

Babu Hit Lal Guha for the Plaintiff-Appellant.—The *kobala* in favour of the Plaintiff by Rash Behary Bhattacharjee passed good title to the Plaintiff although Rash Behary gave the *kobala* as administrator to one Ram Kumar he was thereby estopped from challenging the title of the Plaintiff as heir of Raj Bullav. So is the case of anybody else claiming through him. Referred to sec. 115 (*a*), Evidence Act, *Sarat Chandra De* v. *Gopal Laha*, 19 I. A. 203: S. C. I. L. R. 20 Cal. 296, 4 C. L. J. 23 and 323 at p. 330, sec. 43, Transfer of Property Act, etc.

Further, the Defendant whose *kobala* was a forgery was no better than a trespasser and could not question the Plaintiff's title.

Babu Jadu Nath Kanjilal in reply submitted that Plaintiff claimed title through the *kobala* of Rash Behary and as Rash Behary was nobody and had not title himself at the time he got nothing by the *kobala*. *Vide* sec. 8 of the Transfer of Property Act, and 15 Mad. 54. Sec. 115, Evidence Act, have no application in this case. 11 M. I. A. 7.

Further, as there was no finding as to the genuineness of Defendant's *kobala* the appeal at the worst ought to be remanded for a finding.

Their Lordships asked the Respondents to adduce evidence as to the genuineness of the *kobala*.

The evidence having been taken,

Their Lordships held:—

(1) The *kobala* in favour of the Plaintiff by Rash Behary as heir to Ram Kumar was a genuine one and when Rash Behary inherited the property as heir to another person, *viz.*, Raj Bullav, it passed good title and could not be questioned by Rash Behary or anybody claiming through him.

(2) Further, though there was no finding of the Subordinate Judge as to the genuineness of Defendant's *kobala*, on the evidence of the record, their Lordships found, as under Or. 41, r. 24, C. P. C., they could, that the *kobala* was not a genuine one.

(3) That the presumption arising under sec. 103B, Bengal Tenancy Act, had been satisfactorily rebutted and title of the Plaintiff established in the land in dispute.

The judgment of the Subordinate Judge was set aside and that of the Munsif was affirmed.

H. L. G. *Appeal decreed with costs.*

U. N. BISWAS *v.* KING-EMPEROR.

sale by the accused. The questions consequently remain, whether the accused has manufactured excisable article or has bottled any liquor for sale. Now, the term "manufacture" is defined in cl. (15) of sec. 2 to include every process whether natural or artificial, by which any excisable article is produced or prepared, as also every process for the rectification, flavouring, blending or colouring of liquor. The essence of "manufacture" consequently, is that it is a process, which is defined as follows in the Oxford Dictionary: (Vol. VII, p. 1408). "A continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result; a continuous operation or series of operations; a particular method of operation in any manufacture." We are not prepared to hold that the mere dilution of denatured spirit with water is a process for the manufacture of an excisable article, assuming that the diluted liquid is an excisable article within the meaning of the Act. Besides, there is no evidence to show that it was the accused who "manufactured" the liquid, even if it is assumed that dilution is "manufacture" for the purposes of the Act. Nor is it proved that the accused transferred liquor from a cask or other vessel to a bottle or other receptacle for the purpose of sale within the meaning of cl. 3 of sec. 2. The conviction under sec. 46 cannot consequently be sustained. In this view, it is not necessary to consider whether the spirit diluted with water is excisable article or intoxicating liquor within the meaning of cls. (7) and (14) of sec. 2 or whether the case of *Matilal* v. *Emperor* (1), upon which much reliance was placed on behalf of the Appellant gives effect to the statutory provisions on the subject. It is, however, difficult to believe that the framers of the statute could really have intended that spirit which had been effectually and permanently rendered unfit for human consumption should, by reason of mere dilution with water, be deemed to have become an intoxicating liquor or drug within the meaning of the Act. It is a matter for legitimate comment that the difficulty in this case is attributable principally to the surprising looseness of expression which characterises many of the provisions of the Act.

It was faintly suggested in the course of argument, on behalf of the Crown, that the order of the Magistrate is not liable to be challenged by way of appeal under sec. 410 of the Code of Criminal Procedure, and reference was made to secs. 75 and 81 of the Bengal Excise Act to show that the Code has a restricted application to proceedings taken under the Act. This argument is obviously fallacious inasmuch as secs. 75 and 81 apply only to proceedings before a Collector. On the other hand, sec. 84 which excludes the application of sec. 191 of the Criminal Procedure Code in cases in which a Magistrate has taken cognizance of an offence under the Act, furnishes ample indication that the Criminal Procedure Code is applicable to trials before a Magistrate, subject to specified restrictions.

We may finally add that the trial in the Court below has been obviously vitiated by misjoinder of charges in contravention of the provisions of sec. 233 of the Criminal Procedure Code. The view cannot possibly be maintained that the acts imputed to the accused, namely, manufacturing the excisable article seized and brought into Court, bottling it, possessing it, selling from time to time

(1) I. L. R. 39 Cal. 1053 (1912).

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various other articles not before the Court, and attempting to render denatured spirit fit for human consumption, constitute the same transaction. The fact that the trial has taken place as in a summons case does not exclude the application of sec. 233 of the Criminal Procedure Code [*King-Emperor* v. *San Dun* (2)]. Consequently on the ground of misjoinder alone, the conviction and sentence are liable to be set aside: but we have preferred to rest our decision on the merits of the case, inasmuch as we would have felt inclined to direct a retrial if the appeal had succeeded merely on the ground of misjoinder.

The result is that this Appeal is allowed and the conviction and sentence set aside The consequential order for confiscation made under secs. 63 (1) and 64 (1) will necessarily stand cancelled. The fine, if paid, will be refunded, and the articles seized will be returned to the Appellant.

Appeal allowed

(2) 8 L. B. R 52 F. B.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 2 OF 1911.

JENKINS, C. J.
MOOKERJEE, J.
1913,
10, June.

INDRA MANI DASYA, Plaintiff, Appellant,
v.
PRIYANATH CHACKRABARTY and ors., Defendants, Respondents.

Revenue Sale Law (Act XI of 1859), sec. 13—Share sold for its own arrears though estate as a whole not in arrears—Validity of sale—"Estate," meaning of.

Where the Plaintiff's share in a revenue-paying estate in respect of which a separate account had been opened was sold for its own exclusive arrears, without taking into account excess payments made by the proprietors of other shares and which more than made good the arrears due on Plaintiff's share:

Held—*That as the estate as a whole was not in arrears the sale of Plaintiff's share was illegal and was liable to be set aside by the Civil Court.*

The term "estate" as used in the clause "if the estate shall become liable to sale for arrears of revenue" in sec. 13 of Act XI of 1859, means the entire estate out of which the separate share has been carved.

This was an Appeal preferred on the 3rd of January 1911 against the decree of Mr. Justice Caspersz, dated the 25th of November 1910, passed in Appeal from Appellate Decree No. 432 of 1909.

The appeal arose out of a suit to set aside a sale of Plaintiff's separated share of the revenue paying estate on the ground *inter alia* that the arrears, for the realisation of which the sale was held, were not really due. The suit was contested by the auction-purchaser. The arrears as stated in the notification of sale were Rs. 6 14, made up as follows: Kist of 1914, 12 as. 6 ps.; kist January 1905, Re. 1-8; kist March 1905, Re. 1-9; kist January 1906, Re. 1 8; kist March 1906, Re. 1 9. Plaintiff's case was that she had paid 8 as. 6 pies in excess of the revenue payable by her for these years, that a sum of Rs 5-11-2 pies stood in the general account of the entire estate being excess payments made by other co-sharers and that if these were taken into account, as they should have been, the estate was not in arrear and the Collector had no jurisdiction to sell the estate.

The Munsif was not satisfied with the evidence produced by the Plaintiff to

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prove "wrong debit" in the Collectorate and dismissed the suit observing that in a case like this the Plaintiff should clearly satisfy the Court that there has been actually a mistake and not ask the Court to go upon mere guess. The Subordinate Judge on appeal affirmed this decision observing that it lay on the Plaintiff who challenged the correctness of the Collectorate accounts to prove her contention by the production of fuller accounts from the Collectorate.

Hence this Second Appeal.

Babus Prokash Chandra Mojumdar and *Jogesh Chandra Roy* for the Appellant.

Babus Boidya Nath Dutt and *Taraknesswar Pal Chowdhury* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Plaintiff in a suit for declaration that a sale for arrears of revenue of her share in an estate held on the 14th September 1906 was inoperative, and for recovery of possession thereof.

The sale took place for realization of a sum of Rs. 6-14 annas 6 pies made up as follows: namely, 12 annas 6 pies as arrears due at the end of the year 1903-1904, Rs. 3-1 anna as an arrear due in respect of the year 1904-05 and a second sum of Rs. 3-1 anna as an arrear due in respect of the year 1905-06.

The case for the Plaintiff is that the sale was inoperative because it was held in contravention of the provisions of sec. 13 of Act XI of 1859. This contention has been negatived by all the Courts, and the question in controversy is as to the true construction of this provision of the law. Sec. 13 provides that "whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due."

In the case before us, the share of the Plaintiff was separated in 1887, and the order came into effect from the beginning of the year 1888-1889.

Now, under sec. 13 to which reference has been made, the first point to be determined is whether the estate is liable to sale for arrears of revenue.

On behalf of the Respondents it has been contended that the term "estate" means share of an estate. But notwithstanding the definition of the term estate as given in sec. 1 of Bengal Act VII of 1868, it is plain that the term estate as used in the clause "if the estate shall become liable to sale for arrears of revenue" means the entire estate out of which the separate share has been carved. The policy of the Legislature is clear beyond dispute. The first point for determination is, is the estate as a whole liable to sale for arrears of revenue. If it is not, no further question arises. But if the estate as a whole has become liable to sale for arrears of revenue, the question arises which portion or portions thereof should be brought to sale. Under sec. 13, the Collector can put up to sale only that share or those shares of the estate which has thus become liable to sale for arrears of revenue, from which, according to the separate accounts, an arrear of revenue may be due.

In the case before us, it has been contended by the Plaintiff throughout the litigation that the entire estate which

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comprised her share had not become liable to sale for arrears of revenue on the 14th of September 1906. This is a point which has not been investigated by the Courts below. Consequently, it is open to us, under sec. 103, C. P. C., upon the materials on the record to determine whether the estate has become liable to sale for arrears of revenue.

Now, the Plaintiff has established by the production of the receipts for payments made by her from time to time into the Collectorate that from 1888 to 1904, during a period of seventeen years, she had paid 6 pies a year in excess of the amount due. The amount paid by her was Rs. 3-1-6 pies, whereas the amount payable by her in respect of her share was Rs. 3-1 anna; she had thus over-paid 8 annas 6 pies. At the end of the year 1903-04 consequently the accounts ought to have shown 8 annas 6 pies to her credit, but they erroneously show against her 12 annas 6 pies, and it is not obligatory upon her to show how the error originated. As regards the years 1904-05 and 1905-06 it has not been established that she had paid the amounts due. Consequently, at the end of the year 1905-06 the amount due from her would be Rs. 6-14-6 pies reduced by 12 annas 6 pies, namely, Rs. 6-2 annas. But as already explained she had made the excess payment of 8 annas 6 pies. She further proves that in the residuary estate there had been over-payments and a sum of Rs. 5-13 2 pies stood to the credit of that estate. Consequently a sum of Rs. 6-5 annas 8 pies ought to have stood to the credit of the entire estate, and as there was a non-payment of Rs. [illegible] annas, there would be a sum of 3 annas 8 pies in excess to the credit of the estate. Consequently at the end of the year 1905-06 the estate had not become liable to sale for arrears of revenue. If the estate, as we have found, was not liable to sale for arrears of revenue, the Collector had no jurisdiction to put up any share thereof to sale. Consequently, the sale must be declared as inoperative as explained by their Lordships of the Judicial Committee in the case of *Balkishen Das* v. *Simpson* (1).

The result, therefore, is that this Appeal must be allowed, the decrees of the Courts below discharged and the suit decreed. It will be declared that the sale held on the 14th September 1906 was inoperative, and the Plaintiff will be placed in possession of the property sold.

This order will carry costs throughout.

Appeal allowed.

(1) I. L. R. 25 Cal. 833, 837 (1898).

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORIGINAL ORDER No. 102 OF 1912.

COXE, J.
RAY, J.
1913,
4, June.

JNANENDRANATH BOSE and others, Appellants,

KHULNA LOAN COMPANY LIMITED, Respondents.

Civil Procedure Code (Act V of 1908), sec. 48, Or. 20, r. 6—Mortgage decree—Direction that unrealized balance of decree should be recovered from mortgagor personally, application to execute, if may be made after 12 years.

Where a mortgage decree directed that the property mortgaged should be sold and, if the proceeds of the sale be insufficient, the balance of the decree should be realized from the other properties and the person of the judgment-debtor, an application made more than 12 years after the date of the decree for attachment and sale of the mortgagor's other properties is

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barred by sec. 48 of the Civil Procedure Code.

This was an Appeal preferred on the 28th of February 1912 against the order of Babu Dinonath De, Officiating Subordinate Judge, 1st Court, of Zillah Khulna, dated the 6th of December 1911.

The judgment of the Subordinate Judge which sets out all the material facts was as follows :—

"In this case the judgment-debtors object to the execution of the decree on the ground that as the application has been filed more than 12 years after the passing of the decree the execution is barred under the provisions of sec. 48 of the Civil Procedure Code. The decree was passed in a mortgage suit on the 28th May 1896 and it was ordered that the mortgaged property was to be sold in the first instance and if the proceeds of the sale were insufficient to pay up the decree the balance would be realized from other properties and the persons of the judgment-debtors. Thus virtually there were two decrees passed at the same time, one under sec. 88 of the Transfer of Property Act and another under sec. 90. The decree under sec. 90 was, however, to remain inoperative until the remedy provided under the decree under sec. 88 had been exhausted. Now, the period of 12 years provided in the case of a decree does not certainly begin to run until the decree becomes operative and capable of execution. In the present case the mortgaged properties were sold under the decree passed under sec. 88 of the Transfer of Property Act on the 24th June 1907. So the decree under sec. 90 became operative and capable of execution some time after that date and the period of 12 years must be counted from that time. The case of *Chandi Charan* v. *Ambika Charan* (1) is a direct authority on the point. The present application for execution being filed on the 3rd March 1911 is therefore clearly within time and is not barred by the 12 years' limitation prescribed in the Civil Procedure Code. The objection of the judgment-debtor is accordingly disallowed and it is ordered that execution do proceed. The objectors shall pay costs in this matter with interest at 6 per cent. per annum until payment."

Babu Narendra Kumar Bose for the Appellants.

Babu Brija Lal Chuckerbutty for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This Appeal arises out of execution of a mortgage decree. It was directed in that decree that the mortgaged property should be sold and if the proceeds of the sale were insufficient the balance should be realized from the other properties and the persons of the judgment-debtors. This application was presented more than 12 years after the date of that decree. The learned Subordinate Judge has held that there were virtually two decrees at that time and that the period of 12 years did not run until what he regards as the second decree under sec. 90 of the Transfer of Property Act, 1882, became operative and capable of execution. Accordingly he held that the application was not barred, basing his decision on the case of *Chandi Charan Roy Chowdhury* v. *Ambika Charan Dutt* (1).

The judgment-debtor appeals, and it is argued that the execution is barred. It appears to us that this contention must succeed. The case cited by the learned

(1) I. L. R. 31 Cal. 792 (1904).

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Subordinate Judge is not an authority for holding that the decree-holder who has obtained a decree such as is given in this case has 12 years for proceeding against the person and other properties of the judgment-debtor, dating from the time when the mortgaged property has been sold. The point never arose in that case. All that was held in that case was that when the execution was applied for more than 12 years after the mortgaged property had been sold, the application was barred. But the question whether it was or was not barred before that stage was not raised in that case and was not decided. The terms of sec. 48 seem to us to be perfectly clear, and according to that section time runs from the date of the decree. The date of the decree is fixed by Or. XX, r. 6, and we cannot understand how there can be any other date of the decree from which limitation should run. It has been suggested that this case may be regarded as one in which the decree directed the payment of money to be made at a certain date, namely, after the mortgaged property had been sold. It appears to us that a direction of such a kind would certainly not be a direction to pay money at a certain date. The date would not be certain.

Next it has been argued that the first application for execution against the person and other properties of the judgment-debtor might be regarded as an application for an order under sec. 90 and the order passed thereon might be regarded as a decree. Applications for execution are ordinary applications for the attachment of property and bear no resemblance whatever to an application under sec. 90. No reason really has been shown to us for supposing that the application of 1908 for execution was in any way an application for a decree under sec. 90.

We think, therefore, that the Appeal must be decreed and the application refused as being barred by limitation.

The Appellant will be entitled to his costs in both the Courts. We assess the hearing fee at 4 gold mohurs.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1265 OF 1913.

CARNDUFF, J. RICHARDSON, J. 1913, Heard, 15, December. Judgment, 22, December.	AKHOY KUMAR PAL, Defendant, Petitioner, *v.* HARIDAS BYSACK, Plaintiff, Opposite Party.

Negotiable Instruments Act (XXVI of 1881), sec. 48—Transfer of Property Act (IV of 1882), secs. 123, 130, 137—Promissory note, making over of, without endorsement, if constitutes valid transfer or gift—Chose in action, transfer of—Negotiable Instruments Act, scope of.

The Defendant executed a promissory note in favour of one N who handed over this note without any endorsement to an idol through its pujari, *and having done so, died. The Plaintiff, the* shebait *of the idol, thereupon sued the Petitioner for the amount due on the note:*

Held—*That although a promissory note to order may be transferred otherwise than by endorsement and delivery as contemplated by sec. 48 of the Negotiable Instruments Act, there was no legal transfer of the promissory note to the Plaintiff or the Deity whom the Plaintiff represented, either as a negotiable instrument or as a chose in action under sec. 130 of the Transfer of Property Act nor was there a valid gift of the promissory note under sec. 123 of the Transfer of Property Act.*

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That even assuming that there was a valid transfer the Plaintiff was not entitled to sue in his own name.

It may be generally true that a valid assignment of a negotiable instrument as an actionable claim gives the assignee the rights of the holder subject to equities but this broad proposition must be subject at any rate to the qualification that it is true only so far as it is not inconsistent with the special provisions of the Negotiable Instruments Act.

Per RICHARDSON, J.—*The object and purpose of the Negotiable Instruments Act is to legalise a system under which claims arising upon certain instruments of a mercantile character can be treated like ordinary goods which pass by delivery from hand to hand. But except within the prescribed limits such claims cannot be so treated.*

This was a Rule granted on the 29th of August 1913, against an order of B. L. Chatterjee, Esq., Small Cause Court Judge at Dacca, dated the 31st of July 1913.

The facts of the case will fully appear from the judgment.

Babu Gunada Charan Sen for the Petitioner.

Dr. Sarat Chandra Basak and *Babu Sarat Chandra Dutt* for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—The Petitioner before us executed a promissory note for Rs 300 in favour of one Nityamani Baisnabi. Nityamani handed this note over without any endorsement to an idol through its *pujari*, and, having done so, died. The *shebait*, who is the Opposite Party, sued the Petitioner for the amount due and obtained a decree. Hence this Rule.

For the Petitioner it is contended that a promissory note to order cannot be transferred otherwise than by endorsement and delivery, as contemplated by sec. 48 of the Negotiable Instruments Act, 1881. But there is authority—see *Benode Kishore Goswami* v. *Ashutosh Mukhopadhya* (1) and the cases and text-books there cited—for holding that this is not so; and the argument of the Opposite Party that he can here rely on an assignment of the note as a chose in action or, failing that, on a transfer by gift, requires examination.

A chose in action can now, under sec. 130 of the Transfer of Property Act, 1882, as amended by the Transfer of Property Act, 1900, be assigned only by an instrument in writing signed by the transferor or his agent. But, it is contended, the section does not—see sec. 137—apply to instruments which are for the time being, by law or custom, negotiable, and under the former law there could apparently be an equitable assignment without writing. That is obviously all that the Opposite Party can rely upon here: and he is put out of Court as soon as the fact is recalled that his is the position of a mere volunteer. For equitable assignments were given effect to in equity only when supported by valuable consideration.

There remains the question of gift, which depends upon sec 123 of the Transfer of Property Act, 1882. Under that section a gift of moveable property—and a chose in action is moveable property within the meaning of the Act—may be effected by delivery made in the same way as goods may be delivered. Now, the delivery required by sec. 90 of the Indian Contract Act, 1872, involves

(1) 16 C. W. N. 666 (1912).

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the doing of something which has the effect of putting the goods in the possession of the receiver or his agent. Here what was done was the handing over of a piece of paper, which as it stands, is, on the face of it, of no intrinsic value to anyone but Nityamani or a person nominated by her indorsement, and which, in the hands of a third party unindorsed, is, at most, some evidence of an intention on the part of Nityamani to make a present of the debt indicated by it to that third party. Nityamani having failed to nominate by indorsement, her intention was not carried out, and there was no completed gift: or, to employ the language used in *re Richardson; Shillito* v. *Hobson* (2), the document was only an incident to the chose in action, and all that was delivered was this incident, the handing over of which cannot be said to have had the effect of putting the representative of the idol in possession of the debt. This view is, I think, in accordance with that taken in *Merbai* v. *Perozbai* (3) in *Khursedji Rustomji Colah* v. *Jestonjee Kowasjee Bucha* (4) and by the Judicial Committee in *Aga Mohamad Jaffer Bindamin* v. *Kulsum Bibi* (5). It seems to me, therefore, that there was no completed gift, and that the contention of the Opposite Party again fails. The Rule should, therefore, be made absolute, but I would not make any order as to costs.

I must add that the broadly stated proposition that the Negotiable Instruments Act, 1881, leaves untouched the rules of the general law which regulate the assignment of chose in action and the transfer of chattels seems to me to require the qualification, that the latter must not be inconsistent with the former. In England this qualification is expressly imposed by sec. 97 (2) of the Bills of Exchange Act, 1882 (45 & 46 Vict., C. 61), and, though there is no corresponding provision in the Indian Act of 1881, the principle that a general and earlier rule must give way to a special and later provision seems to be sufficient. Even if there had been in this case a valid transfer to the idol, whether by assignment or gift, of the debt due to Nityamani, the assignee or donee would at once be confronted by the express provisions of the Act of 1881, which not only enacts by sec. 48 that a promissory note payable to order is negotiable by indorsement and delivery, but also declares—see sec. 78—that payment of the amount due on such a note must, in order to discharge the maker, be made to the "holder." The Petitioner is certainly not the "holder" and he cannot, therefore, give the Opposite Party a valid discharge. How, then, can he obtain a decree in his own name? He might be entitled to the money promised, but, before he could recover it, he would have to obtain the indorsement of the legal representative of the deceased promisor. The position would, indeed, be similar to that described in Chalmers on Bills of Exchange, Ed. 7, at p. 140, where it is stated, on the authority of *Bishop* v. *Curtis* (6), that, where C, the holder of a bill payable to order, dies after having specifically bequeathed it to X but without indorsing it, X cannot sue on it unless and until he obtains an indorsement in his favour by C's executor.

RICHARDSON, J.—I agree that there was

(2) 30 C. D. 396 (1885).
(3) I. L. R. 5 Bom. 268 (1881).
(4) I. L. R. 12 Bom. 573 (1888).
(5) I. L. R. 25 Cal. 9; s. c. L. R. 27 I. A. 196 (1897).

(6) [1852] 21 L. J. Q. B. 391.

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no complete legal transfer or gift of the promissory note by the deceased woman to the Plaintiffs or the deity whom the Plaintiffs represent. It is conceded that the instrument represents an actionable claim but it is argued that inasmuch as it is a negotiable instrument the case is taken out of the provisions of sec. 130 of the Transfer of Property Act relating to the transfer of actionable claims by sec. 137 of the same Act. That may be so. But it nevertheless remains that there has been no valid or complete transfer of the instrument either as a negotiable instrument or as an actionable claim. The procedure provided by the Negotiable Instruments Act has not been followed and there is nothing which operates as such a transfer either under or outside the Transfer of Property Act. There is no writing to support the transfer. There is nothing which amounts to an equitable assignment and in fact, the Plaintiffs claiming as volunteers have no equity in respect of which they can ask for the assistance of a Court of Equity. The contention is, as I understand it, that sec. 123 of the Transfer of Property Act, which relates to gifts of moveable property, applies and that this promissory note which is drawn payable to the promisee or order, is capable of being made the subject of a gift by mere delivery under that section, although it is not indorsed by the holder. There is no question here as to the right to the possession of the piece of paper on which the promise is written but the promise itself, or the debt of which the paper is evidence, or the claim to the debt, is an intangible thing incapable of passing by delivery like an ordinary chattel. It is perhaps a possible view that actionable claims are not "moveable property" within the meaning of sec. 123. But if the section applies to them, then it would seem that, delivery being impossible, a gift could only be made under the section in the first of the two modes provided, namely, by a registered deed, attested by two witnesses. The law might say that the delivery of the paper should in such a case as the present (as in the case of a currency note) carry with it the right to the debt but it does not say so.

The right to the debt can only be effectually transferred by some method authorised or recognised by the law. Something must be done to enable the actionable claim or thing in action to be reduced to a thing in possession. The whole object and purpose of the Negotiable Instruments Act is to legalize a system under which claims arising upon certain instruments of a mercantile character can be treated like ordinary goods which pass by delivery from hand to hand. But except within the prescribed limits such claims cannot be so treated. It may be that claims arising upon negotiable instruments may be transferred not only under the Negotiable Instruments Act but also by some means applicable to claims arising upon instruments which are not negotiable, though the rights resulting from the adoption of one mode of transfer may be different from the rights resulting from the adoption of another mode. The topic however need not be pursued because in the present case there has been no legal transfer of the actionable claim by any authorised mode.

The case of *Aga Mohamad* v. *Kulsom Bibi* (5) illustrates the principle involved. The documents there in question were

(5) I. L. R. 25 Cal. 9: s. c. L. R. 27 I. A. 196 (1897).

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not negotiable instruments but it might be said here with equal force (slightly paraphrasing the language of their Lordships) that "the instrument is not in a form which would entitle the bearer of it (without the holder's endorsement) to the debt created thereby as holder there of." It may be well to add that we have not had to consider the provisions of sec. 178 of the Indian Succession Act in regard to gifts made in contemplation of death because these provisions are not applicable to Hindus.

But assuming that there was a valid transfer, the further question arises whether the Plaintiffs are entitled to sue on the note. It may be generally true that a valid assignment of a negotiable instrument as an actionable claim gives the assignee the rights of the holder subject to equities. But this broad proposition must be subject at any rate to the qualification that it is true only so far as it is not inconsistent with the special provisions of the Negotiable Instruments Act. Under sec. 78 of the Act the only person who can give a good discharge to the maker of a negotiable instrument is the holder. That being so, it would seem that the rights which might or would pass to an assignee by an assignment which does not constitute him the holder (assuming any rights to pass at all) would not include the right to give a good discharge. And if they would not include the right to give a good discharge, they could hardly include the right to sue in his own name. The assignee may have instead the right to compel the holder or the holder's legal representative to make the requisite endorsement on the instrument though apparently, the Indian Act does not (like the English Act, sec. 31 (4)) expressly say so. It is not, however, necessary in the present case to express a final opinion on this point or to say more than that in the Madras cases which were cited in the course of the argument no reference was made to sec. 78.

I agree that the Rule should be made absolute without costs.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APPS. NOS. 341, 344, 346, 352 AND 353 OF 1913.

WOODROFFE, J
BEACHCROFT, J.
1913,
11, July.

ROMESH CHANDRA BANERJEE and others, Appellants,
v.
THE EMPEROR, Respondent.

Nature of defence which accused can set up—Duty of Court—Prosecution evidence, deficiency in, defence not bound to fill up—Right of defence to comment on such deficiency—Case of fraud set up by defence—Prosecution, opportunity of explanation to—Verdict of assessors, in answer to questions by Judge, impropriety of—Indian Penal Code (Act XLV of 1860), secs. 399, 402—Acquittal under sec. 399 if involves acquittal under sec. 402, I. P. C.—Repugnancy in judgment, conviction if can be set aside on such ground—Tendency of modern legislation—Power of High Court to alter acquittal on one of two alternative charges into conviction—Distinction between secs. 399 and 402, I. P. C.—Criminal Procedure Code (Act V of 1898), sec. 47, meaning and scope of—Sec. 103, cl. (2)—Search—Right of "occupant" to be present at search—Denial of this right, effect of—"Occupant of the place," meaning of—Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings—Finding of incriminating articles in a house, presumption of law arising from.

WOODROFFE, J. (BEACHCROFT, J., concurring).—*An accused person is entitled to put forward any defence open to him,*

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technical or otherwise,' and to have the Court's judgment on it.

It is no affair of the defence to supplement or explain deficiencies or suspicious circumstances appearing on the face of the prosecution evidence. It is open to it to say that the prosecution has not proved its case and to refer to such deficiencies in proof of the submission or to other circumstances appearing on the face of the prosecution evidence which show that it is so open to suspicion that it would be unsafe to accept it. If however the defence puts forward a case of fraud or if the evidence for the prosecution is not ambiguous the defence should give notice of the point they intend to take so that the prosecution may have an opportunity of explanation. If any charge of fraudulent practice was going to be based on a circumstance which standing by itself was not necessarily suspicious the defence should have cross-examined witnesses on the point.

Where the Sessions Judge in taking the verdict of the assessors put a large number of questions to them and then recorded their opinion on those questions:

Held—*That the Judge should have allowed the assessors in the first instance to have given their opinion in their own language and way, and then when they had completed what they had to say it would have been open to him to put to them such questions as were necessary to elucidate or supplement their opinion.*

Where the charge against the accused was of two separate offences laid in an alternative form, viz., *one under sec. 399 and another under sec. 402, I. P. C., but it appeared that the charges were treated not alternatively but as additional and the Sessions Judge acquitted them of the charge under sec. 399, I. P. C., and convicted them of the charge under sec. 402, I. P. C.*

Held—*That the acquittal under sec. 399, I. P. C., did not involve an acquittal under sec. 402, I. P. C., and the conviction under the latter section was not wrong and the judgment of the Sessions Judge was not vitiated by repugnancy.*

That even if there was any repugnancy it was open to the High Court to alter the finding of acquittal under sec. 399, I. P. C., into one of conviction maintaining the sentence.

That the offences of commission of dacoity, preparation for it and assemblage for the same purpose have this in common that they presume an intention or agreement to commit dacoity by five or more persons. A mere assembly without further preparation is not a preparation within the meaning of sec. 399, I. P. C, for if it were, sec. 402, I. P. C, would be redundant. Sec. 402, I. P. C., applies to the case of mere assembling without proof of other preparation. A person can thus be not guilty of dacoity yet guilty of preparation and not guilty of preparation yet guilty of an assembly.

BEACHCROFT, J.—*The tendency of modern legislation in general and of the Criminal Procedure Code in particular is to avoid technicalities and there is no provision in that Code which would justify interference with a conviction on the ground of repugnancy in the record.*

WOODROFFE, J. (BEACHCROFT, J., concurring).—*Where the Police searched a hut on suspicion and incriminating evidence was found and after the search was over the Additional District Magistrate came to the spot and saw what had been found and a search list was prepared which the Additional District Magistrate*

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signed and the accused were subsequently placed before another Magistrate who held an enquiry and committed the accused to the Court of Sessions for trial:

Held—*That the fact that the Additional District Magistrate did not take cognizance of the case at once did not render the subsequent proceedings before another Magistrate bad nor could such subsequent proceedings be held to be prejudicial to the accused.*

That it was not the duty of the Additional District Magistrate to take cognizance of the case on the basis of what he found at the spot.

Where the accused persons who were inside the room searched by the Police were, after the discovery in their presence of a gun and after search of their persons, sent out of the room and the search was continued:

Held—*That the Code of Criminal Procedure permits the occupants of the place searched to be present at the search and there was therefore a violation of this rule which is one not merely of technicality but of substance, in that it is enacted to guarantee the reality of the search and the discoveries made thereat.*

That this was an irregularity which the accused were entitled to ask the Court to consider and which made it incumbent on the Court to scrutinise the evidence carefully.

BEACHCROFT, J.—*The spirit of sec. 103, sub-sec. 3, is that the occupant of the place searched shall be present and it means that he is to be given the option of being present and not that he is to be allowed to be present only if he demands it. But the right of presence given by sec. 103 applies only to the occupant of the place searched or some person in his behalf and the words "occupant of the place" are not intended to cover every person who may happen to be in the place at the time but they refer back to the person mentioned in sec. 102,* i e., *a person residing in or being in charge of the place.*

WOODROFFE, J.—*Where after searching a hut arms were found under a* machan *inside the hut and in the ceiling of the hut:*

Held—*That knowledge of the existence of the arms would not without other evidence be imputable to any other than the lessee of the hut, nor would the presumption operate even against him if it were shown that the circumstances were such that arms might be in his place without his knowing it.*

BEACHCROFT, J.—*Where an article is found in a man's house the ordinary presumption is that he as owner of the house is aware of its contents. This is subject to the qualification that no other person has access to that particular place. It follows that if the house is in the occupation of more persons than one having access to the particular place there is no presumption against them individually that they have put the article where it is found; though if it be proved that an article has been for a considerable period of time in a place to which all have frequent access it might reasonably be presumed that all were aware of its existence.*

Sec. 47, Cr. P. C., is not intended to restrict the powers of the Police to enter the place to be searched: on the contrary it is a provision compelling householders to afford the Police facilities in carrying out their duties, and sec. 48 provides that if difficulties are placed in the way of a Police officer he may use force to obtain ingress.

This was an Appeal against the judgment of F. W. Ward, Esq., **Sessions**

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Judge of Tipperah, dated the 12th of March 1913.

The facts of the case are fully stated in the judgment.

Messrs. A. Caspersz, Nisith Sen, J. K. Ghosal, H. K. Ghose, M. L. Mitter and *S. Dutt* and *Babus Monmatha Nath Mukherjee, Upendra Nath Roy, Satish Chandra Bhattacharjee, Profulla Chandra Bose* and *Probodh Kumar Dass* for the Appellant in No. 341.

Mr. A. Rasul and *Babu Sasadhur Roy* for the Appellant in No. 344.

Babus Monmatha Nath Mukherjee, Amulya Charan Chatterjee and *Promotho Lal Dutt* for the Appellant in No. 346.

Messrs. U. N. Sen Gupta, N. Sen, H. Ghose and *S. Dutt* and *Babu Birendra Kumar De* for the Appellant in No. 352.

Babus Probodh Kumar Dass and Profulla Chandra Bose for the Appellant in No. 353.

Messrs. S. P. Sinha, N. Gupta and *Babu Atulya Charan Bose* for the Crown in all cases.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—In this case, the hearing of which on appeal has lasted over three weeks, there are twelve accused who have been represented by various learned Counsel and by Babu Monmatha Nath Mukherji.

The charge in the Magistrate's Court was of two separate offences laid in an alternative form. The first charge was that the accused on or about the 1st November 1912 at Comilla made preparation for committing dacoity in a particular manner, which was assigned to be as follows; namely, by assembling together with arms, masks and implements which might be used for the commission of dacoity. The offence there charged was one under sec. 399, Penal Code, all else in the charge than the allegation of preparation being merely particulars as to the preparation alleged. It then proceeded in the alternative to charge an offence under sec. 402 of the Indian Penal Code, in that on the said date and at the same place the accused assembled together for the purpose of committing dacoity; judging from the record before us it would seem that before the Sessions Judge the charges were treated not alternatively but as additional. This appears both from the order-sheet, the judgment, the written statement of the accused and from what learned Counsel has told us Under the circumstances, however, the matter is of no practical importance.

The learned Judge and the Assessors found that the accused were not guilty under sec. 399 The learned Judge's view, as appears in the judgment, was that though the facts alleged by the prosecution had been proved they did not constitute an offence under sec 399, because he was of opinion that mere assembling would not constitute an offence under sec. 399 and because he thought it necessary that it should be proved what part each particular member of the gang took in the preparation and bringing together arms and the like. As he was of opinion that this had not been shown he held that the accused had not been guilty of an offence under sec. 399. There may be a question whether he was right in this for it may be argued that if the facts put in evidence by the prosecution are true, they evidence preparation and that it was not necessary that the prosecution should point out with their finger the exact part taken by each member of the gang as regards such pre-

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paration provided that it were shown that the accused were members of a gang which had made in fact preparation for dacoity. Doubtless the word "whoever makes" in sec. 399, may have been the cause of the contrary view. But sec. 399, it is argued, assumed a previous agreement to commit dacoity and to refer not to individual but concerted action (see Punjab Report, p. 43). It is, however, unnecessary in this case to discuss or decide the question having regard to my findings on the other points raised. The question before us is not whether the accused might not also have been convicted of the major offence but whether their conviction on the minor offence should stand. The Assessors were of opinion that the accused were not guilty under sec. 402. Here I may observe that objection has been and I think rightly taken to the form of the Assessors' verdict which was due to questions put by the learned Judge. The latter put a large number of questions to the Assessors and then recorded their opinion on those questions. He should however have allowed the Assessors in the first instance to have given their opinion in their own language and way and then when they had completed what they had to say it would have been open to him to put to them such questions as were necessary to elucidate or supplement their opinion. To the method followed there is amongst others this objection that the questions which a Judge may call on an Assessor to answer may not be exhaustive in extent nor crucial in character. Speaking generally the opinion of the Assessors was that the accused Nos. 1, 5, 6 and 10 (I take the numbers of the [illegible] here and later from the heading [illegible]ted judgment) had offered a [illegible]planation of their conduct, but that as regards the other eight they were assembled for a purpose which one Assessor describes as "immoral or illegal" and the other as "evil." It is not easy to reconcile such a finding with the facts of the case whatever view be taken of them. The Assessor could only be justified in assuming the existence of some evil and illegal purpose on the evidence. If that evidence is not accepted there is no legal ground for such an imputation. If it is accepted, then the evidence itself discloses specifically what the purpose was, namely, preparation or assembly for the committing of dacoity. The learned Judge accepted the truth of that evidence and consistently with such acceptance found that all the accused were guilty of an offence under sec. 402.

Now, the first objection to this finding is one of law. It is said that the acquittal by the learned Judge of the accused under sec. 399 involved an acquittal under sec. 402, and therefore the conviction under the latter section cannot stand. There is of course no merit in this objection, for when we look at the judgment itself apart from the order of acquittal following on it, we know why it was that the Judge acquitted the accused under sec. 399. It was not because he found that there had been no assembly where arms had been found and so forth but because though there had been such an assembly as would justify a conviction under sec. 402, there was in the Judge's opinion no sufficient evidence of preparation under sec. 399, Penal Code. The objection is a technical one and put forward as such. The accused are, however, entitled to put forward any defence open to them, technical or otherwise, and to have the Court's judgment

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on it. The objection however is ill-founded. I assume for the purpose of argument and without further discussion that we should in determining this matter not consider what the learned Judge had said in his judgment, but that we should determine the objection on a reading of his order of acquittal with reference to the terms of the charge which are incorporated in it. The objection then is this. It is argued that there may be preparation both before and after assembly, and that assembly itself is a form of preparation: that here the preparation alleged is the assembling with arms, etc., and that as the assembling in terms of the first charge was negatived as preparation, assembling under the second charge was also negatived. It is argued that as the accused were acquitted under sec. 399, they should (having regard to the terms of the charge under that section) have been acquitted under sec. 402, as the charges under the two sections contained, having regard to their form, the same essential elements. There is, therefore, it is said, a repugnancy in the judgment. If this were the case, I am not prepared to accede to the argument that we could not ourselves alter the finding of acquittal under sec. 399 into one of conviction maintaining the sentence. Mr. Nisith Sen has argued that the decision in *Queen-Empress* v. *Jabanulla* (1), which admittedly entitles us to do so was wrongly decided. It is, however, now too late to question it even if it was open to us and we wished to do so. That decision was given some seventeen years ago and must have been followed in numbers of unreported cases. It has also been adopted in reported decisions. I think it may be said, as Mr. Sen has done, that the decision in *Satish Chandra* v. *Queen-Empress* (2), in which no question of acquittal was involved: in *Kunja Bhuiya* v. *Emperor* (3) in which the Court did not convict on a charge on which the accused had been acquitted and in 8 Bombay Law Reports, p. 376 (?) in which the Court set aside the order except so far as it involved an acquittal, are not authorities on the particular point before us. But the decision in *Nazimuddin* v. *Emperor* (4) clearly is such an authority. It is true that the Judges in that case say that the trial was vitiated because the Assessors' opinion was not properly taken, but by this word "vitiated" they did not mean that the trial was void, otherwise they could not have proceeded to have expressed the opinion which they did, namely, that it was open to them to convict the accused of an offence of which he had been acquitted. That they did not do that which they considered they had ordinarily jurisdiction to do was due to the fact that they could not enhance the sentence and therefore a retrial was ordered. The Madras High Court have followed the decision in *Empress* v. *Jabanulla* (1), see *Appanna* v. *Pithani* (5), *Hanmappa* v. *Emperor* (6), and the Allahabad High Court proceeds on the same principle, see *Emperor* v. *Sardar* (7), for though that appears to have been a case where a Judge declined to convict, the effect of such an order is tantamount to an acquittal. It is however not necessary to invoke such powers as these cases speak of, as there is in my opinion no such repugnancy in the

(1) I. L. R. 23 Cal. 975 (1896).

(1) I. L. R. 23 Cal. 975 (1896).
(2) I. L. R. 27 Cal. 172 (1899).
(3) I. L. R. 39 Cal. 896 (1912).
(4) I. L. R. 40 Cal. 163 (1912).
(5) I. L. R. 34 Mad. 545 (1910).
(6) I. L. R. 35 Mad. 243 (1911).
(7) I. L. R. 34 All. 115 (1911).

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Judge's order as would require us to have recourse to them. Dealing only with the principal aspects of the offence of dacoity there may be, as is apparent from the Code itself, the actual commission of dacoity, a preparation for it, and an assemblage for the same purpose. As appears from the punishments awarded, the first two are treated as the more grievous offences, preparation is the next grievous, and assembly is the least grievous. All the offences have this in common that they presume an intention or agreement to commit dacoity by five or more persons. In a popular sense an assembly to commit dacoity may be a preparation for it. But a mere assembly without further preparation is not a preparation within the meaning of sec. 399. For if it were, sec. 402 would be redundant. This section applies to the case of mere assembling without proof of other preparation, for which there is a maximum punishment of seven years, whilst the preparation which is the subject of sec. 399 is punishable with ten years' imprisonment. A person can thus be not guilty of dacoity and not guilty of preparation yet guilty of an assembly. This appears also to be admitted by the argument for the defence that a band of dacoits might be convicted under both sections. However this be, and such admission does not affect my conclusion in this case, the argument substantially is that the form of the charges is such that the preparation alleged under sec. 399 is such that if negatived it follows that an offence under sec. 402 is negatived. On the other hand, it is said that the gist of the offence of preparation is the assembly which is also the offence under sec. 402. The argument, though not without an air of seriousness, appears to me to be fallacious. What the first charge says when paraphrased is this: It says that the Defendants assembled or came together with or bringing arms, masks and other implements. This is specifically alleged as the preparation. It is obvious that it is not merely the mere assembly as such which is charged as a preparation under sec. 399, for in law it would not amount to such, and the use of the words with arms, masks and implements would be unnecessary. It is true that in order to make out that the assembly under sec. 402 was for the purpose of committing dacoity, it may be necessary to show that there were arms, masks, and other implements found at the place of assembly indicating such purpose, but in that case such evidence is not relied upon as indicating preparation, but to show the purpose of the assembly. No question of bringing arms, masks and other implements necessarily arises under the second charge though the fact in this particular case that arms and so forth were found on the premises has been taken as evidence indicative of the purpose of the meeting. What therefore the Judge has done is to hold that the accused did not commit the offence of preparation under sec. 399 by assembling together and doing something more, *viz.*, bringing with them arms, masks and implements; but that they did assemble together within the meaning of sec. 402 and that the presence of such arms, masks, and implements (by whomsoever brought and whether by the accused or by others) together with other circumstances of the case showed that such assembly was for the purpose of dacoity. There appears to me to be nothing repugnant in such a finding, though as I have already said, it might perhaps have been open to the learned Judge on the evidence to hold

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that there was not merely an assembly but that the circumstances of the case, if accepted, indicated that the presence of arms, masks and implements at the place of assembly was due to the action of those who took part in it. The learned Judge, however, took a course which I am not prepared without further discussion to say was wrong and which was more favourable to the accused in that he convicted them only of the minor offence. Having now disposed of this argument on the order and charge only I may refer to the judgment which clearly expresses the ground of the learned Judge's decision on this point. He says " with the possible exception of Kumud in whose pocket a mask was found I do not think that there is sufficient evidence of preparation by bringing together arms and weapons. I do not think it can be assumed that any individual actually made preparation for dacoity by bringing together arms. Nor do I think it can be said that under the circumstances of the case constructive preparation has been proved by the application of sec. 149 of the Penal Code."

I hold then that there is no such repugnancy as is alleged, that if there were, it would be open to us to correct it and I now proceed to deal with the facts of the case.

It is said that, on the 27th October 1912, a letter which is in peculiar terms was sent to one Sukhendra Bhattacharji, the thirteen years old son of Sub-Inspector Sashi Kumar Bhattacharjee, here referred to as the witness Sashi. This was received by the witness Sashti Charan De, a servant of the Sub-Inspector, on the 28th October and shewn by the witness Sashi to Inspector Hari Kumar and mentioned to the Superintendent of Police. The letter warned the recepient who was directed to tell his father that a dacoity would be committed on the 1st November. In consequence of this on the 1st November Sub-Inspector Sashi sent a requisition to the Superintendent of Police for extra constables and two head constables and 10 men were deputed for round duty. About 10-30 P.M. on a rainy evening of the 1st November two constables, the witnesses Majub Ali and Fazar Ali who were on the Kandipar Chomuni Road, saw two persons whom they regarded with suspicion and whom on refusing his challenge, Majub Ali chased. He caught one of them but being struck on the arm with something hard either by the man he was holding or by his companion the man who was caught was let go and he and his companion ran eastward along the road, in the direction of the hut, where the accused were found. These two men were followed by 7 or 8 others, who ran past Majub Ali in the same direction, that is, towards the hut of one Probhat Karmakar. This man is said to be a goldsmith and has hired two huts which are in the compound of the witness, and Mukhtear Durga Charan Pal from the latter. The hut in which the latter lives is only 23 cubits from the Karmakar's hut. He gave important evidence when he said that he heard a noise on the road about 11 o'clock, on which he came out of his hut and enquired of Probhat Karmakar what it was about. He then says that Probhat (who would ask us to believe that he was then asleep) told him that there was shouts of " thief, thief" on the road and that people were running, on which the Mukhtear returned to bed until as hereinafter stated he was called by the Police to be a witness to the search of the Karmakar's hut. Majub Ali says he then stayed on the spot and sent Fazar

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Ali for relief, the latter armed with 8 or 10 Police, one of whom was Yakub Ali Havildar. He on being told what had happened went to the Police where Majub had attempted to effect an arrest and there found a blacksmith's cold chisel and iron holder, the fourth Sub-Inspector of the Katowali Thana who lived near by and whose name is Jatindra Mohan Ray, was sent for through the Jamadars Jaffar Ali and Yusuf Ali. The latter seems to have arrived about 11-30 P.M. He was told what had happened and made an examination of the locality. He then went to the Inspector who having heard what he had to say told him to return and enquire and promised to follow later on. The Inspector's house is close by, 40 or 30 cubits south-west of the Kandipar Chomuni. On Sub-Inspector Jatin's return he asked Majub Ali to point out the way along which the suspicious characters had run and according to Jatin's evidence Majub Ali pointed out a route across the drain along a drain and 2 or 3 cubits east of the Karmakar's hut. He then crossed the drain and went and stood at the north-east corner of the Karmakar's north hut,—a light was burning within. The Sub-Inspector asked who was inside to which some one replied "we Karmakars are here." The Sub-Inspector then said "some men have run past this house a little time ago, do you know where they have gone or anything about it." He also asked if any one had come into the house from outside to which some one replied "we heard the footsteps of some people going away but we do not know where they have gone. There is no one else in the hut." On, however, the Sub-Inspector going to the south-east corner of the hut he saw with the light of his lantern a man spring from the south to the north hut of the Karmakar. The whole of this hut measures only 21 × 13 feet. It is divided into two rooms by a fencing, which are called the western and eastern rooms. The eastern or larger room is said to be 13 × 13 and the western 8 × 13 only. Further in the room there is a *machan* which takes up a good deal of the space. On this *machan* was a mosquito curtain which was down. Outside this *machan* were found according to the Sub-Inspector three or four persons whose upper bodies were bare and their dhuties were wet. On lifting up the curtain 6 or 7 more persons were discovered lying down on the *machan* with something like a quilt over them. This was removed and the clothes of some of those who were beneath it were found to be wet. Two men were in the east room where there was a light. These were the accused Thakur and Prasanna. The Sub-Inspector Jatin says that he then asked what they were all doing there on a wet and cloudy night with wet clothes on to which he said none of them answered. There is some conflict of evidence here, for the Constable Yakub Ali before the Committing Magistrate says that the Daroga felt the clothes of a man who appears to be the accused Romesh Banerjee who was standing between the *machan* and the doorway and who explained that his clothes were wet as he had come from the station which is possibly the case. This from his deposition would appear to refer to a time before the arrival of the Sub-Inspector Sashi. In, however, his deposition before the Judge he made the incident take place after the arrival of the witness Sashi. So far as the Police witnesses are concerned, this and other discrepancies to which we have here referred, must be considered in dealing

with the weight to be attached to their evidence, but so far as the defence of the accused is concerned it does not appear to be of much importance, for it is admitted that a little later on they all did give accounts (whether true or not is another matter) of themselves on that night to the Additional Superintendent of Police Rai Sahib Nanda Kumar Bose who has given evidence before us. This man Romesh Banerjee was known to Sub-Inspector Jatin and made an observation which has been held to be not admissible. Thereupon the Sub-Inspector looked under the *machan* and found a basket which, when removed, disclosed a double barrelled gun in two pieces. A man was then sent to fetch the Sub-Inspector Sashi and the Mukhtear in whose *basha* the hut was—Durga Charan Pal. The latter came about midnight. On his arrival he was shown the gun and told what had happened and it is noteworthy that none of the persons in the room made any disclaimer as to knowledge of the gun which was found in their presence, and which according to the evidence was stolen from the district of Mymensingh some 4 or 5 years ago. Five or six minutes after the arrival of the Mukhtear Sub-Inspec or Sashi came. He was informed of what had occurred and three or four minutes later Hari Kumar Gupta, the Sadar Inspector, arrived and with or shortly after him another Mukhtear named Lalit Chandra Chakrabutty. Sashi Inspector on arrival told the men that he put them under arrest and four or five minutes later the accused were taken out of the rooms and kept out of it and tied up—a circumstance on which the defence naturally rely. It is said however that, though taken outside, they were kept near the south door facing the *machan*. In the presence then of the two Mukhtears, the Sadar Inspector and the two Sub-Inspectors a search was commenced of the hut. On the mosquito net being undone a lot of clothes were found heaped upon the *machan*. On examination of the ceiling a cloth bundle was found which on being opened was seen to contain a number of bags of similar pattern and design which it is suggested were to be used for the purpose of carrying loot and so forth, as also two revolvers, one of which was an old fashioned pinfire. There were also found some cloth bundles containing cartridges. Two hammers one of which is described a sledge hammer, a bag of seeds and some *lathis* were found in various places. After this search was over the Superintenden of Police and subsequently the Additional Superintendent Rai Sahib Ananda Kumar Bose arrived. This was about 1 30. They were informed of what had happend and shown the articles which had been found. Still later and some time after 1-30 the Additional Magistrate Mr. Chatterjee came. A search list was then prepared. The clothes which had been found on the *machan* were then examined. These or some of them were wet. Some things were found in the pockets of the clothes. It is not necessary to deal with this in detail. It is sufficient to say that some of the clothes contained cloth marks. If these were truly discovered they could under the circumstances only have been there for the purpose of dacoity, and in a shirt was found a piece of paper marked XVC which is in the following terms. (1) Nishi and Paritosh, (2) note, (3) packing, (4) money takadi, (5) Cheni (Chisel) las etc., (6) automatic, *rumal* (handerkerchief), (7) Carry, (8) Nayan. In a piece of wet rag was found a paper marked XX*a* which runs as follows :—

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1. Kumud	... Hammer.
2. Jogess	... Cheni (in Bengali character.)
3. Madan	... R. 380.
4. Bepad	... S. B. L.
1. Nishi	.. Hammer.
2. Bira	... Cheni (in Bengali character).
3. Rebati	... S. B. L.
4. Arun	... R. 450.
1. Nayan	... D. L.
2. Kalachand	... R. Pur.
3. Dhiren	... D.
1. Debendra	... G.
2. Romesh	... R. 450.
3. Doctor	... L. D.
1. Jiten	... R. 450.
2. Kali Prasanna	... R. 380.
3. Baju	... D.
1. Paritosh	... Automatic.

There are 18 names in this list which, it is suggested, are those of the members of a gang of dacoits. If the names on the list are found to correspond with the names of the persons under trial then under the circumstances the inference is that the names on the list are those of the persons on trial. And the more of such names there are on the list corresponding with the names of the persons on trial the stronger is the evidence of identity. In the present case if the document is a genuine one it is in the highest degree improbable that the 8 names on the list which correspond with the names of 8 persons in the hut should yet refer to some other people. Of these 18 names 8 are said to be those of the accused found in the hut by the Police, *viz.*, accused 1, 2, 4, 5, 6, 8, 9, 11. Arun is one of the names of Ramesh Chandra Gupta, accused No. 4, and accused No. 8, Hara Chand Sil, was known by the name of "Doctor." Baju is the nickname of Brojendra, the fifth Defendant. The names of accused Nos. 3, 7, 10, 12 are not included. The remaining ten names refer to others who are, it is suggested, members of the same gang. Of these names Nishi was a servant of the accused Sarbari or Baju. In a letter which purports to be written by the latter and which was found at the hut on the 7th November six days after the present search, the addressee is Nishi and reference is made to one Revati. It is also remarkable that a man of this name was actually arrested in the early hours of the morning of the 2nd and according to Mr. Watling between 4 and 5 A.M. after the discovery of Ex. XXA and the completion of the search list. This man Revati was wearing a damp dhuti, had shoes and said nothing when the constable made his statement to Mr. Watling. It is suggested as regards the names other than those of the accused that they were those of members of the same gang who were coming to Comilla to join forces with those members who were already there, but which they were unable to do as the steamer missed connection. The words opposite the names on the list are said to indicate the weapons which were to be assigned to each member of the gang. The words "hammer" and "chisel" speak for themselves. R. refers, it is said, to revolvers and a revolver of 380 bore was found which is said to be one of the R. 380 appearing in the list. R. Pin refers, it is said, to the Pinfire revolver found. Other entries, it is suggested, refer to the guns and *lathis*, "automatic" referring to "automatic pistol." One mask was found outside by Jamadar Yusuf Ali near the kitchen.

When the list was completed the Rai Sahib questioned the accused and he has deposed to their answers. They gave

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various accounts of themselves to which I refer later when dealing with their individual cases. It is only necessary to note here that the accused Kumud does not admit having been found in the hut as the others were. He alleges that he was going from his *mama's basha* to the railway station with a view to returning home when he was arrested on the road by the Police and by them mixed up with the other accused.

All these matters took up to about 6 A.M. when formal first information was laid at the Thana. The party then left and the accused were taken to *hajat*. It will be convenient to notice here an argument of Mr. Caspersz who appeared on behalf of the first accused Romesh Banerjee. He contends that when Mr. Ganga Charan Chatterjee arrived he should at once himself have taken cognizance of the case and as he did not, learned Counsel at first contended that all subsequent proceedings were bad, and secondly, the accused were in any event prejudiced. I will assume for the sake of the argument that in law it would have been open to Mr. Chatterjee to have taken cognizance of the case then and there as also for the same purpose that it was his duty to do so. It would of course be impossible to hold that such a neglect of duty and refusal of jurisdiction by one Magistrate could possibly have the effect of preventing any other Magistrate doing his with the result that subsequent trial and commitment before and by Mr. Rankin, the Magistrate, was bad. Ultimately learned Counsel conceded that this must be so and that even on the assumption which he asks us to make the commitment and trial were not bad. I may here observe that nothing appears to have been heard of this objection before this appeal. The matter then ultimately resolved itself into a question of alleged prejudice. According to learned Counsel the Magistrate Mr. Chatterjee should have taken cognizance on his own suspicion from what he saw that an offence had been committed and should then and there and in this hut and in the hours between 2 and 6 at night commenced proceedings, calling upon the prosecution to proceed with their case, asking the accused what they had to say and if necessary postponing further hearing. I have myself no doubt that if the Magistrate had in this case done anything of the kind his conduct would have been severely assailed by the accused. His cognizance on his own suspicion would have been censured as precipitate and his conduct in hastening on the proceedings and questioning the accused would have been challenged as oppressive. I think myself that under the circumstances of the present case had the Magistrate taken the course which Mr. Caspersz suggests it would have been open to objection. It appears to me that what actually followed was right, namely, further investigation by the Police to see whether further light or evidence could be had on the affair and then the charge before Mr. Rankin. If Mr. Chatterjee should not have taken the course suggested then it cannot be argued that the accused were prejudiced by his not doing that which he ought not to have done, but I may add that this objection of prejudice appears to be a shadowy one. It was suggested that the accused had no opportunity of making a statement then and there before the Magistrate. As a matter of fact they did make a statement on that same night to the Rai Sahib which has been recorded and of which they have had the benefit and though a further statement might have

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been made before the Committing Magistrate the opportunity was not availed of. It is also made a grievance that instead of sending up the accused at once for trial the Police took time for further investigation with a view, it is suggested, of discovering whether there was evidence of a wider conspiracy of which the dacoity in question was an incident. I can myself see nothing improper in this. In fact it was their duty to investigate the matter in this manner and for the purpose of collecting all available facts before sending up the accused for trial. On the 2nd November the accused were remanded to *hajat* until the 10th. On the 8th one Nagarbashi Rudra Pal was produced before the Magistrate but discharged at the request of the Police for want of evidence. This has been relied on as a circumstance of suspicion and one tending to support the Police plot suggested in the case. There appears to have been no suggestion or cross-examination as to this before and, had there been, it might have been shown that the reason of his arrest was due to the appearance of his name in the Karmakar's books. On the 11th the Police asked for adjournment to complete enquiry. This was granted until the 16th when a further remand was given till the 27th November on which day and following days evidence was taken, and accused committed to the Court of Sessions on the 14th December last. During the investigation on the 9th November some chisels and crowbar were found at the point marked S on the map while the *basha* of the witness Debendra Nath Ghose was being cleaned. This place is at a short distance to the south of the Karmakar's hut, on the other side of the drain running from north to south. This finding is corroborated by the evidence of Babu Satish Chandra Rai, Honorary Magistrate, who having received immediate information from the sweeper Basanta Mali, who found them, went to the place pointed out by the latter and there saw the crowbar and five or six chisels. With that conflict of argument which has marked the defence in this case it has been suggested on the one hand that these chisels were really dropped there by some dacoits and that therefore these had gone past and never entered into Karmakar's house and on the other hand that the story of suspicious men having been found on the road and of their running away is an invention of the Police who for their own purpose put the chisels at the points where they were subsequently found. On the third of November the house of the accused Kumud was searched and some papers found. In one of these letters the latter is asked to secure a self-sacrificing member, "a young man," for it is said "things are achieved by the energy and perseverance of young men." The writer in the *post script* gives the name of a young student. "You should" it says "watch him strictly and if found fit you should write to me, you should procure all informations regarding him and write to me and if you think it all right you yourself may proceed slowly." Another letter presses upon the addressee the propriety of the time and opportunity of work and in another letter the writer says that by the will of the *mother* (that is the Devi) he hoped to meet Kumud shortly, adding, "It seems to me that mother would get some works done by you. The mother has an eye upon you." Mr. Rasul has suggested to us that these references may apply to assurance business or religious proselytising. It is how-

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ever obvious to me that the letters are of a political character and refer to secret nationalist propaganda most probably of a revolutionary kind. They were however written some time before the occurrence, the subject of the charge, but have this bearing that if Kumud Nag was a member of this gang, this evidence serves to explain its motives and how it is that persons who did not appear to belong to the ordinary criminal classes engaged in the work of dacoity. On the early morning of the 2nd November the house of the accused Romesh Chandra Banerjee was examined. The importance of this evidence is with respect to the postcard, Ex. A, said to have been addressed by one Surendra to Romesh Banerjee and which is relied on by the latter in support of the account which he gave of himself to the Police. For though in examination of the search witness No. 36 the question of the prosecution as to whether that postcard was found at such search was on the objection of the defence disallowed, it is yet obvious that the postcard was not then found as it was produced by the prisoner's Counsel much later and for the first time in the Sessions Court. The fact is of importance when we consider the question of the genuineness of the document. On the 7th November the Karmakar's hut was again searched and possession taken of some *khata* books and papers. An entry in the *khata* exhibit is relied upon in support of the defence of the accused Sarbari or Baju. It has been a matter of dispute whether there were two entries as the defence contends or one as Mr. Sinha for the Crown has submitted. It shows under the name of this accused an entry of gold weighing twelve annas and the receipt of 3 annas for repairing work. Of the other papers there found two have some importance, *viz.*, Exs XXVIII and XXIX, one of which is addressed to one Nishi who was a servant of this accused Sarbari and contains a statement of the sending of one Rebati. These names occur on Exs. XVC and XXA and have importance on the question of the genuineness of the latter documents.

Before leaving the question of Police investigation before trial it is to be noted that the Police charge-sheet of the 15th November in giving the names of the witnesses and the points upon which they are to be called to give evidence mentions two persons' names, Nagarbashi Rudra Pal and Ram Chandra De, who are expected to prove association of the accused and their conduct. The former is the man who had been put up and discharged on the 8th November. These persons are not called and the circumstance is pointed out as one of suspicion; in what way is not clear. All that is before us is that the Police expected two witnesses to depose for the prosecution and for some reason or other they did not. We cannot assume that this indicates something wrong on the part of the Police when it is quite possible that these two witnesses may have been willing to give evidence and for fear or other motive refused at the last moment to do so. Moreover, if any charge of crime in this matter was going to be made against the Police it should, as I have already pointed out, have been cross-examined on when, as Mr. Sinha has argued, an explanation might have been forthcoming. The charge-sheet was signed by Sub Inspector Sashi, who was not questioned as to this. Upon this point I may make an observation which has application to other points in the case. It is of course no affair of the defence to

supplement or explain deficiencies or suspicious circumstances appearing on the face of the prosecution evidence. It is open to it to say that the prosecution has not proved its case and to refer to such deficiencies in proof of the submission or to other circumstances appearing on the face of the prosecution evidence which show that it is so open to suspicion that it would be unsafe to accept it. If however not content with relying on such deficiencies and suspicious matter the defence put forward a case of fraud or if the evidence for the prosecution is not ambiguous the defence should give notice of the point they intend to take so that the prosecution may have an opportunity of explanation. The present is a case in point. If any charge of fraudulent practice was going to be based on a circumstance which standing by itself is not necessarily suspicious the defence should have cross-examined witnesses. I may here add in connection with the witness Sashi that I think that there is ground in the defence objection that he should have been called at an early stage of the case and not at the very end as was the fact. He and the other Sub-Inspector are two of the more important if not most important witnesses in the case and such should always be examined as early as possible. To some extent the matter has been remedied in the present case by the fact that the other Inspector of Police was called at an early stage being in fact the fourth witness.

It must be plain that if the facts are truly stated the case against the accused is fully established in the absence of any credible explanation forthcoming from them.

[His Lordship dealt with the facts and continued.]

I turn now to that which is undoubtedly the most substantial point in favour of the defence, namely, the question of the manner in which the search was conducted. It is argued that there were grave irregularities in the conduct of the search and that although the existence of such irregularities does not render evidence of what was discovered on such search inadmissible, it does affect the credit which we should give to such evidence.

In the first place, reference is made to the provisions of the Police rules that the party making the search should himself be searched. Sub-Inspector Jatin says that he told the search witnesses to examine his person, but they said it was unnecessary. The Mukhtear Durga Charan Pal however says that no one searched him and that he did not search any nor did any one offer to be searched by him. Whether the evidence of the one witness or the other is correct, it seems plain that the searching party were not for one reason or another themselves searched. I need not delay to consider the argument that the entry into the house was illegal and which was sought to be justified on the ground that the Sub-Inspector Jatin may have had reasonable suspicion of an offence. The question is of no importance here whatever might be its value in an action for trespass on which I express no opinion. The Sub-Inspector however admits that after entry no notes were made of the places at which things were found at the same moment that they were found. It is said that people were allowed to come in and go out during search. This, if it took place, would be an irregularity but is certainly no indication of the suggested dishonesty of the Police which might be exposed by allowing any stranger

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to pass in and out of the room. Dealing however with the case of alleged irregularity, Lalit, the Mukhtear, says that between the time of his arrival and the preparation of the search list Police officers and others were coming and going through the door. This refers to a period extending from midnight till four in the morning. The point is who were these others. But this he was not asked. These may have included such persons as the Additional Magistrate, the Deputy Magistrate or Mr. Watling. And this may explain the apparent contradiction between the evidence and that of Sub-Inspector Jatin who, says that people did not come and go in and out of the room before the Additional Magistrate came. He may be speaking of persons other than those concerned in the search. The Mukhtear Lalit may by the word "people" refer to persons who, though not Police officers, may have had a right to be there. The other search witness Durga Charan Pal similarly says that from the time that Sashi Babu arrived till the search list was completed people including officers and constables were coming in and going out of the room. When Durga Charan speaks of the children of his house coming he appears to be speaking of the time of his arrival and on cross-examination, he says the children were outside or rather in the door way. Lalit's statement as to the presence of a post office employee living with Inspector Har Kumar Gupta refers to a period before the accused were removed. It cannot be said that the evidence is very clear or satisfactory on this point but if it be possible that others than those properly concerned did have access to the room, then, as I have said, though an irregularity it would go against the theory that the Police amongst other things fabricated documents there or introduced those documents and other things from outside for it is not likely that under such circumstances anybody and everybody would have been admitted access to the room. The Police rules further provide that what is found should be sent up as soon as possible to the Magistrate. The reason given for the non-observance of the rule in this case is that the Magistrate had (as is the fact) already signed the search list. As, however, the object of this rule is to satisfy the Court of the identity of the objects found it cannot be said that in this case the matter was one of any importance seeing that Mr. Ganga Charan Chatterjee, the Additional Magistrate, was himself in the hut and saw the articles which were entered in the search list.

It is not clear that the alterations on the search list were made whilst the document was in Police custody but in any case they are not of importance. The alteration of the numbering was due to the fact that the number 23 was written twice and though the word Nogen has been changed into Nayan—Nayan appears on the original document entered in the search list. This document was in a bad light read as Nogen and so entered at first in the search list, though in fact it is plainly Nayan. The most important matter in this connection is the fact that the accused were after the discovery of the gun (which was in their presence) after search of their persons sent out of the room. The Code permits the occupants of the room to be present at the search and there was therefore a violation of this rule which is one not merely of technicality but of substance in that it is enacted to guarantee the reality of the search and the discoveries made thereat. It is unnecessary to determine whether

all the accused found in the hut can be said to be occupants within the meaning of the section because the person or persons who were admittedly occupants were not present at the search. The reason for disregard of this rule is that the hut was, as is undoubtedly the case, a very small one. It is said also that the accused, though taken out of the room, were kept near the south door facing the *machan.* This, if a fact, would have been of little service to them. Moreover it is contradicted by the search witness Durga Charan Pal who says they were taken to the west of the wall which appears to be away from the door. Whilst I am not satisfied that, as has been argued, notwithstanding the alleged want of space people of all sorts were allowed to come and go out of the room, I am unable to say on the other hand that it would not have been possible to continue the search in the presence of the accused as by placing them in the eastern room and removing. the mat screen between it and the western room or otherwise. However this be, the fact remains that the accused were not present at the search and this is an irregularity which they are entitled to ask us to consider. The evidence must undoubtedly be carefully scrutinised on that account. It is to be noted, however, that there were two search witnesses present. But after all if upon a careful scrutiny of the evidence we come to a conclusion that notwithstanding the absence of the accused advantage was not and could not have been taken of it the irregularity whilst serving to exact from the Court a careful scrutiny of the evidence relating to the search has no further effect. It is not sufficient to suggest that articles might have been fraudulently introduced we must see whether there are any reasons to suppose that this was done. The chief question therefore iss was it possible or probable that the arms, implements, masks and documents found on that night were either there or previously introduced or fabricated by the Police as alleged. It will be here convenient to deal with the legal presumptions arising from possession if proved If we take the single circumstance tha arms were found under the *machan* and in the ceiling of the hut, knowledge of that existence would not (without other evidence) be imputable to any other than the lessee of the hut Probodh Karmakar— nor would the presumption operate even against him if it were shown that the circumstances were such that arms might be in his place without his knowing it:— for instance, if, as alleged to be the case here, they could have been introduced from outside. The evidence on this point is in some respects not as clear as it might be but appears to me to establish that the arms could not have been introduced from outside.

[His Lordship after dealing with the other facts and circumstances considered the case of each individual accused and concluded as follows.]

I have now dealt with the defence of all twelve accused. In my opinion for the reasons given I think that notwithstanding the suspicion which attaches to them we should acquit the accused Thakur Das Pal and Aditya Charan Dutta, the other circumstances of the case being insufficient to overcome the inferences which may be drawn from their position as subordinates of the Karmakar and the absence of their names from Exhibit XXA. As regards the rest of the accused they have in my opinion failed to meet the strong case which the prosecution

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makes against them and have not by their defence shown that their presence in the hut was, as they allege, of an accidental and innocent character. The two Defendants I have above named, Thakur and Aditya, are accordingly acquitted and I direct that they be set at liberty. The appeal of the other accused fails and is dismissed and their convictions and sentences are confirmed.

BEACHCROFT, J.—In this case I had written a separate judgment, but my learned brother has dealt so exhaustively with the facts and arguments advanced and my own views coincide so closely with his on almost every point, that a lengthy separate judgment would be a mere repetition of a great deal of his. I therefore propose to confine my remarks to a few only of the principal matters that have been argued before us.

I agree with my learned brother's views as to the scope of secs. 399 and 402. The contention that the conviction cannot stand by reason of repugnancy in the record must fail in my opinion for two reasons: (1) that there is in fact no repugnancy, (2) that if the suggested repugnancy existed it would provide no good ground for setting aside the conviction. With the first reason, my learned brother has dealt. I shall therefore confine myself to the second. The argument as to the repugnancy is based on the case of *Rex* v. *Plummer* (8) a case in which a person was acquitted though he had pleaded guilty to a charge of conspiracy, because the jury acquitted the other two persons with whom he was alleged to have conspired. It seems to me that the principle which underlies that case is really this, that you cannot have contradictory results or decisions from one set of facts, as only one decision can be the right one. The verdict of the jury was "no conspiracy," that was conclusive and therefore the prisoner who pleaded guilty could not be convicted because his plea was inconsistent with established facts. It is true the learned Judges speak of the record being inconsistent and contradictory. But the record is merely the outward and visible sign of the facts found and I take it that the underlying principle is that which I have stated.

In that case Bruce, J., says "the record of conviction can only be made up in the terms of the indictment" and on that expression it is argued that in considering this matter we must look only to the indictment and ignore the facts actually proved. The reason for the rule in the case of a jury verdict is obvious, for the verdict is simply one of guilty or not guilty on the specific indictment and the facts found by the Jury are unknown except to this extent that the allegations in the indictment are proved or not proved. But I emphatically dissent from learned Counsel's contention that such a rule can be applied to the case of a decision by a Judge. In such a case we cannot ignore the facts found. The argument amounts to this: The Judge has found certain facts, he has made a mistake in law in saying that those facts do not amount to an offence under sec. 399, the facts do also amount to an offence under sec. 402, yet because he has, though mistakenly, acquitted the accused of the charge under sec. 399 and though he has rightly held the facts to be an offence under sec. 402, the accused must be acquitted of the offence under sec. 402. It seems to me that the argument has only to be stated in this form to insure its instant rejection. The position is

(8) 2 K. B. D. 339 (1902).

this. The Judge finds certain facts, we agree with him in his findings as to those facts, yet if he makes an error in law in the application of the facts as to sec. 399, we are not only to accept his error in regard to that section, but to add to it one of our own in regard to sec. 402.

The accused are entitled to the benefit of any technicality that they can invoke in their favour, but a technicality which leads to such a farcical result as the above, must be clearly established, and it must be one which is to be found within the four corners of the Code of Criminal Procedure and not one borrowed from English law and founded on ideas as to the sacred character of a verdict by a jury, whose findings of fact are unknown, a character which by the express provisions of law does not attach to jury verdicts in this country.

Now, the tendency of modern legislation in general and of the Criminal Procedure Code in particular is to avoid technicalities, and I am aware of no provision in that Code which would justify interference with a conviction on the ground of repugnancy in the record. An instance will make it clear that repugnancy in the verdict of a Jury in India is not by itself sufficient to justify the quashing of a conviction and to anyone with much experience of mofussil juries, it will be evident that such repugnancies do occur. Suppose six persons are charged under sec. 147 with rioting and under sec. 304 read with sec. 149 in respect of culpable homicide committed in the course of the riot. The Jury convicts all six under sec. 147 but convicts only three of the charge under secs. 304 and 149 acquitting the others of this charge. They do this arbitrarily to distinguish the case of ringleaders from those who take a less prominent part. The Judge considers that he can give a sufficient sentence in regard to the latter three, though he does not agree with the verdict. He cannot, therefore, refer the case under sec. 307, for it is not necessary for the ends of justice to do so. Nor on appeal could this Court interfere on the ground of repugnancy, for under sec. 423 (2) it could interfere only on the ground of misdirection by the Judge or misunderstanding by the Jury of the law and both of these elements are absent in the case supposed. It is no answer to say that such verdicts ought not to be given for the fact remains that they are.

If mere repugnancy in the verdict of a Jury is not by itself sufficient to ensure quashing of a conviction, much less can that result be insured by a repugnancy, which exists only in the formal decision of a Judge, whose actual findings of fact are known, in other words a repugnancy in form only and not in substance.

[His Lordship then considered the facts of the case and continued.]

The finding of the gun and revolvers is not disputed, but it is urged that the manner of their finding shows that the Police knew that these articles were there to be found and one of the facts on which this theory had been based is that Jatin found the gun almost immediately after he entered the hut, an entry which it is urged was in itself unjustifiable. It is argued that under sec. 47 of the Code of Criminal Procedure Jatin had no authority to enter the hut until he had asked permission from the occupant of it. This argument, in my opinion, is based on a misconception of the scope of sec. 47. It is not intended to restrict the powers of the Police: on the contrary it is a provision compelling householders to afford the Police facilities in carrying out their

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duties, and sec. 48 provides that if difficulties are placed in the way of a Police officer, he may use force to obtain ingress. Now, no suggestion was made in the course of cross-examination to Jatin that he had done anything improper in entering the hut. What were the facts? He had been told about the occurrence on the road and led to the spot where the men had disappeared. He had been told that there was no one in the hut but the Karmakars, yet he sees a man, as he says, "spring" from the south hut to the north hut. He followed the man through the open door and found a number of men in a room without any light. He was about to look under the *machan* to see if anyone was hiding there, when one of the men there made a statement to him. He then removed the basket which was under the *machan* and found the gun. I do not see anything suspicious in this conduct of Jatin's: on the contrary it seems to me extremely natural. If his suspicions were not aroused before he entered the hut, it is a reasonable supposition to make that he entered to ask the inmates if they could throw any light on the point as to where the fugitives had gone, and it would be absurd to call such an entry illegal. If his suspicions were aroused before he entered, it is impossible to say that in the circumstances his suspicions were not reasonable, and if he had reasonable suspicion of the commission of a cognisable offence sec. 54 would have been a sufficient authority for him to effect an arrest. In either case the contention that his entry was illegal is in my opinion an idle one.

There is, however, more substance in the contention that at the time of the search the provisions of sec. 103, Criminal Procedure Code, were ignored. The learned Judge states, no doubt correctly, that the accused were not "prevented from seeing what was going on after expressing a wish to do so." The language of the Code no doubt is, "shall be permitted to attend during the search," and on that language it might be argued that there is no breach of the Code in excluding the occupant of the place, if he does not demand to be present. But the occupant of a place searched is hardly likely to be aware of his rights and in practice the search is ordinarily made in his presence. In my opinion the spirit of the section is that he shall be present and I take it to mean that he is to be given the option of being present and not that he is to be allowed to be present only if he demands it.

It is to be noticed, however, that the right of presence given by sec. 103 applies only to the "occupant of the place searched or some person in his behalf." I take it that the words "occupant of the place" are not intended to cover every person who may happen to be in the place at the time, but that they refer back to the person mentioned in sec. 102, "a person residing in, or being in charge of the place." Strictly speaking, then, the only persons entitled as of right to be present at a search are persons residing in or in charge of the place, and when that view is applied to the facts of the present case, it is evident that the majority of the accused were not entitled as of right to be present at the search. As a matter of practice it is doubtless desirable that any person against whom an inference may be drawn from the fact of certain articles being found in a particular place should have an opportunity of being present at the search, but if it is proposed to draw an inference against the *bonâ fides* of the Police in

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respect of a search on the ground that the provisions of the law have not been complied with, it must be shown that those provisions have heen ignored, and such an inference will not be justified from a mere failure to exercise a wise discretion. In the present case, however, it is quite clear that some one or more of the accused were in fact occupants of the hut, so that if they were improperly excluded there has been an ignoring of the provisions of the law.

Jatin says that the accused were taken out of the room and kept near the south door, that is the door facing the *machan.* He evidently intends to suggest that they were in such a position as to be able to see what was happening. In cross-examination he gives the reason for the removal to be that the presence of respectable witnesses made it unnecessary to keep them in the room. Sashi, being the person who had then removed, is the proper person to give the explanation. The reason he gives is that there was not sufficient room in the hut and says they were standing in the passage between the hut, in front of the door. Durga says they were taken to the west of the west wall. Lalit says they were taken out but he did not see where they were taken to.

Taking these statements together it may, I think, be fairly inferred that they were taken to a place from which they were not in a position to see what occurred. It is possible that it was not Sashi, but the constables who were in charge of the accused, who removed them from the doorway to the west of the hut, but I think Sashi ought to have taken steps to see that they were not removed.

It is suggested that they might have been taken into the east room and so enabled to watch the proceedings from the opening between the two rooms. Neither of the police-officers was asked why they were not taken and if they had been taken there the suggestion would doubtless have been made that considering the position of that opening they were not able to see anything.

If the dimensions of the hut are considered it will be seen that Sashi's estimate that there was not sufficient space in the west room for them is reasonable. The west room measured 13′ x 8′, the *machan* took up 8′ x 6′ leaving an empty space of only 8′ x 7′. In this space were three search witnesses, and three police-officers, for the Inspector was also there and it does not need much imagination to realize that there was very little space left.

Another consideration must also not be lost sight of, two of the search witnesses were Mukhtears, the third Jadu Babu, is described as a Civil Court Commissioner. These witnesses doubtless knew their businesses and were not likely to be imposed upon.

To my mind the removal of the accused ought to be attributed to an error of judgment, and it must be remembered that it was an error of judgment shared in also by the Inspector as being the senior officer present, against whom not only has no suggestion been made, but it has been made a grievance that he was not examined as a witness, for it is suggested that he having formerly been a pleader and above suspicion, would have materially assisted the defence if called. However, the fact remains that the accused were not present at the search, and for that reaosn the evidence of finding of articles requires careful scrutiny. My learned brother has given reasons, in which, I concur, for holding that the masks

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were not introduced by outside agency and that the two important documents Exs. XVC and XXA were genuine documents.

The grievance of exclusion of the accused from the hut at the search is one which in regard to the earlier stages of the proceedings may fairly be termed unsubstantial, for it is not disputed that the bundle containing two revolvers, and a shirt, in the pocket of which a mask was subsequently found and a hammer was found above the ceiling, or that a gun was found under the *machan*. As regards these things the contention is that, whether put in the places where they were found by the Police or by some body else, the accused knew nothing about them.

When an article is found in a man's house the ordinary presumption is that he, as owner of the house, is aware of its existence. This is subject to the qualification that no other person has access to that particular place. It follows that if the house is in the occupation of more persons than one having access to the particular place, there is no presumption against them individually that they have put the article where it is found; though if it be proved that an article has been for a considerable period of time in a place to which all have frequent access, it might reasonably be presumed that all were aware of its existence. These propositions depend on ordinary common sense and do not require any authority to support them. Applying them to the present case the position is this. If it is shown that these articles could not have been introduced above the ceiling or beneath the *machan* from outside, there will be a presumption that some one or other of the persons using the hut put them where they were found, but there will not be a presumption as against any particular individual if the hut is used by more than one person. It therefore becomes necessary to examine the possibility of the introduction of these things by outside agency.

[His Lordship considered the evidence on the record and agreed with Woodroffe, J., and thus concluded.]

The next stage in the proceedings after the finding of the bundle and hammers and the clothes on the *machan*, was the examination of the contents of the pockets of the clothes after the arrival of the Additional Magistrate, who had been preceded by Mr. Watling :—in fact it was Mr. Watling who sent for the Additional Magistrate and the Additional District Superintendent of Police,—and much argument has been devoted by all the learned Counsel appearing for the Appellants as to the interval of time that elapsed between the arrival of Sashi and the arrival of Mr. Watling. The arguments are based on the estimate of the times given by the different witnesses when the various steps were taken. It is urged that no explanation is given of what was done during 1½ hours. The estimates of time given by the different witnesses naturally vary somewhat, and it is impossible to suppose that men who have been suddenly called from bed will have any very clear idea of what the time was. Mr. Sinha, for the Crown, has argued that the interval was not more than about ½ hour to ¾ hour, *i.e.*, from the time when the Inspector left to call Mr. Watling till the arrival of the latter. Considering the time that has been taken I do not think it makes very much difference whether it was ¾ hour, an hour, or 1½ hours.

The argument is this. Sashi having

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found the revolvers etc. and the clothes must have done something in the interval before Mr. Watling came; as it has not been stated what was done an inference must be drawn against the prosecution that the Police were up to no good, or at any rate that the absence of an explanation as to what was done rouses such an amount of suspicion that no reliance can be placed on the subsequent finding of the papers, Exhibits XVC and XX*a*, and of the masks.

Mr. Sinha's suggestion is that what was uppermost in the minds of Sashi and Jatin was the nature and condition of the clothes, for the circumstances showed that the accused found on the *machan* with wet clothes were out for no good purpose, and that they had no idea of the possible contents of pockets at that time, but thought only of showing the clothes as they found them to the superior authorities.

It seems to me to be futile to speculate as to what were the motives of the two police-officers when not a single question has been put to them, the only persons who could state them, touching the point. It is suggested that that was a point which it was the duty of the prosecution to clear up. Now, not only is the argument based on a false premise that the police-officers must have been doing something, but it is obvious that if the argument is to have any force it must be clear that the circumstances were such as to throw on the prosecution the duty of giving an explanation.

In cross-examination no stress was laid on the lapse of time and it was not suggested by a single question that there was a period for which some account should be given. And if the cross-examination does not even lay the foundation of a suggestion that there is a period for which an account ought to have been [illegible] been given, an Appellate Court ought not in my opinion to pay any attention to suggestions made for the first time in appeal. If there is anything in the evidence which on the face of it requires explanation, the absence of an explanation may reasonably give rise to adverse comment, and an accused is entitled to the full benefit of the want of explanation of a circumstance which *primâ facie* requires explanation. But the very argument that there has been no explanation implies the suggestion that something ought to have been done other than what was done or what appears on the evidence to have been done. That, it is suggested, was according to the evidence nothing. Of the various counsel to whom I put the question what did they suggest ought to have been done, one alone had a suggestion to make; it was that the clothes ought to have been examined. Now, I have not the slightest doubt that if the two police-officers had examined the clothes and found the masks and papers, the comment would have been that their haste was evidence of dishonesty, and that in view of the fact that the Inspector had gone to call the District Superintendent of Police, they ought to have waited. In a case like this it is impossible for the Police to do anything which will not be attacked and it is impossible to say, in view of the fact that their actions are so frequently subjected to hypercritical comment, that it would have been wiser to pursue one course rather than the other.

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I agree that accused Aditya Charan Dutt and Thakur Das Pal should be acquitted and the convictions and sentences of the rest of the accused affirmed.

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Contents.

NOTES.

Identification of criminals.

In noticing the death of Bertillon, the English *Law Journal* in an appreciative note notices how the researches of the illustrious deceased directed the attention of criminologists to the identification of criminals. Although finger-print has in the present day superseded any other method of identification yet it is doubtful whether it would have been resorted to for the purpose had not Bertillon carried on his anthropological researches in this connection. It is however interesting to note that the finger-print method of identification of criminals was practically initiated by Anglo-Indian officials in India. Finger-print as a means of identification has been in vogue in India from the very earliest times. So much so that the Indian Sovereigns and later on the Mahomedan Emperors used to seal all their important documents with their finger-prints. All the important charters and grants always bore the imprint of *panja* or the five finger-prints of the Emperors. The suggestion that finger-print is an infallible means of identification surely originated in India and the credit of its being made use of for the identification of criminals surely belong to Anglo-Indian officers.

This is what the *Law Journal* says on the subject :—

Few men have rendered the cause of criminal justice more solid service than the late M. Bertillon, whose death, at the early age of sixty-one, will be sincerely regretted by everyone who realises how useful his system of anthropological measurements has proved to be in the better identification of criminals. It is true that Sir Francis Galton's system of finger-prints, with the method of classification invented by Sir Edward Henry, has, at any rate in England, surpassed the Bertillon system ; but it was the famous Frenchman's method of elaborate measurements of body, head, feet and hands which facilitated the introduction of the more trustworthy system now existing in this country. Not that Sir Francis Galton, whose method was adopted in 1894, is entitled to the distinction of having been the first to recognise the value of finger impressions as a means of identification. Sir William Herschel devised a system which was successfully introduced into India as long ago as 1858. Finger impressions are, of course, of much more ancient origin. To give but one instance, Professor Sollas, in dealing with the palæolithic races, states that 'impressions of the human hand are met with painted in red in Altamira, but in other caves also in black, and sometimes uncoloured on a coloured ground.' Dickens, too, may be quoted in this connection. Did not Dan'l Peggotty, in that quaint dwelling of his at Yarmouth, 'print off fishy impressions of his thumb on all the cards he found'? But the employment of finger-prints as a means of indentifying prisoners is quite a modern thing, and nowhere has it been brought to a higher pitch of utility than in England.

Sale of Court-fee stamps to pleaders' clerks.

Our attention has been drawn to a practice which is said to be common, *viz.*, the sale of Court fees to pleaders' clerks in the name of such clerks by licensed vendors and we have been asked as to the propriety of the course. The pleaders' clerks are said to sell them to their masters' clients without further endorsement. The question is whether such purchase and sale offend against sec. 34 (3) of the Court Fees Act. If the pleaders' clerks do it for any profit of their own they surely come under the section. But if they do it on their masters' behalf and for the latters' clients they surely do not offend against the section. We think that if the stamp vendors would in such cases endorse the name of the pleaders' clerks as such, and not merely individually, there can be little objection urged against the practice. We believe that since the enactment of sub-sec. (3) of sec. 34, the question was referred to the Government of India as to whether legal practitioners may buy a stock of Court-fee stamps for the use of their clients from time to time. The Government of India decided that the prohibition as contemplated in sec. 34 (3) is not applicable to a case of a legal practitioner or banker buying a

stock of stamps for use in his own business. They may prepare drafts on the stamped paper and recover the cost of the stamp and their professional charges from their clients. But surely it would be improper for a pleader or solicitor's clerk to purchase any Court-fee stamps except in the name of his master and for the use of his clients.

Judicial jokes.

The lay and the legal journals in England are at present discussing the limitations of judicial joking. The following observations of the *Law Journal* may be said to sum up the view which will receive general acceptance.

'The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity,' Chief Justice Erle told a member of the Bar who apologised for a sally that set the Court in a roar of laughter. To judge from the protests which are being made against judicial humour, there are persons who regard even 'a little honest hilarity' as something quite alien to the serious work of the Courts. They would not object to a flash of wit from the witness box; they might even tolerate a witticism from the Bar; but they appear to think that the dignity of the Bench requires that a judge, no matter how mirthful or tedious the proceedings over which he presides, should sit all day 'like his grandsire cut in alabaster.' Judicial joking may, no doubt, sometimes be carried to excess. An incident in the judicial career of Sir James Fitzjames Stephen—by no means, in the ordinary sense, a 'judicial humorist'—indicates its dangers. He was trying a slander case in which both the parties were Billingsgate salesmen, and the counsel for the defendant did not fail to take full advantage of the humour of the situation. Mr. H. F. Dickens, who represented the plaintiff, seeing the judge, as well as the rest of the court, impressed by the jocular aspects of the case, made a strong effort to bring out the serious injury that had been inflicted upon his client Mr Justice Stephen, his sense of fairness aroused, was sobered in a moment, and summed up in favour of the plaintiff. After the jury had returned their verdict the learned judge sent this note to the plaintiff's counsel: 'Dear Dickens,—I am very grateful to you for preventing me from doing a great act of injustice.' Perhaps some judges would display a better regard not only for their reputation as wits but also for the dignity of the Bench if their attempts at jocularity were rather less frequent. For laughter, though it certainly need not be banished from the courts, may sometimes create an atmosphere in which the serious character of the work is prejudiced. A 'little honest hilarity' in a court of justice is one thing; an habitual striving after the mirth-provoking is quite another.

EXAMINATION OF WITNESSES BY THE POLICE.

Chap. XIII of the Code of Criminal Procedure deals with "information to the Police and their powers to investigate." Any officer in charge of a Police Station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to enquire into or try under the Code. This power of a police-officer to hold an investigation of his own accord is limited to cognizable cases only and so far as non-cognizable cases are concerned it is absolutely necessary that the police-officer should be authorised in the Mofussil by the order of a Magistrate of the first or second class having power to try such case or commit the same for trial and in a Presidency town by the order of a Presidency Magistrate. In the course of an investigation under Chap. XIV of the Code, a police-officer may by order in writing require the attendance before himself of any person being within the limits of his own or any adjoining station who from the information given or otherwise appears to be acquainted with the circumstances of the case and such person is bound to attend as required (sec. 160). By a misuse of this provision, accused persons are sometimes called upon to appear before a police-officer, but this is wholly illegal. The intention of the Legislature in making this provision, as pointed out by Turner, C. J., in *Queen Empress* v. *Saminada Chetti*, I. L. R. 7 Mad. 274, seems to have been only to provide a facility for obtaining evidence and a police-officer cannot legitimately invoke the aid of sec. 160, Cr P. C, in seeking to enforce the attendance of an accused person.

Even in exercising his legitimate powers under sec. 161 with reference to witnesses, a police-officer must act with discretion and caution. The case of *Haladhar Bhumij*, 9 C. W. N. 199, where the Police had taken a number of women stated to be related to certain absconders from their village to the Police Station on the pretext that they wished to examine them, is an instance of the indiscreet exercise of powers conferred on the Police by the section. It was pointed out by Harington and Pargiter, JJ, that the proper course for the Police was to hold the examination of the women at their own houses.

It is to be noted that non-attendance in obedience to an order issued by a police-officer under sec. 160, Cr. P. C., is punishable under sec. 174, I. P. C., but it is essential that the order should be properly made, *Lakshmi Gadu*, 2 Weir. 121, and if the order disobeyed was not made in writing no conviction can be had for disobedience thereof, *Verasami Pillai*, 1 Weir. 86, see also *Queen-Empress* v. *Purshotam Vanamali*, Ratanlal's Unreported Cases, page 850.

Secs. 161 and 162 lay down the scope and the manner of the examination of witnesses summoned under sec. 160. Under sec. 161 the witness is bound to answer all questions relating to the case under investigation put to him by the police-officer, other than questions the answers to which have a tendency to expose him to a criminal charge or to a penalty or forfeiture. When the Code of 1872 was in force it was ruled by a Full Bench of the Calcutta High Court (*Emperor* v. *Kassim Khan*, I. L. R. 7, Cal. 121; s. c. 8 C. L. R. 30)

that the corresponding secs. 118 and 119 of that Code imposed no obligation upon a person examined by the Police under those sections to speak the truth. This decision overruled the case of *Queen* v. *Nimchand Mookerji*, 20 W. R. Cr. 41, and it was also directly opposed to a previous decision in the case of *Juggornath Sahai*, 8 C. L. R. 236. The decison of the Full Bench was superseded by sec. 161 of the Code of 1882 in which the word "truly" was for the first time added after the words "shall be bound to answer." Accordingly in *Emperor* v. *Parshram Ray Sing*, I. L. R. 8 Bom. 216 and *Nathu Sheikh* v. *Emperor*, I. L. R. 10 Cal. 405, it was held that if a person knowingly answered falsely questions put to him by a police-officer under sec. 161 he would be guilty of intentionally giving false evidence but a contrary view was held in *Queen-Empress* v. *Ismail Valad Fatari*, I. L. R. 11 Bom. 659. In the Code of 1898 the Legislature has reverted to the law as it stood under the Code of 1872 and it has been held that as under sec. 161 of the present Code a person is not bound to answer truly questions put by a police-officer no conviction under sec. 179, I. P. C., can be had for refusing to answer such questions (*Savani Virabayi*, 1 Weir. 111) and that such a refusal is not punishable under secs. 176, 179 or 187, I. P. C., (*Queen-Empress* v. *Sankaralinga Kone*, I. L. R. 23 Mad. 544); and in *Queen-Empress* v. *Appi Gadu*, I. L. R. 23 Mad. 544 (note), where the accused was charged in the alternative with making a false statement to a police-officer investigating under sec. 161 or with making a false statement before the Magistrate, it was held that as under the present Code a person is no longer bound by law to tell the truth when questioned by a police-officer, a conviction in the alternative as aforesaid cannot stand.

An instance of a rather curious application of the section is to be found in *Reg.* v. *Fakira*, Ratanlal's Unreported Cases, p. 92, where a police-officer asked a witness to look at the hands of a complainant and answer whether there were any marks of tying with a rope on his hands; this the witness refused and it was held that he could not be convicted of an offence under sec. 179, I. P. C., for refusing to comply with the police-officer's bidding.

So far as liability to a prosecution under sec. 211, I. P. C., is concerned it was held in *Veerepalli Penchalugadu*, 1 Weir. 193, *Chenna Ramana*, I. L. R. 31 Mad. 506, that a person who answers questions put to him by a police-officer making an investigation under sec. 161 does not institute or cause to be instituted criminal proceedings within the meaning of sec. 211, I. P. C., nor does he thereby charge any person within the meaning of that section but a statement made under sec. 161, Cr. P. C., is included in the word "information" as used in sec. 182, I. P. C. (*Queen-Empress* v. *Bhikaji*, Ratanlal's Unreported Cases, page 124).

It may be observed that under sec. 175, Cr. P. C., a police-officer of the class mentioned in the section on receiving information of the commission of suicide, murder or accidental or suspicious death is bound to proceed to the place where the body of such deceased person is and there make an investigation and draw up a report. This report is popularly known as the *Surathhal* report and for the purpose of an investigation as aforesaid a police-officer may by order in writing summon persons appearing to be acquainted with the facts of the case and every person so summoned shall be bound to attend and to answer truly all questions other than those of an incriminating nature and if he answers falsely he is liable to be prosecuted under sec. 193, I. P. C.

In the practical application of sec. 161, Cr. P. C., it appears to have been the practice for police-officers in the mofussil to hold a regular investigation of a *quasi* judicial character in the presence of the accused and his agents. This does not seem to be contemplated by the law which lays down that the statement of a witness examined under sec. 161 may be taken down in writing under the provisions of sec. 162 but such statement shall not be signed by the person making it nor shall such writing be used in evidence: provided that when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid the Court shall on the request of the accused refer to such writing and may then, if the Court thinks it expedient in the interests of justice direct that the accused be furnished with a copy thereof: and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act.

Sec. 157 of the Indian Evidence Act is the general section which deals with the subject of previous statements which may be proved to corroborate the testimony of a witness. Sec. 162 of the Code of Criminal Procedure occurs in a special enactment relating to the procedure of Criminal Courts. This section deals with a special class of statements, namely, those made by a witness in a criminal case to a police officer in the course of the investigation of an offence. The Evidence Act is a general Act dealing with the admission of evidence generally. The general provisions of sec. 157 of that Act must be taken to be controlled by the special provisions of the Code of Criminal Procedure embodied in sec. 162 (*Emperor* v. *Narayan Raghunath Palki*, I. L. R. 32 Bom. 111; *Bhulai Sing*, 13 Oudh Cases 7). The rule of construction applicable in a case like this is thus laid down in Beal's Cardinal Rules of Legal Interpretation, p. 219. "It is to be borne in mind that where there are provisions in a special Act which are inconsistent with the pro-

visions of the prior general Act the provisions of the general Act must yield to those of the special Act."

The first Code of Criminal Procedure which was passed soon after the passing of the Evidence Act, in sec. 119 of the Code, enacted that no statement of a person examined by the Police if reduced to writing shall be signed by the person making it nor shall it be treated as part of the record or used as evidence. Sec. 162 of the Code of 1882 formulated the rule in these words: "No statement other than a dying declaration made by any person to a police-officer in the course of an investigation under this Chapter (XIV) shall if reduced to writing be signed by the person making it or shall be used as evidence against the accused." The section as at present enacted plainly constitutes an exception to the ordinary rule of evidence. The proviso again engrafts an exception upon the exception (*Emperor* v. *Narayan Raghunath*, I. L. R. 32 Bom. 111, per Beaman, J., *Bhulai Sing*, 13 Oudh Cases 7.)

(*To be continued.*)

SOURCES OF LAW IN ANCIENT INDIA.*

This is an essay on Hindu Jurisprudence which the author submitted as his thesis for the degree of Doctor of Laws of the Calcutta University. The thesis, we are informed, has been accepted, and so far it may be said to have served its immediate purpose. But its intrinsic merits will not, we hope, be measured merely by its success as a University thesis—for it is, within its modest limits, a very suggestive and in some respects original contribution to Hindu Jurisprudence. It cannot be said, indeed, that the sources of law in ancient India are an entirely new subject. But this essay is, we believe, the first in which an attempt has been made to co-ordinate these sources according to the historical and generic method. This work of co-ordination could not, of course, be accomplished without taking account of the institutions which acted and reacted on the law and accordingly the subject has naturally expanded into an inquiry into the development, by interaction, of Law and Society in Ancient India.

The author's sketch of the constitution of Ancient Indian Society, it may be stated at once, is a highly conjectural one. But it is not necessary for us to assent to every link in the chain of ideas which lead him to formulate the view, which seems to us to be a sound one, *viz.*, that Ancient Hindu Society "should be looked upon as an aggregate of several societies embodying different principles of association, loosely knit together by the military principle into a rudimentary State" (p. 18). He has also, we think, correctly indicated the position of the King in Ancient Hindu polity. The king in India was never a "lawgiver," and his legislative powers were restricted within the narrowest bounds (p. 80). His judicial functions too were very much circumscribed, being limited in theory at least to merely exacting compliance on the part of the subjects with the eternal laws of *dharma*. In no other society too were constitutional limitations on the king's powers more thoroughly secured by the obligation to consult various bodies of councillors.

The author takes note, as every one must, of the well-known fact that the end of society in Ancient Hindu India was the promotion of *dharma* or the moral order of the universe. "All law was viewed as subsumed under that ruling conception. Law was therefore not a matter to be made or moulded by human hands. It is eternally ordained and interwoven with the constitution of society and capable of ascertainment partly by revelation and partly by enquiry in a spirit of reverence, into the nature of *dharma*. The result of this was the development of a comprehensive idea of law which is the dream and perhaps the despair of the sociological school of modern philosophical jurists." How and by what processes this idea of an all-pervading *dharma* or moral order permeated, moulded and in a great measure refined the customary rules of the people through the changing ages forms of course the main theme of this essay and it is here that the author's originality in ideas as also method of treatment becomes most marked.

The Sruti of course is the traditional source of all Hindu Law, and no text-book on Hindu Law omits to impress this fact on students. But the Vedas never were a concrete source of strictly legal rules. All rules, *srouta* or *grihya* or strictly legal, were alike referred to the ultimate authority of the Vedas. "It would seem then that 'Veda' had ceased to signify merely the aggregate of sacred revealed texts known to the writers but stood for the sum total of actual and possible knowledge and the embodiment of all moral and religious truth" (p. 37). The reference of all rules of conduct for their source to the "Veda" finds its nearest parallel in Roman Jurisprudence in the reference to Natural Law. The Smritis according to the writer were originally understood to be "recollections" of the practices of those who knew the Vedas—not individual recollections but "agreements" or common recollections of associations of men—in other words, traditions preserved in colleges of learned men (*Parishads*). The author's account of how in course of time Smritis came to assume super-human authority until claims of equal (if not superior) authority with the Vedas were put

*By Nares Chandra Sen-Gupta, Calcutta. Art Press, 1914. [illegible] of the essay is "Sources of Law and Society in [illegible] power of a p[illegible]

forward on behalf of such works as the Dharmashastras of Manu and Yajnavalkya is both suggestive and interesting. Not less interesting is his account of the process by which the customs of the Aryas came in course of time to secure the sanction of presumed Vedic origin, were transformed in the process, and became laws. The only other matter dealt with in this essay which deserves special mention is "secular customs" as a source of law. "There are in the contemplation of the Smritis, countries and classes of people where and amongst whom sacred law does not exist (the Vrishalas, Vratyas, Antyajas, Abhisartas and Apapatras), and possibly we should never have known by what law they were governed were it not that it would be *dharma* for the king to maintain such laws as prevailed amongst them" (pp. 91-92). These and other secular customs were not touched by the Sruti and consequently consistency with the Srutis or the Smritis was not demanded of the customs, for instance, of herdsmen, husbandmen, traders, bankers, and artisans" (p. 93). It was the king's *dharma* to enforce these customs as he found them amongst the persons concerned. Thus "it was the duty of the king to do justice as amongst gamblers according to the rules of the game ascertained from the gamblers themselves. Even a woman's wages of shame did not fall outside the scope of the king's *dharma*" (p. 95).

We do not propose to notice this essay at greater length as the extracts given above will suffice to show the character and value of the author's speculations on a subject of absorbing interest to all students of Jurisprudence, particularly amongst Indians. The ancient Indians were in many respects a most remarkable community with a social organisation of far more elaborate structure and cohesion than either the Roman, or the Teutonic polity. Should the labours of historical jurists ever succeed in re-discovering and reconstructing the lost records of this community, the result, we feel sure, will far exceed in interest and importance the records of any other people on the earth, not excluding the Hebrews, for in no society have moral ideals been more consciously and consistently worked out in practice than in ancient India. We sincerely trust therefore that the present essay is but an earnest of what in the fulness of time the author and others who have been working in this most interesting field of research will yet accomplish by more extended and sustained efforts to comprehend and interpret Hindu Jurisprudence in the spirit in which it was understood and accepted in ancient Aryavarta.

CURRENT INDIAN CASES.

(CIVIL.)

Money transaction—Agency.

OFFICIAL ASSIGNEE OF MADRAS *v.* D. RAGAIN AYYAR, I. L. R 36 Mad. 499 (F. B.).

A certain railway company remitted money to a firm to the credit of a claimant. The firm informed the claimant who was not one of their customers that this has been done and asked for his instructions but before he could instruct them they suspended payment.

Held—That the firm held the money as agents of the Railway Company and not as bankers of the claimant.

Indian Contract Act, sec. 16—Rate of interest, Court's power to interfere with.

U. KESADULU NAIDU *v.* ASITHALAI AMMAL, I. L. R. 36 Mad. 533.

It is not open to a Court to reduce the rate of interest unless it is of opinion that the stipulation as to interest was procured by the exercise of undue influence as defined in sec. 16.

Promissory note—Payment to one of several payees, effect of.

M. ANNAPURNAMMA *v.* U. AKKAYYA, I. L. R. 36 Mad. 544 (F. B.)

Under a promissory note the promisor is entitled to offer payment to one of the promisees and the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment therefore must be treated as a complete discharge.

(CRIMINAL.)

Forgery committed to conceal already perpetrated fraud.

EMPEROR *v.* BALKRISHNO WAMAN, I. L. R. 37 Bom. 666.

The word "fraud" as used in the Penal Code is used in its ordinary and popular acceptation and a man who deliberately makes a false document with false signatures in order to shield and conceal an already perpetrated fraud is himself acting with intent to commit fraud.

Indian Railways Act (IX of 1890), sec. 101—Rule 100.

EMPEROR *v.* RAMCHANDRA HARI, I. L. R. 37 Bom. 685.

The object of the Rule is to lessen the risk of accidents through shunting on a through line after line clear has been given. The disregard of the rule enhances the danger to passengers. It is the risk thus entailed which renders the rule breaker liable to punishment. The offence is the endangering of the passengers, not the contributing to an accident, for the rule breaker may be punished even though no accident occurs. The gravity of the offence should be estimated not by the actual ultimate consequences but by the risk involved.

Indian Penal Code, secs. 213, 214—Screening an offender—Verdict of "not guilty."

EMPEROR *v.* SAVALAL LALLUBHAI, I. L. R. 37 Bom. 658.

The only thing which is made punishable under the law is the screening of an offence and if it cannot be made to appear that an offence has been committed then there has been no screening of an offence.

It is a very dangerous principle to adopt to regard a verdict of "not guilty" as not fully establishing the innocence of the person to whom it relates.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Lyons & Co. Ld.*, v. *Gulliver and Capital Syndicate, Ld.* Before the MASTER OF THE ROLLS AND LORDS JUSTICES SWINFEN EADY AND PHILLIMORE. 12th November 1913.

Nuisance caused by collection of large crowds for theatres, when actionable.

This was an appeal from a decision of Joyce, J. The Plaintiffs owned a tea-shop near a theatre. In order to get into the theatre for unreserved seats persons formed themselves into a queue, a long time before the performance. The Plaintiffs alleged that it was a nuisance and caused them loss of custom and the Court below so held. The appeal was dismissed, Lord Justice Phillimore dissenting. In the course of his judgment the Master of the Rolls said.

It was said by the Appellants that they were not answerable for what went on in the streets, because it was the duty of the police to keep the streets clear; and they also said that the persons forming the queues were not there on their invitation, because their only invitation was for the public to come into their theatre when the doors were opened. It was, they suggested, unreasonable that they should be made liable without having issued any invitation to people to obstruct the highway. His Lordship said he had no intention of going through the ancient authorities on the point of law involved, all of which had been fully discussed in *Barber* v. *Penley*, (1893) 2 Ch. 447. He was quite content to take as the law what was said by Lord Bairns in *Inchbald* v. *Robinson* (L. R., 4 Ch., at p. 390): —"There are authorities to show that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of these crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act." That was the law quite irrespective of any improper action by the person causing the crowds to collect. There were other authorities, where persons had been indicted because they had instituted attractions which caused a crowd to assemble. His Lordship thought it was impossible to find in favour of the Appellants here without overruling not only *Barber* v. *Penley* but other authorities as well. In *Rex* v. *Carlile* (6 Car. and P., 636), the law was clearly laid down as what was treated by Lord Cairns as plain law in 1869, and adopted by the Court of Appeal in the same case. The same view of the law had also been taken in *Barber* v. *Penley* and subsequent cases.

There was a further argument, which his Lordship said he failed to appreciate, that *Barber* v. *Penley* was a decision in favour of the present Appellants, because the Court refused to grant an injunction in that case on the ground that the police had done their duty. That was a case where the Plaintiff had complained that by reason of the performances of *Charley's Aunt* such crowds assembled that customers could not get into her premises. The learned Judge held that there was an actionable nuisance, but as the Plaintiff had by her affidavit in reply stated that since the action had begun the police had intervened and removed the nuisance, North J., did not grant an injunction, but showed his view of the matter by giving the Plaintiff the costs of the action. His Lordship said he was unable to see how the Appellants could escape liability in the present case by saying that it was the duty of the police to do whatever was necessary to prevent a nuisance.

LORD JUSTICE PHILLIMORE said people were not entitled to stop in the highway and stand still in it for more than a reasonable time, and the police had, at any rate in the metropolis, power to move them on. Instead of doing that the police had taken the reasonable course of forming people in queues outside places of entertainment and only allowing them to take up their stand on the terms that they should stand in a queue. The formation of these queues was said to form a nuisance, for which the owners of the Palladium were responsible, although they had only invited the people forming the queues to come to the theatre. The police had powers of control which they had exercised by insisting on the formation of a queue. Whether there ought always to have been a gap left opposite the Plaintiffs' premises was a matter for the police, and complaints as regarded the obstruction should have been made to the police. He disagreed with tho decision in *Barber* v. *Penley* although it was noticeable that in that case Mr. Justice North had hardly had the courage of his opinions, but had refused to grant an injunction because the police had so acted as to put an end to the nuisance. He also disagreed with *Wagstaff* v. *Edision Bell Phonograph Corporation* (10 T. L. R. 80), a case in which it was held that a shopkeeper could be restrained from exhibiting such attractive goods in his window as to cause a crowd to assemble and obstruct the entrance to his

neighbour's premises. In his Lordship's opinion a shopkeeper was within his rights in so doing, and it was for the police to move on the crowds and prevent a nuisance. The present was an *a fortiori* case. There was actionable wrong on the part of the present Appellants.

Messrs. Crenliffe, K. C., and *Pollock* for the Appellants.

Messrs Hughes, K. C., Farwell and *Green* for the Respondents.

B. D. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

THE LORD CHANCELLOR.
LORD PARKER.
LORD DUNEDIN.
LORD SUMNER.
LORD PARMOOR.
1914,
3, February.

IN THE MATTER OF AN ATTORNEY.

Proceedings of a Civil Court sanctioning prosecution under sec. 195 of the Code of Criminal Procedure are of a Criminal nature for the purposes of special leave to appeal to His Majesty in Council.

This was an application for special leave to appeal against an order of the Calcutta High Court whereby in a matter arising out of a Civil suit sanction was given to prosecute the Petitioner for an offence specified in sec. 195 of the Code of Criminal Procedure. The High Court at first issued a certificate to the effect that the case was a fit one for appeal to His Majesty in Council under the provisions of sec. 39 of the Letters Patent. But it subsequently rescinded the certificate on the ground of its want of jurisdiction to grant the same.

Sir Robert Finlay, K. C. (with him *Sir William Garth*) submitted that they were Civil and not Criminal proceedings under the law and decisions in India, and that the Petitioner was entitled to appeal to His Majesty in Council. Their Lordships rejected the petition. The Lord Chancellor remarked that the proceeding was of a Criminal nature, and the grounds urged on behalf of the Petitioner did not satisfy the rule in *Dillet's* case.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before TEUNON, J. APPEAL FROM APPELLATE DECREE No. 3085 OF 1910. ABDUL KARIM AND OTHERS, Plaintiffs, Appellants *v.* WAHED ALI BEPARI AND ANOTHER, Respondents. Heard, 5th February. Judgment, 20th February 1914.

Merger—Transfer of Property Act (IV of 1882), sec. 111 (d)*—Lease created before passing of the Act—Vesting subsequent to the passing of the Act—Merger, doctrine of, before the passing of the Act—Intention.*

The appeal was by the Plaintiff in a suit brought for recovery of *khas* possession of the lands comprised in a certain under-tenure on the ground that the under-tenure had been annulled by appropriate proceedings under sec. 167 of the Bengal Tenancy Act.

In a certain *putni* taluk a ⅔rd share was held by one R and by a series of devolutions the owner thereof was one D. Under this ⅔rd share of the *putni* were created 3 sikmi aluks of which one representing a moiety of the ⅔rd share came to be held by A. At a sale in execution of a decree for arrears of rent against A, D, father and predecessor-in interest of J, purchased the sikmi on the 9th August 1905, and after proceedings for the annulment of encumbrances, the son, D, sold the same to the Plaintiff. Plaintiff next sold the moiety of the sikmi to Defendant No. 3 and sought to recover *khas* possession in proportion to the second moiety jointly with him and the other two Defendants who were the owners of the 2nd and 3rd sikmis (each of 4 annas) representing the second half of the *putni*.

The case of the Defendants 1 and 2 was that the second moiety of the 8 anna sikmi of which Plaintiff sought *khas* possession was held by them on a howla tenure created by A's predecessor-in-interest on the 16th Assin 1276. They denied that this howla had been annulled and further said that on the 9th August 1905, on the purchase of the 8 anna sikmi, the sikmi and the superior or taluki interest vested in one and the same person, that is, D's predecessor and that therefore by reason of the doctrine of merger as embodied in sec. 111 (*d*) of the Transfer of Property Act, the sikmi lease was determined, and consequently by his purchase from D of that interest on the 24th April 1907 the Plaintiff obtained nothing.

The Plaintiff succeeded in the Court of first instance, but on appeal, the second contention of the Defendant was upheld and the Plaintiff's suit was dismissed.

Held, that sec. 111, cl. (*d*) is applicable to leases

[illegible] prior to the passing of the Transfer of [illegible] Act when the vesting of the superior [illegible]hold interests in one and the same person [illegible] subsequently to the passing of the said Act [illegible] the doctrine of merger applied in [illegible] ——.

[illegible] Hosein v. *Gayani Dass*, I. L. R. 36 Cal. [illegible], followed on this point.

Prior to the Transfer of Property Act, the doctrine of merger did not apply to property in the mofussil. In any case if it did apply the Courts here as in England would have to be guided by the intention and in the present case the conduct of the lessor might be taken as showing that merger was not intended.

Babu Brajendra Nath Chatterjee and *Ramesh Chandra Sen* for the Appellants.

Babu Ram Doyal De for the Respondents.

A. T. M. *Appeal allowed · Case remanded.*

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, AND RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE Nos. 837, 838 AND 840 OF 1911. RANI HEMANTA KUMARI DEVI, Plaintiff, Appellant *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS, Defendants, Respondents Heard, 16th February Judgment, 25th February 1914.

Limitation Act (IX of 1908), Sch I, Arts 142, 144—Right to fish in a pond left by river shifting in its course.

These appeals were against the dismissal by the District Judge of Dacca of three suits brought by the Appellants against the Secretary of State and others for a declaration of their right to fish in a certain *doba* or back water of the Brahmaputra river, and for recovery of possession of the same.

The *doba* was situated in what was formerly the bed of the river. The Appellant's case was that the fishery in this part of the Brahmaputra was settled with them as Jal Hatna by the Government, and that in 1897 the river, by reason of the great earthquake of that year, suddenly changed its course and left the *doba*. In 1901 the Respondents, who were the lessees of an adjoining *khas mahal*, refused to allow them to exercise their rights in the *doba*, and these suits were in consequence instituted.

The first Court decreed the suit. It was found by that Court—and that finding was not displaced—that the *doba* was connected throughout the year with the new channel in which the Brahmaputra flowed. The lower Appellate Court dismissed the suits as being barred by Art. 142 of the first Schedule to the Limitation Act, the Appellants having failed to show that they had exercised their rights in the *doba* within 12 years of suing. It was admitted that they never fished in the *doba* since it was formed.

Held, "where a river shifts its course, leaving *dobas* in its old bed, the grantee of the exclusive right of fishery in the river retains his right over such *dobas* so long as the latter remain in communication with the main channel at all seasons of the year."

Bhaba Prasad v. *Jagadindra Nath Rai*, (1905) I L R 33 Cal. 15, followed.

Hence so long as the Appellants had been fishing in the new channel they could not be said to have ceased to be in possession of the *doba* and, if they exercised their rights in the channel within the period of limitation, Art. 142, (even if it be applicable at all where the matter in dispute was an interest in immoveable property) was no bar to these suits. In such circumstances, the plea of limitation could prevail only if the Respondents could show that they held adverse possession of the *doba* portion of the fishery for more than 12 years, or in other words, that they prevented the Appellants, not since 1901, as the latter alleged, but for 12 years before the 29th June 1907 from fishing in the *doba*. That is to say, the Respondents must rely on Art. 144 and the *onus* was on them, and not on the Appellants.

Dr. Rash Behary Ghose and *Babus Kishori Lal Sarkar*, *Jogesh Chandra Roy* and *Ramani Mohan Chatterjee* for the Appellants in No. 837.

Babus Bepin Behary Ghose and *Debendra Nath Bagchi (Sr.)* for the Appellants in No. 838.

Babu Priya Sankar Majumder for the Appellants in No. 840.

Babus Ram Charan Mitra, *Dwarka Nath Chuckrobutty*, *Satish Chunder Ghose* and *Satish Chunder Bhattacharjee* for the Respondents.

A. T. M. *Cases remanded.*

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD SHAW.
LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
Heard, 3 and 4, November.
Judgment, 3, December.

MUSAMMAT JAGRANI KOER and others, Appellants,
v.
KUAR DURGA PARSHAD, Respondent.

Will, natural in its terms—Presumption in favour of genuineness—Attestation by servants and dependants only, if discredits such Will—Evidence that men of testator's position sign blank vakalatnamas *if admissible to question genuineness of Will—Civil Procedure Code (Act XIV of 1882), sec. 468—Appellate Court, taking of evidence to discredit a witness without giving him opportunity to explain, propriety.*

Where the Will challenged is in every respect a natural Will and in accord with the feelings and tenor of life of the testator, and its execution is proved by anything like reasonable evidence, the presumptions of law are in favour of its being maintained.

In the case of a Will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents which are unnatural, unreasonable or tinged with impropriety.

Comment, therefore, with reference to such a Will, that the witnesses to the Will might have been of a better class and persons other than servants that the testator had about him, had no force unless something showing much higher than mere suspicion was established, viz., ***proof which would thoroughly satisfy the mind of a Court that these persons had committed both forgery and perjury.***

CHOTEYNARAIN SINGH *v.* RATAN KOER (1) *referred to.*

Blank forms and sheets signed for the purpose of vakalatnamas ***by people other than the testator and with whom he had nothing to do were not relevant to prove that the testator also was in the habit of signing similar blank sheets and that the Will was written after his death on one such form.***

Where on appeal the Appellate Court admitted fresh evidence to prove that on a date on which a witness deposed to having attested the Will he was elsewhere and could not have attended on the testator and the witness, who had not been asked anything in the original Court on this point, and whose evidence was otherwise unimpeachable, was disbelieved by the Appellate Court without being given an opportunity to offer any explanation of the matter by the Appellate Court:

Held—***That the procedure was illegal and no witness, whatever his standing, would be safe from adverse judicial comment under such procedure.***

This is an Appeal from a judgment of the Judicial Commissioners of Oudh, Mr. W. Tudball and Mr. E. Chamier.

The material facts of the case sufficiently appear from their Lordships' judgment. The Will, dated the 21st October 1904, was not registered till forty days after the testator's death. The Appellants' case was that on the 20th April 1905 the testator got the Will attested by Chowdhri Nasarat Ali at Sandila. The Plaintiff instituted the present suit for a declaration that the said Will was a forgery. He alleged that although the signature of the testator on the Will was genuine, the Will was nevertheless a forgery and that it was concocted with the help of the

(1) L. R. 22 I. A. 12 (1894).

MUSAMMAT JAGRANI KOER *v.* KUAR DURGA PARSHAD.

attesting witnesses. He suggested that a man in the testator's position would be accustomed to sign blank forms and blank sheets for the purpose of *vakalatnamas* being drawn up thereon for use in cases in the subordinate district Courts by his Agents.

To prove that this was not an unheard-of thing, the Plaintiff produced, at the hearing, a number of blank forms signed by one Syed Fazal Husain, a deceased talukdar of Sandila. The Subordinate Judge believed the attesting witnesses and found for the Will. On appeal during the argument it was discovered that Chowdhri Nasrat Ali was present at a meeting of the Municipal Board of Lucknow on the 20th April 1905 at a time when, according to his deposition, he attested the Will at Sandila. The Judicial Commissioners allowed the Plaintiff to call witnesses to prove this fact and to this no objection was taken by the Defendant. Chowdhri Nasrat Ali, however, was not called and no explanation was offered on his behalf. The Judicial Commissioners disbelieved Chowdhri Nasrat Ali and the other witnesses.

The principal judgment of the Court was written by Mr. W. Tudball, the Second Additional Judicial Commissioner, who, after a full examination of the evidence on the record, concluded his judgment as follows:—

"The burden of proof was upon the Defendants to prove this Will. In my opinion the evidence put forward by them cannot be trusted and they have utterly failed to discharge the burden which lay upon them. The lower Court, in my opinion, has not given the evidence its true value but has slurred over the points which were against it. In the place of good reliable evidence we have discrepant, suspicious evidence, some of which, to say the least, lies on the margin of perjury, even if it does not clearly overstep it. I therefore hold the Will not proved."

Mr. E. Chamier, the Judicial Commissioner, concurred entirely with his colleague and also delivered a separate judgment, in the course of which he observed:—

"As my learned colleague has shewn, the Will presents every circumstance of suspicion, and the evidence of the witnesses Bajrang Bali, Ganga Parshad, Khuda Bakhsh and Suraj Bakhsh, though they were well-drilled, is most unsatisfactory. Their story that Narindra Bahadur went out of his way to let them know the contents of the Will and then bound them over to secrecy, and that they never said a word to anyone about the Will till Narindra Bahadur died is incredible. The Defendants seem to have felt that the evidence of these men would not be sufficient. Their sheet anchor was Nasrat Ali. I can only account for the Subordinate Judge's estimate of the evidence of this witness by supposing that he was carried away or overawed by the long list of honours and distinctions enjoyed by this witness which are paraded at the beginning of his deposition. The witness for many years, indeed up to the time when he gave his evidence in this case, held an honourable position, and was *primâ facie* entitled to credit, but I agree with my learned colleague that it is impossible to accept his evidence. His statement that he visited Narindra Bahadur at Sandila on April 20th, 1905, found Narindra Bahadur then suffering from a carbuncle and sat with him all day, has been shown to be false. It was suggested that he made a mistake in the date. A man performing the solemn act of attest-

tion
Lordship

MUSAMMAT JAGRANI KOER *v.* KUAR DURGA PARSHAD.

ing a Will would probably not make a mistake about the date. At the most he might put 20th for 21st, but he could not put 20th for 15th or 30th, nor could he give the wrong month. The evidence on the record of the Court below established conclusively the falsity of the statement of Nasrat Ali that he attested the Will on or even about April 20th. The evidence admitted here shows only that he was on that date in Lucknow, and cannot have travelled by the morning train to Sandila. It was said that he is a man of means and has no object in giving false evidence. But his cross examination shows that his claim to be considered a rich man is unfounded. It may be conceded that the affair of the notes purchased by his cousin Khaslat Husain is rather ancient history, but the witness's persistent denial of all knowledge or recollection of it till the letters were produced is plainly false. In my opinion the evidence of Nasrat Ali should be rejected altogether."

Hence this Appeal.

Mr. L. DeGruyther, K. C., and *Mr. A. Jackson* for the Appellant submitted that the decision of the Subordinate Judge who had heard and seen the witnesses to the Will was right. The Judicial Commissioners were wrong in rejecting the positive evidence of the attesting witnesses who were trustworthy servants of the testator. Mere suspicion was not enough to prevail against positive evidence. Reference was made to *Choteynarain Singh* v. *Ratan Koer* (1). The propounders of the Will had discharged the burden of proving the execution of the Will and the burden had shifted to the Plaintiff and it was for him to show that the Will was a forgery. It was submitted that the blank forms signed by Syed Fazal Husain ought not to have been admitted in evidence. As regards Chowdhri Nasrat Ali, it was submitted that his evidence was trustworthy and that, in any case, the Judicial Commissioners ought to have given him an opportunity of explaining the inaccuracy (if any). Under sec. 568 of the Code of Civil Procedure 1882, the additional evidence called by the Judicial Commissioners was not admissible.

Mr. G. E. A. Ross, K. C., and *Mr. Bhagwandin Dube* for the Respondent submitted that the judgment of the Judicial Commissioners was right. The onus was upon the propounder of the Will to satisfy the Court beyond a reasonable doubt that it was a genuine Will. The Defendant had failed to discharge the burden. The additional evidence was admitted by the Judicial Commissioners without any opposition on the part of the Defendants and if they had no explanation to give they could have asked the Court to call Chowdhri Nasrat Ali. The point for determination was a pure question of fact and, the Courts having differed on what were not the same materials for decision, the judgment of the Judicial Commissioners ought not to be reversed unless the Appellants satisfied their Lordships that it was wrong. Reference was made to *Jagannath Pershad* v. *Hanuman Pershad* (2)

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal from a Judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 11th January 1909. This partly affirmed and partly reversed a judgment and decree, dated the 4th February 1908,

(1) L. R. 22 I. A. 12 (1894).

(2) I. L. R. 36 Cal. 833 (1909).

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of the Court of the Subordinate Judge of Hardoi.

The only question raised at the Bar of the Board was whether a will executed on the 21 October 1904 by one Kuar Narindra Bahadur is or is not a genuine Will.

Its provisions are substantially these: That after his death his widow should be proprietor of his estate in the Kheri District, and should have absolute power over the estate in the Hardoi District and hold proprietary possession over all his estate. By the third clause of the Will it was provided that after her death "Raj Bahadur, my sister's son, shall be the absolute owner of all my property moveable and immoveable, of every description." Other provisions, including certain annuities to the testator's brother-in-law, occur in the Will.

Ex facie it was duly executed and properly attested, and the witnesses are, first, his *diwan*, or general agent; secondly, a servant, who appears to have had charge of the wardrobe and a certain power of supervision, including that of making purchases; and lastly, his treasurer, or confidential clerk. In the words of the Subordinate Judge,—

"The scribe of the Will is the mukhtar, and the three attesting witnesses are the diwan, the treasurer, and the daroga of late Kuar Narindra Bahadur, who were his respectable private servants, and used to be always in the house, as is the case with Indian gentlemen in the position of the Kuar."

The domestic position of the testator and the parties was this: Durga Pershad, the Respondent, was remotely related to the testator Narindra, and for years had been on terms of enmity with him. Details of this are given, as, for instance, that they had not been on "eating and visiting terms," and that there "used to be no exchange of presents during marriages." Both the Courts below are clear upon the subject, the Judicial Commissioner's opinion being so strong as this, that "the ill-feeling, however, which existed between the two men was quite sufficient to cause Narindra Bahadur to desire that his property should not go to the Plaintiff or his branch of the family."

On the other hand, the Appellant, the testator's sister's son, was treated with regard and affection by the testator and, upon this subject also both Courts have no doubt. In the language of the judgment of the Judicial Commissioner:—

"In respect of the feelings which existed in Narindra Bahadur's mind towards the Defendant, Raj Bahadur, there can also be but little doubt . . . . Narindra Bahadur treated his sister's son as if he were his own son in every way . . . . . This feeling of affection towards his sister's son by a childless Hindu is fairly common; and, after full consideration of the evidence on the point, I have no hesitation in holding that Narindra Bahadur did look upon Defendant No. 2 more or less in the light of a son. It would, therefore, not have been a matter for surprise if he had made a Will benefiting the latter."

This being the state of the relations of the parties to the testator, it stands conceded that the Will now challenged was in every respect a natural Will, and in accord with his feelings and tenour of life. Granted, therefore, that its execution is proved by anything like reasonable evidence, the presumptions of law are in favour of its being maintained. The Subordinate Judge, after a close analysis of all the evidence, affirms its validity, and that without hesitation. Every kind of challenge was made of it,—of its execution, of the status of the witnesses, of the health of the testator, and so on. But at the end of a long litigation upon the subject it was admitted by Mr. Ross, the learned

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Counsel for the Respondent, in his clear and candid argument at their Lordships' Bar, that the signature was genuine, nor could he venture to disturb what he admitted were concurrent findings on the subject of the Appellant's position in the testator's household being equal to that of a son, nor upon the point of the estrangement between the testator and the Respondent.

This makes an end of a considerable portion of the judgment of the Judicial Commissioner, which treats the signature as suspect. The grounds of suspicion which that Court, notwithstanding its view as to the complete propriety and naturalness of the Will itself, nevertheless attaches to the execution, are three-fold.

1. In the first place, it is maintained that the witnesses might have been of a better class. Perhaps they might; but they were just those witnesses that the testator had about him; and a comment of this character has no force except upon something on a much higher level than mere suspicion, *viz*, proof which would thoroughly satisfy the mind of a Court that these persons had committed both forgery and perjury. In the case of a Will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety. Their Lordships venture to repeat the judgment of Lord Watson in *Choteynarain Singh* v. *Ratan Koer* (1) bearing upon the point of an attestation by a person's own servants and dependants. As has been shown, the execution of this Will was not only not improbable, but was in fact probable. The words of Lord Watson apply to this case, therefore, *a fortiori*:—

"The theory of improbability remains to be considered; and the first observation which their Lordships have to make is, that, in order to prevail against such evidence as has been adduced by the Respondent in this case, an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility. To give effect to the argument pressed upon this Board by the Appellants, which seems to have found favour in the Court of First Instance, would be equivalent to holding that the Will of a Hindu gentleman, attested by his own servants and dependants, must be held to be invalid, unless it is shown that the testator, at the time assigned for its execution, was placed in such circumstances that he could not secure the attendance of persons of a higher rank. That is a proposition which verges too closely on the absurd to be seriously entertained. There may be cases in which attestation by servants only is an important element to be taken into account in considering whether a Will has been validly executed—cases, for example, in which there is reasonable ground for suspicion that the Will is not the voluntary act of the testator, but has been procured by the undue influence of members of his household. This case does not, in the opinion of their Lordships, belong to that class."

This point, however, is at an end because the execution and attestation are proved.

2. The second ground of suspicion in the minds of the Judicial Commissioners was that the paper upon which the Will was written appeared to be old instead of fresh, and proof was given that the paper was official paper in general use, together with evidence that some other people had been in the habit of having forms or sheets which they signed in blank. In the language of the judgment of the Judicial Commissioner:—

"That men of the deceased's position in life do sign blank forms and blank sheets, especially for the purpose of Vakalatnamas being drawn up

(1) L. R. 22 I. A. 12 (1894).

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thereon for use in cases in the subordinate District Courts, is not an unheard-of thing."

Various forms were produced, signed by people other than the testator, and with none of which the testator had anything to do. In their Lordships' opinion, such evidence should not have been allowed to influence the mind of a Court. It should not have been admitted, as it was not relevant to the present cause.

3. The third matter appears, however, to their Lordships to be more serious. By sec. 568 of the Code of Civil Procedure it is provided that if "the Appellate Court requires any document to be produced, or any witness to be examined, to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence to be produced or document to be received or witness to be examined." In the course of the hearing of this Appeal by the Judicial Commissioners, a question was asked as to the additional attestation of the Will, which bore to have been made on the 20th April 1905 (that is, on a date about six months after execution) by Mohammed Nusrat Ali. This gentleman appears from the Record to be a person of standing, the judgment mentioning that he is the Honorary Secretary or Assistant Secretary of the British Indian Association. He is also a member of the Municipal Board of Lucknow, Lucknow being thirty miles by train from Sandila, where the Will was ordered to be registered. On this date, 20th April, a meeting of the Municipal Board had been held, followed by a special meeting, both meetings being early in the day and being of some duration. Enquiry was made, and it was proved before the Judicial Commissioners that Nusrat Ali was present at these meetings. If this was so, then, it was argued, he could not at the same hours of the 20th April have been in Sandila.

Nusrat Ali had been examined before the Subordinate Judge, but nothing had been asked of him on the point, and he was not examined by or before the Judicial Commissioners. Their Lordships disapprove of the procedure which has permitted doubt to be thrown upon his evidence in the course of procedure taken on appeal by the Judicial Commissioners, "to enable them to pronounce judgment," without the witness whose testimony is impugned having been afforded the opportunity of clearing up the mistake and having been convened for that purpose. No witness, whatever his standing, would be safe from adverse judicial comment under such procedure. I may quite well be that Nusrat Ali could have clearly explained the whole point of difficulty, and their Lordships would be slow to conclude, in the absence of his own evidence on the point, that the rest of his testimony, otherwise quite unimpeachable, was perjury.

Fortunately, there is no necessity for further procedure or expense in regard to the matter, for the case that the Board is now dealing with is a case in which the signature of the Will, whether the deed was additionally attested on the date stated or not, is proved and is properly attested. In these circumstances their Lordships do not doubt that the judgment of the Subordinate Judge should be restored.

They will accordingly humbly advise His Majesty to that effect. The Respondent will pay to the Appellant the costs of this Appeal, and in the Courts below.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondents.

B. D. *Appeal decreed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 319 OF 1911.

COXE, J.
RAY, J.
1913,
Heard,
29, May.
Judgment,
26, August.

SARAT CHANDRA BASACK, Petitioner, Appellant,
v.
GOLAP SUNDARI DASYA, Objector, Respondent.

Probate and Administration Act (V of 1881), secs. 19, 24, 57—Letters of Administration with Will annexed—"Will" in sec. 19, if means original document—Existence of Will up to testator's death if necessary to be proved—Revocation, pleading and proof of—Presumption of destruction of Will, when arises—Loss of Will if operates as revocation—Destruction of Will when operates as revocation—Sec. 24—"Since the testator's death," scope and effect of—Delay in applying for Letters of Administration with Will annexed.

Where the testator did not appoint an executor and the residuary legatee applied for Letters of Administration with the Will annexed 12 years after the death of the testator and the objector did not plead revocation but set up non-execution of the will.

Held—*That the execution of the Will in the manner required by law having been proved it lay upon the objector to plead and prove revocation and no such plea having been taken it could not be held that the Will was revoked.*

Per RAY, J.—*That the application for Letters of Administration was not liable to dismissal on the ground that the Petitioner did not prove that the Will was in existence up to the time of the testator's death.*

That in sec. 19 of the Probate and Administration Act the word "Will" does not mean the original document but has been obviously used to mean the disposition.

When a Will is shown to have been in the custody of the testator and is not found at his death the well-known presumption arises that the Will has been destroyed by the testator for the purpose of revoking it. This rule of law bears only on revocation when it is an issue in the suit and then the presumption may be rebutted by the facts.

The loss of a Will does not operate as revocation to establish which destruction of the Will by the testator must be shown.

In sec. 24 of the Probate and Administration Act the words "since the testator's death" qualify the word "mislaid" and have no reference to the word "lost" or to the succeeding clause of the sentence.

The delay in making the application under sec. 19 was not a material fact in this case.

This was an Appeal preferred on the 14th of August 1911, agains the decree of Moulvi Ali Ahmed, Officiating Additional District Judge of Zillah Dacca, dated the 23rd of June 1911.

The facts of the case are shortly as follows:—

The Appellant, who was the Petitioner in the lower Court, presented an application for probate of a Will of one Tokani Basak dated 18th November 1897. The Will was registered on the same day. The testator died on the 6th Sraban 1305, corresponding to 21st July 1898, leaving behind him a daughter Golap Sundari and nephews, Sarat Chandra Basak who was the Petitioner, Ruidas Basak and others. The present petition for probate was filed by Sarat Chandra Basak as a legatee under the Will for Letters of Administration on the 21st January 1911. The original Will not being forthcoming a certified copy of the Will was filed with the petition. In this petition it is stated that the original Will was with Golap Sundari Dassya and she was re-

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quested to produce the original in Court. To this petition the Respondent Golap Sundari objected on various grounds stating that she was not aware of any Will having been executed by the testator and no Will was in her possession. She did not state in her petition of objection that although the testator made a Will it was subsequently destroyed by him with the intention of revoking it. The lower Court refused probate on the ground that the Petitioner did not discharge the onus of proving that the Will existed up to the time of testator's death.

The Petitioner preferred this Appeal.

Babu Bhudeb Chandra Ray for the Appellant.—The lower Court is wrong in holding that before probate can be granted it must be shown by the applicant that the Will existed up to the death of the testator without being revoked. The objectrix does not say that there was a Will but it was subsequently revoked. That is not her case. Her case is that no Will was executed. Here there is no doubt that the Will was executed and registered. I say that the original Will is in possession of the objectrix and is to be found in the chest which the testator left, the key of which is with the objectrix but she does not say that she made a search for it there and could not find it. On the other hand her husband deposes that no search was made for the Will. Under these circumstances the legal presumption that a Will which is not forthcoming was destroyed by the testator *animo revocandi* does not arise. *Finch* v. *Finch* (6). Once it is proved that there was a Will, and there is no evidence that it was destroyed by the testator *animo revocandi*, revocation must be pleaded and proved by the other side. The onus is on the other side to prove this. *Sugden* v. *Lord St. Leonards* (1), *Benson* v. *Benson* (7), *Sib Sabitri* v. *Collector of Meerut* (4), *Saheb Mirza* v. *Umda Khanam* (8), *Anwar Hossein* v. *Secretary of State* (3).

(6) (1867) 1 P. & D. 371.

Babu Biswanath Bose for the Respondent.—I submit that as the original Will is not forthcoming it must be proved by the other side that the Will was not revoked by the testator and in such cases the legal presumption of revocation from the loss of the Will does arise. Refers to secs. 24 and 19, Probate and Administration Act. The onus is on the applicant to satisfy that this is the last disposition by the testator and the applicant not having done that the application was rightly refused.

C. A V.

THE JUDGMENT OF THE COURT was as follows :—

COXE, J.—This Appeal arises out of an application for probate or Letters of Administration (the applicant seems not quite certain which) with respect to a Will said to have been executed on the 18th November 1897. The learned District Judge has refused the application on two grounds, namely, that the applicant has not proved, *firstly*, that the Will was in existence at the death of the testator, and, *secondly*, that it was duly executed. The facts in this case seem to me to indicate very strongly that this Will was not in existence at the time of the testator's death. He died in July 1898, eight months after the Will. The

(1) L. R. 1 P. D. 154 (1876).
(3) I. L. R. 31 Cal. 885 (1904).
(4) I. L. R. 29 All. 82 (1906).
(7) L. R. 2 P. & D. 172 (1870).
(8) I. L. R. 19 Cal. 444 P. C. (1892).

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petition itself shows that he changed his mind with regard to an important portion of the property. In the Will he devoted a deposit of Rs. 200 in the Savings Bank to the service of a certain idol and directed that the Petitioner and the husband of the objector should draw the interest and spend it on the *sheba*. But it appears from para. 8 of the petition that the testator drew out the whole sum before his death and handed it over to the objector's husband. This shows that with regard to at least a quarter of the whole property the testator had completely changed his mind. Finally the Petitioner's conduct suggests very strongly to my mind that he knew that the Will had in some manner come to an end It is not uncommon in a case of this nature for the Will to be made over to and kept by the person for whose benefit it is executed. Here the Petitioner's whole title is based upon the Will, yet not only did he not keep the Will himself but he does not say that he ever took any steps to obtain it or even see it after the testator's death. He was entitled under the Will to a quarter of the moveable property, but apparently he has never attempted to secure it. This application was presented 12 years after the testator's death when everybody had forgotten all about the circumstances of the case, and it looks to me very like a speculation.

If the objector had been frank and truthful about the matter and had admitted the execution but pleaded revocation I could not have agreed with the view of my brother Ray that Letters of Administration should be granted. The objector however takes up the impossible attitude that this Will, which is a registered Will, was never executed and therefore he does not plead revocation. That being so, it is difficult for me to hold that the Will has been revoked, when that plea has not been taken, and I therefore will not dissent from the decision of my learned colleague. The Appeal will be allowed and Letters of Administration with a copy of the Will annexed will be granted. Costs of all Courts to be paid out of the estate.

Hearing-fee two gold mohurs.

RAY, J.—This suit is for Letters of Administration with the Will annexed under sec. 19 of the Probate and Administration Act, 1881. The Will is dated the 18th November 1897. Tekari Barak is said to have made the Will. . The Petitioner is brother's son of Tekari and the objector is his daughter. The Will purports to give half his immoveable property to the Petitioner and half to the objector. If there was no Will, the whole of the property would go to the objector and after her to her sons, if she should have any surviving her. The Will was duly registered and upon reading the evidence I am clearly of opinion that its proper execution has been established. Tekari died on the 6th of Sravan 1305—July 1898. The evidence is that Tekari kept the Will in his box. The objector's husband says that Tekari had an iron safe. This iron safe has been called a box by the Petitioner. This safe was in Tekari's room and the key remained with him. The key of the room also remained with Tekari and the husband of the objector says that after his death probably it went into the possession of his wife, *i.e.*, the objector. As to the key of the iron safe his evidence is this. "The key of the iron chest was with my father-in-law." It came to the hands of my wife after his death." The objector in her written statement denies being in posses-

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sion of the Will but her husband has given evidence that they have not opened the iron chest and have not searched for the Will. On these facts the suit is not liable to dismissal on the ground that the Petitioner has not proved that the Will was in existence up to the time of the testator's death. There has been a misconception of the law on the subject. In this case the testator did not appoint an executor, so the application is necessarily under sec. 19 of the Probate and Administration Act, 1881. That section provides when the deceased has made a Will, but has not appointed an executor, or etc., etc., an universal or a residuary legatee may be admitted to prove the Will, and Letters of Administration with the Will annexed may be granted to him, etc., etc. It cannot be said that "Will" must be the original document. The word has been obviously used to mean the disposition. Otherwise in no case where the Will is not in existence the universal or residuary legatee can apply. He cannot do it even if he proves tha an interested party has destroyed it after the death of the testator. That cannot be the law. Hence I think nothing turns upon the fact that in the previous sec. 18, there is mention of a copy of the Will. This sec. 19 does not lay down any rules for the guidance of the Court in determining when the Will is established. The execution of the Will in the manner required by law having been proved, it lay upon the objector to plead and prove revocation. She has not even pleaded revocation. All that she says in her written statement is that she is not aware of any Will having been executed by her father. Her husband says in his evidence that Tokani did not execute any Will. That being so, the revocation of the Will is not a question in this suit. When a Will is shewn to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the Will has been destroyed by the testator for the purpose of revoking it. Now this rule of law bears only on revocation when that is an issue in the suit. Then the presumption may be rebutted by the facts, *Sugden* v. *Lord St. Leonards* (1). In the case of *Brown* v. *Brown* (2), Lord Campbell observes:—If, for instance, it could be shewn that the heir-at-law had access to the place where the testator had deposited the Will, and grounds could be shown for a suspicion that he had destroyed it, it would be a case to consider. These rules of English law are founded on reason and good sense and are regarded as of general application. The Courts in India have adopted these rules and have applied them to cases arising under the Probate and Administration Act, 1881. *Anwar Hossein* v. *Secretary of State for India* (3), *Shib Sabitri Prasad* v. *The Collector of Meerut* (4), *Ishur Chandra Sarma* v. *Dayamoyi Debia* (5). This last case was for Letters of Administration with Will annexed and the application was by a residuary legatee. The Will was not produced and it was stated to be in the possession of the objector as in the present case. The Court observed—If the Will is not shown to be in existence, then the Court will have to consider whether it had been destroyed by the testator, or by his orders with the intention of revoking it. Sec. 24 of the Probate and Administration

(1) L. R. 1 P. D. 154 (1876).
(2) 8 E. & B. 876: s. c. 27 L. J. A. B. 173 (1858).
(3) I. L. R. 31 Cal. 885 (1904).
(4) I. L. R. 29 All. 82 (1906).
(5) I. L. R. 8 Cal. 864 (1882).

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Act runs thus: When the Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, etc., etc. It appears to me that the words 'since the testator's death' qualify only the verb 'mislaid.' They have no reference to the word 'lost', otherwise, what would happen if the Will has been lost before the testator's death? The loss of the Will would not operate as revocation—*vide* sec. 57. To establish revocation you must show destruction by the testator. Loss is no destruction. Then the words 'since the testator's death' have no reference to the succeeding clause of the sentence. The Will could not have been destroyed by any act of the testator since his death. The second clause is independent by itself. Then the words in this clause "and not by any act of the testator" have no special meaning. For, if the Will has been destroyed by any act of the testator, it has been revoked and and it is a dead thing. In the succeeding section the words used are "when the Will has been lost or destroyed, etc., etc." The former section refers to cases when a copy of the Will is available and the latter when no copy is available. This is the only difference. In neither of these sections any rule of law has been laid down and none tending to defeat the applicant's suit. Revocation must be proved by the party who sets it up. The facts proved and admitted preclude a presumption in favour of the objector and there is no evidence that the Will has been actually destroyed. The Petitioner has established his right to the Letters of Administration. The delay in making this application is not a material fact in this case. No sooner the objector attached his half share in the immoveable property he put in this application for Letters of Administration. I would reverse the judgment of the learned District Judge and decree the Appeal.

Appeal decreed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 320 OF 1908.

MOOKERJEE, J. BEACHCROFT, J. 1912, Heard, 2, December. Judgment, 3, December.	JOGESH CHANDRA RAY, Claimant, Appellant, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Defendant, Respondent.

Land Acquisition Act (I of 1894)—Noabad Mehal property, acquisition, of—Apportionment of compensation between Government and claimant—Basis of calculation of value of Government interest—Chance of enhancement of rent, value of.

A Noabad Mehal held under Government implies a hereditary and transferable title in perpetuity subject to payment of rent for all lands under cultivation.

Where certain properties included in a Noabad Mehal held under the Government were acquired under the Land Acquisition Act:

Held—*That the mere fact that the rent was enhancible did not justify the Court awarding half the compensation money to Government, as Government would not in ordinary course increase the assessment unless the assets of the property also increased.*

That the interest of the Government ought to be measured by capitalising the present rent at 30 years' purchase.

This was an Appeal preferred on the 13th of July 1908 against a decree of B. K. Mullick, Esq., District Judge of

Zillah Chittagong, dated the 2nd of April 1908.

The material facts will appear from the judgment.

Babus Ram Chandra Majumdar and *Dhirendra Lal Kastgir* for the Appellant.

Babu Ram Charan Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the claimant in a case under the Land Acquisition Act. The property acquired is known as Lanes Hill and the substantial controversy between the parties at the present stage relates to two matters, namely, *first*, the valuation of what is described as hill top and high flat lands; and, *secondly*, the apportionment of the compensation between the claimant and the Government, as a considerable portion of the property under acquisition is included in a Noabad Mehal held by the claimant under the Government.

In so far as the value of the hill top and high flat land is concerned, the award made by the Judge in affirmance of the award of the Collector is at the rate of Rs. 1,000 per kani. The materials placed before the Court to determine the market value are of two descriptions, namely, *first*, evidence of the rent payable and, *secondly*, evidence of land acquisition awards made in respect of similar property in the locality. The first class of evidence relates to what has been described as Good's Hill. This property was held in lease by Mr. Good for a period of 22 years at the rent of Rs. 67-12 per month and the Court below has passed its award on the assumption that this indicated fairly the award of rent payable in respect of that property. It has been pointed out to us, however, that the property was subsequently let out to Messrs. Turner Morrison & Co., at a much higher rate, namely, Rs. 130 per month. But it is worthy of note that Messrs. Turner Morrison & Co. took a lease of the property in 1905, that is, nearly two years after the declaration had been made for the acquisition of the present property. The claimant cannot consequently contend that the present rent furnishes a conclusive test as to the market value of the property at the date of acquisition. But even if we assume that the fair rent at that time was the average of the rent paid by Mr. Good and the rent now paid by Messrs. Turner Morrison & Co., that is to say, approximately Rs. 100 a month, it is clear that the value of the property should be assessed at about Rs. 15,00 a kani. Here, then, is some indication that the value assessed by the Court below is too low. This view is confirmed when we consider the second class of evidence on the record, namely, that derivable from the award made in respect of Parsonage Hill. With regard to this hill, it has been pointed out that the award was made at the rate of Rs. 1,364 per kani. No doubt there is some evidence to indicate that the hill now acquired is not as conveniently situated for residential purposes as Parsonage Hill. But we are not prepared to hold that this circumstance alone would justify the reduction of the rate to Rs. 1,000 per kani, specially when we find that another hill in the neighbourhood, known as Tempest Hill, was valued at Rs. 1,300 per kani. In our opinion, taking the evidence as a whole, the hill top and high flat lands should be assessed at Rs. 1,350 instead of Rs. 1,000 per kani and we direct that the award be modified accordingly.

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In so far as the question of apportionment is concerned, it has been stated that the property acquired is situated in a Noabad Mehal held by the claimant under the Government A Noabad Mehal, it is well known, implies a hereditary and transferable title in perpetuity subject to payment of rent for all lands under cultivation. In so far as the taluk now in question is concerned, it has been pointed out that the rent has been nearly doubled in the course of about half a century: and the learned Government pleader has contended that it is possible that at the next settlement the rent will be still further enhanced. This, however, does not justify the apportionment made by the Court below. The learned Judge has divided the compensation equally between the Government and the claimant, on the ground that it has always been the practice to assess, in respect of Noabad properties in hill lands, the Government interest at half, allowing the surplus over the capitalized value of the rental to represent the chance of enhancement. This mode of apportionment is manifestly fallacious. Let it be assumed that the Government is entitled hereafter to enhance the rent: but there is no basis for the assumption that the net income of the property upon which the valuation must be based would remain constant during this period. On the other hand, it is reasonably clear that the Government would not in ordinary course increase the assessment unless the assets of the property also increased. In our opinion, the value of the interest of the Government ought to be measured by capitalising the rent now payable. The question next arises, how this capitalisation is to be effected. The learned Government pleader has invited our attention to a paragraph of the written statement of the claimant in which he admits that the rent ought to be capitalised on the basis of 20 to 25 years' purchase. We are of opinion, that in the case of Government, we may very well capitalise at 30 years' purchase, on the assumption that the rate of interest is three and a half per cent. per annum, which is the rate ordinarily payable upon Government securities. We therefore direct that the interest of the Government be valued at 30 times the present rental. This will be deducted from the amount awarded and the remainder will belong to the claimant. We may add that it has been mentioned that there are some inaccuracies in the judgment of the Court below in so far as the area of the land is concerned. The error in this respect is merely arithmetical and will be corrected when the decree in this Court is drawn up. If upon calculation it is found that the amount due to the claimant exceeds Rs. 5,000 the decree will be limited to that sum only, as Court-fees have been paid to that extent. Under the circumstances of this case we direct each party to pay his own costs both in this Court and in the Court below.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 116 OF 1913.

MOOKERJEE, J.
BEACHCROFT. J.
1913,
Heard, 21 &
26, August.
Judgment,
27, August.

SUPRASANNA ROY and others, Plaintiffs, Appellants,

v.

UPENDRA NARAIN ROY, Defendant, Respondent.

Receiver, appointment of—Partition suit—Defendant in sole occupation, though Plaintiff not altogether excluded—Court if may appoint a

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Receiver and when—Party to a suit when may be appointed.

The Court has jurisdiction to appoint a Receiver until the hearing of a partition action or until further orders, even though there is no exclusive occupation by any party, and the Court will not hesitate to do so whenever it is just and convenient. The case for the appointment of a Receiver is much stronger if a party to the partition action is in sole occupation. In such a case any other party may obtain a Receiver either of his share of the rents and profits or of the whole estate. The Court may also allow the party in exclusive occupation to elect to pay to the others an occupation rent, or the Court may require security from the co-owner in exclusive occupation to account for their share of the rents to the other co-owners.

Held—*That in the circumstances of the present case the second of the four alternative courses,* viz., *appointment of a Receiver of the whole estate was the proper one to adopt.*

One of the parties to a litigation should not ordinarily be appointed a Receiver except in very exceptional circumstances.

In the special circumstances of this case, the Defendant in possession was appointed Receiver of the whole estate subject to conditions.

This was an Appeal preferred on the 18th of March 1913 against the order of Babu Biraja Charan Mitra, Subordinate Judge of Zillah Faridpore, dated the 12th of March 1913.

The facts of the case will appear from the judgment.

Messrs. Sinha, C. R. Das, P. R. Das and *Babu Ramesh Chandra Sen* for the Appellant.

Mr. Chackrabartty, Babus Jogesh Chandra Roy, Biraj Mohun Mojumdar and *Anilendra Nath Roy Chowdhury* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This Appeal is directed against an order by which the Court below has rejected an application by the Plaintiff in a partition suit for the appointment of a Receiver of the subject matter of the litigation. The Plaintiff and the Defendant are brothers and are the owners of joint properties of considerable value and extent. In 1902, after the death of their father, the Respondent, the eldest son, took out Letters of Administration of the estate with a copy of the Will annexed. He was at the same time appointed guardian of the person and property of his infant brother, the present Plaintiff, who went to England in 1906 and came back three years later. On his return, he demanded partition of the family estate, but met with refusal from his brother. Accordingly, the Plaintiff sued for partition in 1910 On the 22nd February 1910, a consent decree was made in the suit, under which the properties were to be divided and allotted to the two brothers. Arbitrators were appointed to make the division, but the partition was not carried out for reasons which need not be recited for our present purpose. On the 31 January 1912, the Plaintiff commenced this fresh action for partition either on the basis of the award of the arbitrators or irrespective of it. On the 22nd November he asked for the appointment of a Receiver *pendente lite.* This application has been refused by the Court below on four grounds; namely, first, that as the Plaintiff has from time to time received

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from his brother, who is in possession of the estate, various sums of money, it cannot be said that the Plaintiff has been kept out of possession of the joint estate; secondly, that under the circumstances of the case, the estate will be managed better by the Defendant than by a stranger as Receiver; thirdly, that the appointment of a stranger Receiver would mean imposition of a heavy burden upon the estate which is already encumbered to some extent; and, fourthly, that if the Plaintiff is not satisfied with the amount he has received from his brother, his obvious remedy is to move the District Judge to make an order for an increase of his allowance. In our opinion, these reasons do not justify a refusal of the application for the appointment of a Receiver.

Upon the facts stated, it is plain that the title of the Plaintiff to one-half share of the estate cannot be disputed. The Plaintiff has attained majority and is entitled to the enjoyment of his share. When the partition is effected, he will be entitled to take his share severally but so long as partition is not effected, he is clearly entitled to receive approximately one-half share of the net income of the estate. This aspect of the matter was not appreciated by the Court below, and as the Subordinate Judge has made an order which is manifestly erroneous, it is desirable to explain the principles applicable to a case of this description. At one time, it was held in England that as between legal co-owners of land, the Court of Chancery would not appoint a Receiver unless by consent, *Ramsden* v. *Fairthorp* (1), or unless the applicant was prevented from exercising his legal rights of entering into possession and sharing in the management, *Millbank* v. *Revett* (2) and *Spratt* v. *Ahearne* (3). In the same way, as between equitable co-owners, exclusive occupation by one owner, in the sense that he refuses to pay to his co-owners their proper share of the rents and profits, has always been deemed a good ground for the appointment of a Receiver. *Tyson* v. *Fairclough* (4). After the Judicature Act, however, it has been repeatedly held that the Court has jurisdiction to appoint a Receiver until the hearing of a partition action or until further order, even though there is no exclusive occupation by any party, and the Court will not hesitate to do so whenever it is just and convenient.' The case for the appointment of a Receiver is much stronger, if a party to the partition action is in sole occupation; in such a case, any other party may obtain a Receiver either of his share of the rents and profits or of the whole estate. *Sandford* v. *Ballard* (5), *Sandford* v. *Ballard* (6), *Porter* v. *Lopes* (7). The Court may also allow the party in exclusive occupation to elect to pay to the otners an occupation rent [*Teasdale* v. *Sanderson* (8)], or the Court may require security from the co-owner in exclusive occupation to account for their share of the rents to the other co-owners. [*Street* v. *Anderson* (9)]. Consequently, in cases of this description there are four alternative courses open: (1) the Court may require security from the person in sole occupation; (2) the Court may require him to pay occupation rent; (2) the Court

(1) 1 N. R. 389 (1863).

(2) 2 Mer 405 (1817).

(3) 1 Jones 50 (1831).

(4) 2 Sim. & St. 142 (1824).

(5) 30 Beav. 109 (1861).

(6) 33 Beav. 401 (1864).

(7) 7 Ch D. 358 (1877).

(8) 33 Beav. 534 (1864).

(9) 4 Brown C. C. 414 (1793).

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may appoint a Receiver of the share of the Plaintiff; or (4) the Court may appoint a Receiver of the entire estate.

In the case before us, there is no room for controversy that a Receiver should be appointed in respect of the whole estate. The Plaintiff is, as already stated, the owner of one-half share of the estate. He has attained majority, is a married man and has a family to support. He is further engaged in this litigation and has to bear heavy expenses. If the Defendant is directed to furnish security, the order would be of no avail to the Plaintiff, and would not afford him immediate relief in the least degree. If the Defendant is directed to pay occupation rent, the Plaintiff would be entitled to claim one-half share of the income of the estate. But it would be difficult, if not impracticable, to carry out the order, because, the parties are hopelessly at variance as to the amount of the annual income which has been estimated at figures varying from Rs. 30,000 to Rs. 50,000. If a Receiver is appointed in respect of the one-half share of the Plaintiff, there will obviously be an immediate conflict between the Receiver and the Defendant and the management of the estate will be completely paralysed. Under these circumstances, the only feasible and practicable course which can be adopted without detriment to the parties is to appoint a Receiver of the whole estate.

The next question for consideration is, who should be appointed Receiver. As pointed out by this Court in the case of *Kali Kumari* v. *Bachhun Singh* (10), one of the parties to a litigation should not ordinarily be appointed a Receiver and very exceptional circumstances must be established to justify the appointment of a party as Receiver. In our opinion, in the present case, such grounds have been made out. The appointment of a stranger would mean the imposition of a heavy burden upon the estate which is already encumbered; and it might also tend to dislocate the management. The Defendant, on the other hand, has offered to accept the appointment as Receiver, if the Court decides that a Receiver should be appointed. He has further agreed to bring into Court Rs. 10,000 within two weeks from this date, for payment to the Plaintiff; he has also consented to bring into Court Rs. 10,000 a year in four equal instalments for payment to the Plaintiff. In view of the offers thus made, we are of opinion that the Defendant may very well be appointed Receiver. We accordingly appoint him Receiver with effect from this date. His share of the joint estate in controversy will remain as security for the due performance of his duties as Receiver. He will bring into Court Rs. 10,000 within fourteen days from this date. As soon as the money is deposited in this Court, it will be paid out on the joint receipt of the Plaintiff and his trustees who are parties to the suit. No further order from the Court will be required in this behalf. As regards the sum of Rs. 10,000 which the Defendant undertakes to bring into Court annually in four equal instalments, we direct that the first instalment of Rs. 2,500 be deposited in this Court on or before the 31st October next. As soon as the money is deposited it will be paid out on the joint receipt of the Plaintiff and his trustees. The subsequent instalments of Rs. 2,500 each will similarly be deposited in this Court upon the expira-

(10) 17 C. W. N. 974 (1913).

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tion of every period of three months and will be similarly paid out to the Plaintiff and his trustees on their joint receipt. The Receiver will in all matters act under the direction of the Subordinate Judge. As regards the submission of accounts, we direct the Receiver to submit his accounts every three months in the Court of the Subordinate Judge. If the Receiver fails to deposit Rs. 10,000 as directed, or to deposit Rs. 2,500 every three months as ordered above, he will be discharged and the Subordinate Judge will proceed forthwith to appoint another person as Receiver. At the end of twelve months from this date, the parties will be at liberty to apply to this Court to vary this order as regards the annual payment of Rs. 10,000.

The Appellant is entitled to his costs of this Appeal. We assess the hearing-fee at five gold mohurs. Let the record be sent down at once so that the hearing of the suit may be expedited.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 571 OF 1912.

CHITTY, J.
TEUNON, J.
1913,
Heard, 21, 22 & 23, January.
Judgment, 28, January.

KUMAR SATYA NARAIN SINGH, minor by his next friend and uncle Sashi Bhusan Singh, Plaintiff, Appellant,

v.

SRIMATI RANI KESHABATI KUMARI and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), Or. XL, r. 1 (2)—Receiver, appointment of—Property in possession of Defendant, it may be taken over—Object of appointment.

Where the Plaintiff sued to recover property in the possession of his adoptive mother and the suit was resisted inter alia *on the ground that the Defendant was entitled to retain possession of the estate for her life :*

Held—*That Or. XL, r. 1 (2), which clearly refers to a case of removal of property from the possession or custody of a person other than the parties to the suit, was no bar to the appointment of a Receiver on the application of Plaintiff when it was established that the estate was being grossly mismanaged by the Defendant.*

The effect of the appointment of a Receiver would not be to prejudge the case in any way, as the only object and effect of so doing would be to maintain the estate in its present condition during the pendency of the suit.

This was an Appeal preferred on the 28th of November 1912 against the order of W. H. Thomson, Esq, Subordinate Judge of Zillah Sonthal Perganas, dated 16th of November 1912.

The material facts will appear from the judgment.

Dr. Rash Behary Ghosh and *Babus Mahendra Nath Roy, Hemendra Nath Sen, Sarat Chundra Mukherjee* and *Sachidananda Gupta* for the Appellant.

Messrs. S. P. Sinha and *B. C. Mitra* and *Babus Lakshmi Narain Singh* and *Gunga Charan Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal from an order of the Subordinate Judge of Dumka rejecting the Plaintiff's application for the appointment of a Receiver. The Plaintiff, who is still a minor, has by his next friend brought this suit for construction of a document purporting to be the Will of his father, Raja Udit Narain Singh ; for a declaration that two documents, dated

8th March 1898 and 14th August 1905, respectively, are void and inoperative so far as they purport to curtail the Plaintiff's rights and for possession of the properties left by his deceased father. The Plaintiff also asks for administration of his father's estate for the appointment of a Receiver and for an injunction restraining the Defendants from dealing with the estate. The Defendants are Rani Keshobati Kumari, widow of Raja Udit Narain Singh, Gajadhar Prosad Singh and Chundra Doyal Baram, whom Defendant No. 1 purported to appoint trustees by the deed of 14th August 1905 and Devsi Hirji, who has taken a lease of the forests on the estate from Defendant No. 1.

Raja Udit Narain Singh died on 10th April 1896. On 8th March 1898, his widow adopted the Plaintiff. The Plaintiff is now about 19 years of age. As the Plaintiff is under guardianship he will not attain majority until he is 21 years of age. The estate left by Raja Udit Narain is valued at about Rs. 26 lakhs. The net annual income is admittedly well over Rs. 1 lakh. The main grounds put forward by the Plaintiff for the appointment of a Receiver are: (1) that the Defendant No. 1 is a *purdanashin* lady of little education entirely incapable of managing the estate herself, (2) that the estate is in fact being grossly mismanaged by Defendant No. 1 in conjunction with the other Defendants, (3) that in particular Defendant No. 1 has granted to Defendant No. 4 a lease for cutting timber from the forest for railway sleepers, which is quite improvident and against the interests of the estate, and that (4) Defendant No. 1 has been and still is borrowing recklessly and at exorbitant rates of interest to such an extent as to endanger the estate. The Subordinate Judge has found that the case of mismanagement, particularly in the matter of the dismissal and subsequent re-employment of Mr. Falkner, has been made out against Defendant No. 1, that the charge of reckless borrowing at what he terms "illegal" interest, has been proved and that the whole situation is one of confusion. He, however, considers himself helpless by reason of certain rules of law which, in his opinion, prevent the Court from appointing a Receiver in this case. The learned Subordinate Judge is, we think, in error, in the view that he takes of the law. Or. XL, r. 1 (2), for instance, clearly refers to a case of removal of property from the possession or custody of a person other than the parties to the suit. Here one of the main questions in the case is whether the Plaintiff is entitled to immediate possession against Defendant No. 1 or whether she is entitled to retain possession for her life.

Nor is there any necessity to prejudge the case in any way by appointing a Receiver, the only object and effect of so doing should be to maintain the estate in its present condition pending the suit and for that period at any rate to avoid further waste.

We have carefully perused the evidence tendered on this application and heard the arguments of Counsel for Defendant No. 1 against the appointment of a Receiver. We are of opinion that a clear case has been made out for such appointment. There has been and still is gross mismanagement of the estate by Defendant No. 1 and if the present state of things be allowed to continue the whole estate will be jeopardised. It was argued that Defendant No. 1 had borrowed only on personal security and had not so far charged the estate. If, however, she borrows in such reckless fashion as to

absorb the whole legitimate income of the estate it is obvious that the estate itself will immediately suffer. It cannot much longer be kept intact. We do not think that any useful purpose would be served by discussing in detail the facts disclosed in the several affidavits. No satisfactory reply has been vouchsafed by Defendant No. 1 or rather by those who profess to be looking after her affairs to the specific charges put forward on behalf of the Plaintiff. We accordingly allow this appeal and direct that a Receiver be appointed as prayed by the Plaintiff.

An application was made to the Vacation Bench by Defendant No. 1 for the transfer of this suit to the Original Side of this Court. That application was refused, mainly, as it was obviously made to obstruct or delay the present application for a Receiver. Further, it was considered unnecessary and inexpedient to remove it to this Court. Now, however, both sides agree that it would be well to transfer the case to another District, that the trial may be held before a Subordinate Judge of more experience. We agree in this view and order accordingly that the suit be transferred to the Court of the 1st Subordinate Judge of Bhagalpur for disposal.

We think that it is advisable that this Court should nominate the Receiver at once and thus prevent further delay in this matter. Of the various names suggested that of Babu Murli Lal appears to us to be the most suitable. He is a wealthy man, resides in Bhagalpore and appears to be a good man of business. He is also willing to give the requisite security which in this case will be large. We accordingly appoint Babu Murli Lal as the Receiver in this case subject to his furnishing security to the extent of a lakh of rupees to the satisfaction of the Subordinate Judge of Bhagalpore. We confer on the Receiver such powers as are contained in Or. XL, r. 1 (d) of the Code of Civil Procedure. We fix his remuneration at 10 per cent. on the gross collections, such percentage to cover all charges for collections, establishment and the Receiver's remuneration but not the costs of actual litigation. Costs of this Appeal must be costs in the case. We fix the hearing-fee at 10 gold mohurs.

Let the record be sent down at once.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 427 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 11, June, 1912 and 8, January, 1913, Judgment, 8, January.	SARANDHARI LAL, Decree-holder, Appellant, *v.* BIKRAM SINGH, Judgment-debtor, Respondent.

Bengal Tenancy Act (VIII of 1885), Sch III, Art. 6—Limitation—Execution proceedings arrested by injunction of Court—Case dismissed, attachment subsisting—Subsequent application if continuation of former application—Prayer for execution by attachment and sale of land—Subsequent application for attachment and sale of moveables, if abandonment of relief claimed in first application.

The Appellant obtained an ex parte *decree for rent against the Defendant on the 16th July 1906. After an unsuccessful application by the judgment-debtor under sec. 108, C. P. C., to have the* ex parte *decree set aside the decree-holder applied on the 13th February 1907 for attachment and sale of specified lands. The judgment-*

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debtor applied on the 6th May 1907 for time to satisfy the decree. The judgment-debtor instituted a suit to have the decree set aside on the ground of fraud and obtained on the 27th June 1907 an injunction restraining the decree-holder from further executing the decree and the Court recorded an order to the effect "that the case be dismissed, attachment subsisting;" the injunction was subsequently dissolved on 8th May 1908. On 18th October 1909, the decree-holder made a second application for execution by attachment and sale of moveables. To this the judgment-debtor objected on the 16th December that the execution was barred by limitation. The objection was overruled on 9th June 1910 and the decree-holder was called upon to take further steps but as the writ of attachment was returned unserved on the 18th June 1910 the case was dismissed for default and want of prosecution. On 4th July 1910, a third application was made for execution by attachment and sale of the identical lands mentioned in the first application of the 13th February 1907:

Held—*That the application for execution of the 4th July 1910 was not barred by limitation under Art. 6, Sch. III of the Bengal Tenancy Act, as the second application of 18th October 1909 could not rightly be treated as an abandonment of the relief claimed in the first application but was an application for additional relief, and the third application of the 4th July 1910 was in substance an application in continuation of the first application, the proceedings wherein were discontinued by reason of the injunction obtained by the judgment-debtor.*

This was an Appeal preferred on the 21st August 1911 against an order of Babu Amrita Lal Palit, Subordinate Judge of Zillah Bhagalpur, dated the 26th of May 1911, reversing that of Babu Akhory Nityanund Singh, Munsif of that place, dated the 11th of February 1911.

The facts of the case sufficiently appear from the judgment.

Moulvie Khursed Husain for the Appellant.

Babu Laksmhi Narayan Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the decree-holder in a proceeding for execution of an *ex parte* decree for rent. The question in controversy between the parties is, whether the present application for execution made on the 4th July 1910, is barred by limitation under Art. 6 of the third Schedule to the Bengal Tenancy Act.

The decree was obtained *ex parte* on the 16th July 1906. On the 18th August 1906, the Defendants applied under sec. 108 of the Civil Procedure Code of 1882 to have the *ex parte* decree set aside. This application was refused on the 3rd January 1907. The decree-holder then applied for execution on the 13th February 1907 by the attachment and sale of specified lands. The judgment-debtors made an application on the 6th May 1907 for time to satisfy the decree. Meanwhile, they had instituted a suit to set aside the *ex parte* decree, on the ground of fraud, and, in the course of that litigation, they obtained, on the 27th June 1907, an injunction to restrain the decree-holders from further execution of the decree. The injunction was granted: the result was that further progress of the excution was arrested and the execution Court proceeded to record an order to the effect that the "case be dismissed, attachment subsisting." The injunction was subsequently dissolved on the 8th May 1908. On the

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7th October 1909, the decree-holders made a second application for execution by attachment and sale of moveables ; to this, the judgment-debtors objected on the 16th December that the execution was barred by limitation. On the 9th June 1910, the objection was overruled on the ground that limitation must be taken to run from the 6th May 1907, when the judgment-debtors acknowledged their liability to satisfy the decree. The decree-holders were then called upon to take further steps, but as the writ of attachment was returned unserved on the 18th June 1910, the case was dismissed "for default and want of further prosecution."

On the 4th July 1910, the present application was made for execution by attachment and sale of the identical lands mentioned in the first application. The Court of first instance held, that the decree-dolders had been prevented by the fraud of the judgment-debtors from executing the decree, within the meaning of Art. 6 of the third Schedule to the Bengal Tenancy Act, and, in this view, held, that the period of limitation applicable was that prescribed by the Indian Limitation Act, 1908. Upon appeal, the Subordinate Judge has held that fraud, as contemplated by Art. 6, has not been established, and that, neither the application to set aside the *ex parte* decree nor the suit commenced to vacate the decree could be treated as a fraudulent act on the part of the judgment-debtors. In this view the Subordinate Judge has held that the application for execution is governed by Art. 6 and is consequently barred by limitation.

On the present appeal, it has been argued on behalf of the decree-holders that the question of fraud has not been properly tried. In our opinion, there is considerable force in this contention, and in view of the decision in *Raghunath* v. *Kashi Prosad* (1), further investigation would be necessary, if our decision had to be based on the ground assigned by the Courts below.

It is clear, however, that the objection of the judgment-debtor to the execution must be overruled on the ground that the third application of the 4th July 1910 is in substance an application in continuation of the first application of the 13th February 1907, the proceedings whereon were discontinued by reason of the injunction obtained by the judgment-debtors. In support of this view, reference may be made to the decision of the Judicial Committee in the case of *Qamaruddin Ahmad* v. *Jawahir Lal* (2). The principle which underlies that decision had been previously applied to proceedings in execution of rent-decree in the case of *Chandra Pradhan* v. *Gopi Mohan* (3) and *Baikanta Nath* v. *Aghorenath* (4). A similar view had been adopted by the High Court of Bombay in the case of *Jivaji* v. *Ram Chandra* (5). The case of *Sarup Ganjan* v. *Watson* (6) is clearly distinguishable, as there the proceedings on the first application had been interrupted by reason of the default of the decree-holder, and not on account of any bar imposed by the judgment-debtor [see also *Kedar Nath* v. *Prodyat Coomar* (7)]. It has been strenuously contended, however, on behalf of the judgment-debtors, that inasmuch as the second application has intervened, the third application cannot

(1) 15 C. L. J. 678 (1911).
(2) I. L. R. 27 All. 334 (1905).
(3) I. L. R. 14 Cal. 385 (1887).
(4) I. L. R. 21 Cal. 387 (1893).
(5) I. L. R. 16 Bom. 123 (1891).
(6) 6 C. W. N. 735 (1901).
(7) 14 C. L. J. 610 (1911).

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be treated as one in continuation of the first. In our opinion, this view cannot possibly be maintained. In the first application, the decree holders prayed for sale of certain immoveable properties. In the second application, they asked for attachment and sale of moveables. In the third application, they asked for the sale of the immoveable properties mentioned in the schedule to the first application. The second application cannot rightly be treated as an abandonment of the relief claimed in the first application: it must be deemed as an application for additional relief; and in this view, the third application may well be treated as a continuation of the first application. Considered from this standpoint, the case of the decree-holders presents no difficulty, as no question of limitation really arises.

The result is that this Appeal is allowed, the order of the Subordinate Judge set aside, and the order of the Court of first instance restored, with costs in all the Courts We assess the hearing-fee in this Court at five gold mohurs. The records will be remitted to the Court of first instance with directions to execute the decree forthwith on the basis of the application of the 4th July 1910.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 238 OF 1909.

BRETT, J. SHARFUDDIN, J. 1912, Heard, 11 & 12, June. Judgment, 12, June.

NAFAR CHANDRA PAL CHOWDHURY and another, Plaintiffs, Appellants,

v.

KAMINI KUMAR LAHIRI and others, Defendants, Respondents.

Hindu Law:—Female heir, wrongful possession of immoveable property by—Mesne profits, decree for, if may be passed against reversionary heirs —Female heir nominal litigant, one of reversionary heirs conducting defence, effect of.

Where a darputni *in the possession of a Hindu woman as daughter and heir of a former* darputnidar *was annulled by an auction purchaser of the* putni *right by notice under sec. 167, Bengal Tenancy Act, but she refused to vacate the land:*

Held—*That this was a personal tortious act on her part and not an act done by her as representing the estate and for the benefit of that estate, and a decree for mesne profits for the period she was in wrongful possession could be made only against her personal estate which passed on her death to her heirs and not against the estate in the hands of the reversionary heirs.*

Held, further, *that the fact that one of her sons who were the reversionary heirs carried on the litigation on her behalf, and that she was merely a nominal Defendant was not sufficient to convert the act into anything different from a tortious act for which she was personally liable.* KATAMA NATCHIAR *v.* THE RAJA OF SHIVAGUNGA (1), HARI NATH CHATTERJEE *v.* MUTHUR MOHUN GOSSWAMI (2), GRISH CHUNDER LAHIRI *v.* SHOSHI SEKHARESHUR ROY (6), and HARIHAR PERSHAD *v.* BHOLI PERSHAD (5), LALJI SAHAYA SINGH *v.* KURKI JHA (3) and SADASI KOER *v.* RAM GOBIND SINGH (4) *referred to.*

This was an Appeal preferred on the 31st of May 1909 against the decree of Babu Promotha Nath Chatterjee, Sub-

(1) 9 M. I. A. 539 (1863)
(2) I. L. R. 21 Cal. 8 (1893).
(3) 14 C. L. J. 90 (1909).
(4) 14 C. L. J. 91 (1909).
(5) 6 C. L. J. 383 (1907).
(6) I. L. R. 27 Cal. 951, 957 (1900).

NAFAR CHANDRA PAL CHOWDHURY *v.* KAMINI KUMAR LAHIRI.

ordinate Judge of Nadia, dated the 30th of July 1908.

The facts of the case will appear from the judgment.

Babus Amarendra Nath Bose and *Abani Bhushan Mukerjee* for the Appellants.

Babus Mahendra Nath Roy and *Sarat Chandra Khan* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal against a judgment and decree of the Subordinate Judge of Nadia in a case brought by the present Appellants, as Plaintiffs, to recover possession of 2 *darputni* holdings with mesne profits.

It appears that the present Appellants are purchasers of the *putni* right at a sale for arrears of rent, and that, under sec. 167 of the Bengal Tenancy Act, they served notices on Rajabala Debi, the daughter and heir of Radhaballav Gossain, annulling the *darputni* tenures and requiring her to give up possession. The notices were served on the 4th June 1901, but she refused to give up possession; and the present suit was instituted on the 13th April 1904. On the 31st July 1905, the suit was dismissed. The suit was instituted against Rajabala Debi, and, after it had been dismissed in the Court of the Subordinate Judge she died. There was an appeal to the High Court by the Plaintiffs; and the three sons of Rajabala were substituted for her as Respondents. The appeal was decreed on the 28th August 1907, and the suit was remanded for retrial by the Court of first instance. On the 30th July 1908, the Court of first instance decreed the Plaintiffs' claim for possession and for mesne profits from the 4th June 1901 up to the date of delivery of possession. In the judgment the Subordinate Judge distinctly stated that, as the original Defendant Rajabala was dead, her legal representatives would be liable for mesne profits which had accrued prior to the death of Rajabala to the extent only of Rajabala's assets which had come into their hands at her death, and that for the mesne profits subsequent to her death they would be liable personally. In the decree, as originally drawn up, mesne profits were awarded, with interest at six per cent per annum, against the 3 sons who had been substituted as Defendants; but on an application made to the lower Court, the decree was amended, on the 7th November 1908, in the following terms :—"If there be any property left by Rajabala and which has come into the hands of her heirs, then that property will be liable for mesne profits for the period from the date of service of notice up to the date of the death of the Defendant Rajabala. The heirs will be personally liable for mesne profits for the period subsequent to the aforesaid period."

The Plaintiffs have now appealed to us and in support of their appeal the main contention advanced is that the decree for mesne profits ought to have been against the sons for the whole period during which the Plaintiffs were kept out of possession.

It is suggested that Rajabala in refusing to give up possession was acting for the benefit of the estate and therefore that the whole estate of which she was in possession with a widow's interest would be liable for the mesne profits, and not merely her personal estate which came into the possession of the sons, the substituted Defendants. In support of this contention the learned pleader for the Appellants has relied upon the case of

Katama Natchiar v. *The Raja of Shivagunga* (1), and the case of *Hari Nath Chatterjee* v. *Muthur Mohun Gosswami* (2). These two cases are not, however, applicable to the facts of the present case, and cannot in any way govern our decision in the present matter. The learned pleader for the Appellants has also relied on the three decisions of this Court in *Lalji Sahaya Singh* v. *Kurki Jha* (3), and *Sadasi Koer* v. *Ram Gobind Singh* (4), and *Harihar Pershad* v. *Bholi Pershad* (5). The question, however, whether these judgments can be taken to apply to the present case must depend upon whether or not the act of Rajabala in the present instance can be taken to be an act done by her as representing the estate of which she was in possession as widow, and done for the benefit of that estate. After giving our best consideration to the matter, we think it is not possible to hold in the present case that the act of Rajabala can be so regarded. The notice was addressed to her to give up possession, after the *darputni* tenures had been annulled, and her failure to deliver possession was a personal tortious act on her part, rendering her personally liable to an action for mesne profits or damages, and not an act which can be regarded as one done in the interests of the family estate. The learned pleader for the Appellants has invited our attention to the fact that the elder son of the lady carried on the litigation on her behalf and that she was merely a nominal Defendant; but we are unable to hold that that circumstance would be sufficient to convert the act of Rajabala into anything different from a tortious act for which she personally would be liable for damages. In the case of *Grish Chunder Lahiri* v. *Shoshi Sekhareshur Roy* (6), it was pointed out by their Lordships of the Privy Council that "mesne profits are in the nature of damages which the Court may mould according to the justice of the case." In the present instance the profits accruing from the wrongful possession prior to Rajabala's death may be taken to have gone to the person wrongfully in possession, namely, the widow; and we do not think that it can be held that they have gone for the benefit of the estate.

Under these circumstances we hold that the view taken by the lower Court was correct and that, so far as the Plaintiff's claim lay for mesne profits realised up to the date of Rajabala's death, they could only in law be entitled to recover those profits from the widow, or from the personal estate of the widow, which had passed on her death to her heirs. It may be unfortunate in the present case that little or no property belonging to the widow has passed to the heirs; but we do not think that on that account it is possible for us to give the Plaintiffs any relief. In our opinion the view taken of the law and of the justice of the case by the lower Court is correct; and we must therefore affirm the judgment and decree of the lower Court and dismiss this Appeal with costs.

We assess the pleader's fee at five gold mohurs.

Appeal dismissed.

(1) 9 M. I. A. 539 (1863).
(2) I. L. R. 21 Cal. 8 (1893).
(3) 14 C. L. J. 90 (1909).
(4) 14 C. L. J. 91 (1909).
(5) 6 C. L. J. 383 (1907).
(6) I. L. R. 27 Cal. 951, 957: 4 C. W. N. 631 (1900).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2322 OF 1910.

COXE, J.
RAY, J.
1913,
Heard,
23, July.
Judgment,
20, August.

JAHAR LAL BANDURI and others, Defendants, Appellants,
v.
NANDA LAL CHAUDHURI and others, Plaintiffs, Respondents.

Injunction, suit for, if lies against trespasser in possession—Specific Relief Act (I of 1877), sec. 56, Ill. (i).

A Plaintiff who is out of possession should not be allowed to sue the Defendant who is alleged to be in possession as a trespasser for an injunction. He ought to sue for recovery of the land.

This was an Appeal preferred on the 19th July 1910 against a decree of Babu Kanti Charan Mukherjee, Subordinate Judge of Zillah Hughly, dated the 6th of April 1910, reversing a decree of Babu Kunja Behari Ballab, Munsif at Howrah, dated the 9th of July 1909.

The Appeal arose out of a suit for perpetual injunction restraining the Defendant from digging earth from the land in question on declaration that the Defendant has no such right. The Plaintiffs also prayed that the Defendant should be directed to fill up the pits dug by him. The Defendant contended that the original tenant, Dino Muchi, was a raiyat at fixed rate and he had sold his interest to Khettur Dutta from whom he himself had purchased the land and that he was recognised as tenant by the Plaintiff's co-sharers. The Munsif dismissed the suit on the ground that the suit was not maintainable as admittedly the Defendant was in possession of the land and the Plaintiffs should have prayed for possession. The Subordinate Judge in appeal held that the Plaintiffs were n constructive possession through their recorded tenants, and that it was open to them to allow the Defendant to keep possession, so long as he did not change the character of the land. In this view he decreed the suit.

The Defendants preferred this Second Appeal.

Babu Amarendra Nath Bose for the Appellants.

Babu Narendra Chandra Bose for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

COXE, J.—This was a suit for an injunction to restrain the Defendant from digging up the land in his possession for the purpose of making bricks. The Munsif dismissed the suit holding that as the Plaintiff was out of possession the suit was not maintainable. The Subordinate Judge in appeal held that this view was erroneous. He accordingly decreed the Plaintiffs' suit. The Defendant appeals.

The question whether a suit of this nature is maintainable by a Plaintiff who is out of possession is discussed in the case of *Davenport* v. *Davenport* (1). That case may be regarded as authority that the Courts will not interfere by way of injuntion when the Plaintiff is out of possession unless there is some privity between the parties. As pointed out in *Lowndes* v. *Bettle* (2), the tendency of decisions has been to break down the unreasonable distinction between waste and trespass, and in *Davenport* v. *Davenport* (1), the refusal of an injunction was regretted. Indeed in such a case as the latter in which an action of ejectment was also pending, the Courts in India would probably grant an injunction. But

(1) 7 Hares. Rep. 217 (1849).
(2) 33 L. J. Ch. 451 (1864).

JAHAR LAL BANDURI *v.* NANDA LAL CHAUDHURI.

it certainly seems to me wrong that when a Plaintiff avers that the Defendant is on his land without any right whatever, he should be allowed to sue for an injunction when he ought to sue for recovery of the land.

Accordingly I would decree the Appeal and restore the decision of the Munsif with costs throughout.

RAY, J.—I agree. The learned Subordinate Judge says that the Plaintiffs have constructive possession through their recorded tenant. This is not correct. The original tenant is not now in the land. The Plaintiffs allege that he had no assignable interest. They further allege that Defendant has no right to the land. That means he is a trespasser. In a case like this, relief can be obtained by the usual proceeding in ejectment, and sec. 56 of the Specific Relief Act lays down that the exceptional relief by injunction should not be allowed, *vide* Ill. (i). The Appeal should be decreed.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2921 OF 1911.

FLETCHER, J.
N. R. CHATTERJEA, J.
1913,
26, November.

SATYA KRIPAL BANERJEE, Defendant No. 2, Appellant,
v.
SATYA BHUPAL BANERJEE, Plaintiff, Respondent.

Receivers, authorised to sue and defend—Suit by one against the other, if maintainable—Objection to suit, when to be taken—Contempt of Court.

A Receiver is an officer of the Court and the possession by him is the possession of the Court and to bring a suit so as to interfere with the possession of the Court without the leave of the Court is a contempt of Court.

But if a party is guilty of contempt of Court the proper way for the Receiver to act is to bring it immediately to the notice of the Court so that proper steps may be taken against the party guilty of contempt; and, in a proper case the Court would grant a party leave to proceed with the suit. But it is not proper for the Receiver to wait till the day of hearing and put this objection forward as a ground for dismissing the suit.

Where by consent, in a partition suit two of the parties were made Receivers of different portions of the property with full powers under sec. 503 of Act XIV of 1882:

Held—*That each of the Receivers had power to bring and defend suits, and a suit by one against the other without leave specially obtained from Court did not amount to such a grave and serious contempt of Court by the Plaintiff as to merit dismissal.*

PRAMATHANATH *v.* KHETRANATH (1) *referred to.*

This was an Appeal preferred on the 20th of November 1911 against the decree of T. S. Macpherson, Esq., District Judge of Zillah Hughly, dated the 14th of August 1911, affirming the decree of Babu Bidhu Bhusan Banerjee, Subordinate Judge of that District, dated the 11th of October 1909.

Satya Kripal, Satya Bhupal and Satya Doyal were the three sons of one Satya Doyal Banerji. In Jaista 1311 the three brothers by an amicable arrangement took separate possession of different portions of properties which subsequently formed the

(1) I. L. R. 32 Cal. 270: s. c. 9 C. W. N. 247 (1904).

SATYA KRIPAL BANERJEE *v.* SATYA BHUPAL BANERJEE.

subject of a partition suit between them. In this suit the three brothers were appointed Receivers of the portions of the properties in their respective possession under the said arrangement, under which Satya Bhupal became Receiver of 8 as. zemindari interest in Lot Sarisa, whilst Satya Kripal became Receiver of the 16 as. of a *putni* tenure under Lot Sarisa. Satya Bhupal brought the present suit for rent against Satya Kripal in respect of this *putni* and the latter raised the objection that the suit was not maintainable without the leave of the Court. The Court of first instance overruled this plea on the ground that the order appointing the contesting parties Receivers sufficiently authorised the Plaintiff to bring this suit and no further permission was needed and accordingly decreed the suit. The District Judge having dismissed Satya Kripal's appeal, he preferred this Second Appeal.

Dr. Dwarka Nath Mitter and *Babu Bejoy K. Bhuttacharjee* for the Appellant.

Babus Jogendra Nath Mukerjee and *Harendra Krishna Mukerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—The only point raised in this Appeal is whether of the two parties in this case, both of whom appear to have been appointed Receivers of portions of the estate, one can maintain a suit and the other defend the suit brought against him by the former. These two gentlemen, the Plaintiff and the Defendant No. 2, are brothers and they seem to be quarrelling over their father's estate with another brother.

Apparently, there was a partition suit and, on the 2nd June 1909, the Court by an order which obviously must have been a consent order appointed each of the three brothers Receiver of a portion of the property and, in the words of the order, each of the brothers was given full powers under sec. 503 of the old Code of Civil Procedure. That section conferred upon the Receiver all such powers as to bringing and defending suits and for realisation, management, protection, preservation and improvement of the property and the collection of the rents and profits thereof as the owner himself had or such of those powers as the Court thought fit. The Court gave full powers and, therefore, each of the Receivers as regards the land of which he was appointed the Receiver, had the power of bringing and defending suits. It would be impossible to construe otherwise the words of the authority given by the order appointing the Receiver than that each of the Receivers had powers to bring and defend suits. Therefore, obviously, the Plaintiff had the power to institute the present suit and the Defendant had also the power to defend it. The only question is whether there was such a grave and serious contempt of Court by the Plaintiff in suing the Receiver of another portion of the estate, that the Court is bound to say that the suit must fail and ought to be dismissed. I am not clear that the argument put forward by the learned Vakil for the Appellant is right that when this point as to the suit having been instituted against an officer of the Court without the leave of the Court is a defence to be used at the trial to have the suit dismissed, that must of necessity make the Plaintiff's suit fail. It is much more likely that the statement which was read to us by the learned Vakil from some text-book that the state that prevailed in the old

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Courts of Equity is what represents the practice to-day. It is quite true that proceedings cannot be brought against a Receiver without the consent of the Court. The Receiver is an officer of the Court and the possession by him is the possession of the Court and to bring a suit so as to interfere with the possession of the Court without the leave of the Court is a contempt of Court. That has been established by a large number of authorities. But if a party is guilty of contempt of Court, the proper way for the Receiver to act is to bring it immediately to the notice of the Court and the Court will deal with the party so guilty of the contempt of Court and take proper steps: and, no doubt, in a proper case, it would grant a party leave to proceed with the suit against the Receiver. Where leave is allowed to a person who happens to occupy the position of a Receiver by an order which is obviously a consent order, to keep the matter unchallenged until the suit comes on for hearing and then say that the suit must be dismissed is not a proper way. The only point on which there is any difficulty in the Plaintiff's way is the case of *Pramathanath* v. *Khetranath* (1) decided by Mr. Justice Bodilly. Whether that case does not too broadly state the proposition of law that is laid down in the judgment I do not wish to express any opinion. I rather wish to guard myself against either approving or disapproving it. It is quite sufficient to say that the order appointing the Receiver clearly authorised the Receiver to bring suits to recover the rent of the property of which he was appointed the Receiver. That being so, it seems to me that the present Appeal fails and must be dismissed with costs.

(1) I. L. R. 32 Cal. 270: s. c. 9 C. W. N. 247 (1904).

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1626 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
19, November.

PREO LAL MUKERJEE,
Petitioner,
v.
THE KING-EMPEROR,
Opposite Party.

Indian Penal Code (Act XLV of 1860), secs. 99, 353—Assault—Public servant acting under colour of office and in good faith—Right of private defence.

Where the Petitioner was convicted under sec. 353, I. P. C., of having assaulted a Civil Court peon when executing a writ of delivery of possession of a share in a tank by ordering some fishermen to cast their nets in the tank and catch fish for the decree-holder as provided in the writ:

Held—*That whatever mistake there might be in the procedure of the Munsif in giving the direction in the writ, the Petitioner had no right of private defence under sec. 99, I. P. C., against the peon who was a public servant acting under colour of his office and in good faith.*

This was a Rule granted on the 25th of September 1913 against an order of L. Barrow, Esq., Sub-Divisional Magistrate of Vishenpur, dated the 8th of July 1913, convicting Petitioner under sec. 353, I. P. C., and sentencing him to rigorous imprisonment for 6 months, an appeal from which order was dismissed by C. Bartley, Esq., Sessions Judge of Bankura, on 29th of August 1913.

The facts of the case will sufficiently appear from the judgment.

PREO LAL MUKERJEE *v.* THE KING-EMPEROR.

Babu Manmatha Nath Mukerjee for the Petitioner.

Babu Amarendra Nath Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner has been convicted of an offence under sec. 353, I. P. C., and sentenced to six months' rigorous imprisonment for having assaulted a public servant, namely, a peon of a Civil Court, while he was delivering posseesion of a share in a tank to a decree-holder purchaser. A co-sharer of the Petitioner was the judgment-debtor in the civil suit and had been ordered under a decree to make over possessson of six annas out of the 16 annas of the tank to the decree-holder. The decree-holder obtained a writ of delivery of possession and was accompanied by a peon to whom a direction was given in the writ that he was to give delivery of possession of the share in the tank by "catching fish" in the tank. On the day on which the occurrence took place the decree-holder accompanied by the peon and some fishermen came to the tank and the peon ordered the fishermen to cast their nets in the tank and catch fish for the decree-holder. The Petitioner on behalf of his co-sharer finding that fish was to be caught in this manner came and objected and when his protest was not listened to he rushed into water and with a knife cut some of the nets. Thereafter there was a protest by the decree-holder as well as the peon and the Petitioner ran up to them. That constitutes the assault in this case. When the peon declared to the Petitioner that he had been acting under the order of the Civil Court and his authority was disclosed, the Petitioner desisted from actually striking either the decree-holder or the peon. On this case the Petitioner has been convicted.

It is contended before us by the learned Vakil appearing on behalf of the Petitioner that by permitting the fishermen to cast their nets therein the peon acted in excess of his authority, inasmuch as he had no power given to him by the *parwana* to catch fish in the tank. It has further been contended on behalf of the Petitioner that the Munsif had no power to give a direction in the *parwana* that possession was to be given by permitting the decree-holder to catch fish in the tank. Whatever mistake there may be in the procedure of the Munsif, if there was any at all by giving this direction, the Petitioner had no right of private defence against the peon who was acting under the colour of his office and in good faith though the act might not be strictly justifiable by law. The provisions of sec. 99, I. P. C., clearly confer no right of private defence on the Petitioner against the action of the peon who was a public servant. In this view we think that the conviction is sound and cannot be set aside. But the sentence passed on him appears to us to be extremely harsh. According to the case for the prosecution the Petitioner so long as he did not know that the person giving possession was a peon, that is, a public servant, was agitated and appeared to give opposition. But as soon as the official status of the peon was disclosed to him and his authority pointed out, the Petitioner subsided into a peaceful attitude and offered resistance no more. We think that in a case like this where the Petitioner even in a state of excitement showed so much respect for the law as he did by submitting to the authority

of the public servant when his official designation was explained, a fine of Rs. 50 would amply vindicate the law for the technical offence of an assault on a public servant. We accordingly reduce the sentence passed on the Petitioner from six months' rigorous imprisonment to a fine of Rs. 50 (Rupees fifty) or in default of payment a fortnight's rigorous imprisonment. This Rule is made absolute to that extent.

Rule made ablolute.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 261 OF 1913.

JENKINS, C. J.
SHARFUDDIN, J.
1913,
Heard, 12 and 13, May.
Judgment, 13, May.

SIAR NONIA and others, Appellants,
v.
THE KING-EMPEROR, Respondent.

Accomplice, competency of, as witness—Corroboration required, nature of.

An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad, but there is an established practice, founded on the judicial experience of generations, which requires corroboration by some untainted evidence and that in a material particular pointing not only to the crime but to the participation of the accused in that crime.

This was an Appeal preferred on the 31st of March 1913 against the conviction and sentence passed upon the accused by the Sessions Judge of Sarun under secs. 395 and 395/109, I. P. C., on the 10th of February 1913.

The accused were convicted of charges of dacoity and abetment of dacoity. The Committing Magistrate tendered a pardon under sec. 337, Cr. P. C., to one of the accused Sobran Ahir and another accused Sheonandan Ahir pleaded guilty and was convicted and sentenced. Both were examined as witnesses for the prosecution at the trial. Three other accused persons made confessions which they subsequently retracted. The material portion of the judgment of the Sessions Judge bearing on the evidence of the accomplice is set out below:

"The evidence of the villagers amply corroborates the evidence of Sobran the approver and Sheonandan the convict.

"I think it may be taken as certain that these two men Sobran and Sheonandan were among the dacoits. There does not seem to be any reason to disbelieve them, and they are amply corroborated. They each name all the accused as having taken part in the dacoity. They are accomplices, and their evidence is therefore open to suspicion. Sheonandan Ahir has however a stronger claim to credit than Sobran Ahir, for he has pleaded guilty, been convicted and sentenced, and has little now to gain or lose from the favour or displeasure of the Police.

* * * * *

"These seven men have against them the evidence of Sobran Ahir and Sheonandan Ahir, together with the statements of the three accused who have since retracted their confessions.

"Now the retracted confessions, (even if they had not been retracted), would not technically be corroboration: for corroboration implies evidence of the persons not incriminated. They can merely be considered as confirmation, for they may be 'taken into consideration' (sec. 30, Evidence Act).

"So, if I am convinced of the guilt of these seven men, I shall not be going out-

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side the law in convicting them. The next question is, is there any reason why the confessions made in the Committing Magistrate's Court by Lokman Bind, Subhan Gond and Maniraj Ahir should be disbelieved, or not looked upon as confirmation of the evidence given by the accomplices Sheonandan and Sobran? Lokman, Subhan and Maniraj have all made statements in this Court to the effect that they are innocent, that their confessions were false and tutored by the Police and that they have no defence witnesses. I have before me no *primâ facie* grounds, (unless the fact of retraction be taken as such), for holding that the confessions were not voluntary. They were made on the 30 h September, nearly four weeks after the submission of charge-sheet by the Police, and more than three weeks af er the opening of the Magistrate's enquiry.

* * * * *

"I hold that the statements of Sheonandan and Sobran can in this case be accepted, confirmed as they are by the three confessions, and answered as they are by most unconvincing statements. I hold that Dahari Nonia, Kunjan Kurmi, Siar Nonia, Ramrup Ahir and Saudagar Tewari committed the dacoity, and that Gothaul and Sobha Bania were guilty of abetment by conspiracy and aid. The two later joined and went with the gang and watched their clothes, knowing full well that the dacoity was in progress."

Babu Abâni Bhusan Mukerjee for the accused, Pitambar and Badul, Appellants.

Mr. Bagram, *Offg. Deputy Legal Remembrancer*, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is an Appeal preferred by fifteen accused who have been convicted of dacoity by the Sessions Judge of Sarun agreeing with the opinion of both the assessors. The evidence principally is that of accomplices. An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad, but there is an es ablished practice founded on the judicial experience of generations which requires corroboration by some untainted evidence, and that this should be a corroboration in a material particular pointing not only to the crime but to the participation of the accused in that crime. This rule has been disregarded to a large extent by the Sessions Judge. Perhaps it was not known to the assessors. We do not feel at liberty to disregard this rule, and the result is hat as to seven of the accused it has to be conceded that there is not that evidence on which a Court of law, properly guided, would convict. Those accused are Siar Nonia, accused No. 7, Dabari Nonia, accused No. 8, Badal Ahir, accused No. 9, Kunjan Kurmi, accused No. 14, Ramrup Ahir, accused No. 17, Saudagar Tewari, accused No. 18, and Sobha Bania, accused No. 19. As against these seven accused the conviction and sentences must be set aside, they must be acquitted and we direct that they be released.

As against the other Appellants, there is some amount of evidence independent of the testimony of the accomplices, and we have been assisted in the consideration of that evidence by the learned Vakil who appeared for Pitambar Ahir and brought to our notice matters relating to the other accused. The first of these is Munessar Ahir, and as against him it appears to us that there is evidence which

is sufficient to sustain the conviction if it is believed. Now, with regard to the belief of this evidence we are in this position that we merely have a written record of it. The testimony was actually given before the Sessions Judge and the two assessors, and we must pay some regard to their appreciation of the evidence. They have believed this evidence and we see no reason to question the propriety of this appreciation. What we have said here applies to all the rest of the accused with one exception. That exception is Khedari Nonia, for we feel that as against him it is not brought sufficiently home to him that he was present at the scene of the occurrence. It is true that he was seen but how far from the scene of occurrence does not appear. There is nothing to show that he was at any time so near it as to raise any presumption against him. We feel that as against him there is no such corroboration as the law requires. As against him the conviction and sentence must be set aside and we direct that he be released.

As against the others, and in saying that we include Pitambar Ahir, we think there is sufficient evidence, and so far as they are concerned, we accept the view of the Sessions Judge and the assessors, and the appeals of those seven accused, that is accused Nos. 1, 3, 4, 5, 6, 15 and 16 are dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 152 OF 1911.

HOLMWOOD, J.
CHAPMAN, J.
1912.
6, December.

NOORIJAN SARDAR, Defendant, Appellant,
v.
BIMOLA SUNDARI GUPTA, Plaintiff, Respondent.

Eviction by title paramount, if good defence to rent suit—Tenant induced to attorn to superior landlord by offer of reduced rent.

Eviction by title paramount would be a good defence to a suit for rent, if the party evicting having a good title, the tenant quitted against his will.

The same result would follow where the party seeking to evict should claim the rent and the tenant on such notice attorn to him.

HILL *v.* SAUNDERS (2) *followed.*

This doctrine of quasi-*eviction should apply in this country, but it does not apply to a case where the tenant is induced to attorn to the superior landlord by an offer to accept a reduced rent.*

This was an Appeal preferred on the 23rd of January 1911 against the decree of Babu Latu B[illegible] y Bose, 2nd Subordinate Judge of Zillah Mymensingh, dated the 19th of November 1910, affirming the decree of Babu Ananga Mohun Lahiri, Munsif at Sherpur, dated the 23rd of December 1909.

The material facts will appear from the judgment.

Dr. Rash Behary Ghose and *Babus Jogesh Chandra Ray* and *Sasanka Jiban Ray* for the Appellant.

Babus Gobinda Chandra Dey Roy and *Upendra Kumar Ray* for the Respondent.

(2) 4 B. and C. 529 (1825).

THE

Calcutta Weekly Notes.

Vol. XVIII.] MONDAY, MARCH 23, 1914. [No. 19.

Contents.

NOTES.

Proposed legislation regarding contempt of Court.

We publish in another column the statement of Objects and Reasons of the Bill to amend the Indian Penal Code and the Code of Criminal Procedure with a view to make contempt of Court a substantive offence under the Indian Penal Code and to make it punishable by a Presidency Magistrate or a Magistrate of the first class subject to the sanction for prosecution being previously obtained from the Government of India or the Local Government. It is explained that the law of contempt as comprised at present in the Penal Code and the Code of Criminal Procedure contemplates punishment of contempts committed *ex facie*, *i.e.*, in the presence of the Court. The Chartered High Courts have power to punish contempts committed outside the precincts of the Court but a doubt is expressed whether they have any such power in respect of contempts committed outside the Ordinary Original Jurisdiction of the Court. We shall not for the present join issue with regard to the latter proposition, although we are of opinion that there is not much room for legitimate doubt with regard to this question. The question whether Presidency Magistrates and Magistrates of the first class should be invested with powers to punish people for publishing reports of pending proceedings which may not be strictly correct or criticism which may be considered derogatory to the dignity of judicial officers of all ranks and status or drawing public attention to supposed irregularities of procedure or objectionable conduct on the part of such officers or others concerned in any judicial proceeding or trial, is a matter for much more serious consideration. We are of opinion that the Bill as framed is so very wide in its scope that it would stifle criticism of judicial proceedings to an unreasonable extent and no less hamper publication of newspaper reports of such proceedings.

We have carefully read the speech of the Hon'ble Sir Reginald Craddock, the Home Member to the Government of India, explaining the scope and objects of the Bill. But we are unable to accept his exposition of the English law on the subject either as accurate or up to date. The judicial dicta of all the Superior Courts in England since the latter part of the last century up to the present day have been uniformly in favour of excluding what is called "scandalizing the Court itself," or in other words, criticisms derogatory to the dignity of the Court or a Judge, from the operation of the law of contempt. *Reg* v. *Gray*, (1900) 2 Q. B. 38, which the learned Home Member cites, is no doubt the last case of any moment of this kind and in all fairness to the Home Member, we must say, that he has not omitted to refer to the caution administered by Lord Russel of Killowen regarding the exercise of this extraordinary jurisdiction of the Courts of Record in England. We regret, however, that inspite of the severe judicial criticism to which this antiquated and almost obsolete power for committal for contempt has been subjected both before and after Lord Russel's dictum, the Indian Legislature should at this distance of time come forward to constitute the so-called contempt by "scandalizing the Court" as a substantive offence under the Indian Penal Code and

further that its scope in India should be extended to any and every person who is authorised under any law to record evidence. Or, in other words, the definition is wide enough to include judicial officers of all ranks and status from a High Court Judge to a Sub-Registrar of Deeds and Assurances. We presume that to speak of his incompetence or irregularity in the discharge of his duty, or arbitrariness, would amount to "scandalizing" such Court and make one amenable to the Penal Code. We wonder if it struck the Indian Legislature that this would amount to introduction of the law of "*les majestes*" to India with this difference that it would be made applicable to only judicial officers of all ranks. The anomaly of it is too obvious.

So far as 'scandalizing' the Court is a form of contempt we would invite attention to the decision of the Judicial Committee of the Privy Council in the case of *MacLeod* v. *St. Aubyn* (3 C. W. N. cccxlvi: s. c. 1899, A. C. 549), where it was held that the power of committal for contempt was not meant for the vindication of the Judge as a person. He must resort to an *action for libel or criminal information.* Committal for contempt should be used *sparingly* and always with reference to the interests of justice. With regard to small colonies with a coloured population their Lordships, no doubt, made certain qualifications but observed that the power even there was to be execised sparingly and in a proper case. With regard to civilized people their Lordships observed, "Courts in this country were satisfied to leave to public opinion attacks or comments made derogatory or scandalous to them." As the intended legislation is directed against the newspaper press in this country, surely the law as it prevails in England ought to be applicable here. The Hon'ble the Home Member also says that he wishes to bring the law in India into line with the law as it is in England. The observations of the Judicial Committee above referred to obviously alludes to Mr. Justice Bruce's view expressed in 1898, in connection with an article headed "Nobbling Justice" in a Liverpool paper in which the learned Judge was grossly attacked. His Lordship's attention being drawn to it, he observed :—"It was quite immaterial to a Judge what newspapers said. Proceedings for contempts were taken, *not to vindicate the dignity of the Court, but to prevent tampering with justice.* We would assume that it was the most extravagant and ridiculous article ever written, but we should not take any notice of it." (See 2 C. W. N. cli—clii.)

We cannot do better than reproduce also in this connection the most authoritative pronouncement on this question and which commands uniform respect of the highest judiciary in England. Jessel, M. R. (Mellish, L. J., and Baggalay, J., agreeing) observed in *Clement's* case (46 L. J. 383).

It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject. I say that a Judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless the extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.

The Hon'ble the Home Member in explaining the scope of the Bill so far as it relates to its provisions regarding "scandalizing" a Court said :

The two new sections which the Bill will add to the Penal Code, as sections 228A and 228B, make it quite clear what kinds of acts are made punishable. Section 228 deals with what is known as scandalising the courts, that is to say, speaking or writing anything which brings or attempts to bring into contempt or lowers or attempts to lower the authority of any court of justice or of any person empowered by law to record or direct the proceeding of evidence on oath when exercising such power. By the exception to the clause, comments which are in substance true and made in good faith for the public good are saved, for, as has been well said, the law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published (per Russel, L. C. J., in *R.* v. *Gray*, (1900, 2 Q B, at p 41).

So far as the Bill relates to pending proceedings the learned Home Member observed :—

The second addition which the Bill will add to the Indian Penal Code deals with cases that are *sub-judice* and punishes reports of pending proceedings which are of a false or misleading character, and comments relating to such proceedings or to the presiding officers, parties, witnesses, assessors, jurors or pleaders, which may cause or tend to cause prejudice in the public mind, or which may prejudice the trial of cases. There are two explanations to this section. The first defines judicial proceedings for the purposes of this section and the second exempts true, full and fair reports of judicial proceedings from the penalties provided in the section.

Proceedings for these offences will only be made on complaint made by order or under authority from the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in this behalf. The imprisonment provided for these two offences is simple and subject to the maximum of six months. They will be bailable, but not compoundable, and triable only by a Presidency Magistrate or Magistrate of the 1st Class.

As regards the detailed provisions of the Bill, we reserve our comments for the present. We would only suggest, however, that the power to commit for contempt not committed in the face of the

Court should be reserved to the High Court and, if necessary, its jurisdiction extended to protect the Mofussil Courts against comments which are likely to frustrate the ends of justice. We have recently given extracts from English legal journals (see our issue of the 7th March last and English Law Journal of the 7th February last) where expression is given to the prevailing professional and judicial opinion in England that comments not calculated to prejudice trials before a jury should not come under the category of contempt. We, however, agree with the view expressed by Jenkins, C. J., and Stephen, J., in the *Amrita Bazar* contempt case that where comments are likely to deter witnesses from deposing before a Court, they might constitute contempt. But it would be very undesirable to bring reports on comments drawing public attention to judicial irregularities within the category of contempt.

It is not always easy for the lay public to follow judicial proceedings with the care and caution of a trained lawyer. Lay journals will surely be justified in criticising arbitrary conduct of a judicial officer, or of others in connection with a case when no question of prejudice to any jury or witness is involved. To stifle comments or criticisms in these directions would practically amount to putting the judiciary above the law. Lord Shaw sitting in the House of Lords recently observed that the practice of administering justice before the eyes of the public was one of the greatest safeguards to the rights and liberties of the British subject. So, should the proposed law of contempt be passed and enforced, comments on judicial proceedings will be almost an impossibility and this surely will interfere with the proper administration of justice. In our view the public should be given at least as much liberty to criticise the acts and conduct of the judiciary as they enjoy with regard to the acts of the executive of all grades and ranks. The provision in the Bill that in respect of reports or comments impugned for contempt, the only defence would be *truth* and *bonâ fides*, is putting forward another impossible standard of justification. Reports or comments in the newspaper press may be and often are inaccurate but are published in good faith for *public information.* So comments in good faith for public good ought always to be a sufficient defence.

STATEMENTS OF OBJECTS AND REASONS.

When the Penal Code became law in 1860, conditions in India were such that its framers were in a position to disregard that class of contempt which is known to English law as "scandalizing the Courts." But subsequent developments have demonstrated the necessity of affording greater protection to the Courts against attempts to lower their prestige and of checking the practice which has manifested itself to a serious extent in recent years, of commenting on cases pending before the Courts in a manner which constitutes a serious menace to the dispensation of public justice. Sec 228, Indian Penal Code, renders punishable an intentional insult or interruption to a public servant sitting in a judicial proceeding, but does not provide for the punishment of contempts of the authority of judicial officers not committed in their presence, or of improper comments on their proceedings in cases under trial. A recent decision of the Calcutta High Court *In re The King-Emperor* v. *Girindra Mohan Das and others* (see *In the matter of Amrita Bazar Patrika*, 17 C. W. N. 1253) read with the decision of the Madras High Court *In re K. Venkata Rao* (21 Madras Law Journal 832) has raised doubts how far a Chartered High Court can protect Subordinate Courts in respect of such contempts, and it is also at last questionable whether the unrestricted jurisdiction of any Court to punish contempts summarily is the best way of combating the evil. The trend of modern opinion is rather in the direction of dealing with contempts as a substantive offence and not as a matter to be dealt with summarily, and this is more particularly desirable where the contempt is not committed in open Court. The draft Bill accordingly proposes to make punishable by amendment of the Indian Penal Code (1) the contempt of the authority of Courts or persons empowered by law to record evidence on oath and (2) the publication of false or misleading reports of pending cases or of objectionable comments upon them. At the same time in order to safeguard the proper exercise of these powers, an amendment of the Code of Criminal Procedure is provided for, so that prosecutions for the above offences shall be undertaken only upon complaint made by order of or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in this behalf, and that such cases shall be triable only by a Presidency Magistrate, or a Magistrate of the first class. Certain exceptions and explanations have also been inserted in the draft Bill which are designed to protect *bonâ fide* comments or reports.

EXAMINATION OF WITNESSES BY THE POLICE.

(*Continued from p. xcviii.*)

The effect of sec. 162, Cr. P. C., on sec. 157 of the Evidence Act has been thus stated by Mr. Sundar Lal in his elaborate judgment in Bhulai Sing *ante*.

The section in the first place modifies the rule contained in sec. 157 of the Evidence Act in the following respects, *viz*.,

(1) As a general rule the written record of statements previously made by a witness to a Police officer which is referred to in the section as "such writing" in the course of an investigation cannot be used as evidence.

(2) Such written record of the statement cannot be used

(*a*) To corroborate the statement of a witness for the prosecution or

(*b*) To corroborate the statement of a witness for the defence or

(*c*) To impeach the credit of a witness for the defence.

(3) It may be used to impeach the credit of a witness for the prosecution if

(*a*) The accused person requests the Court to inspect the written record of the deposition and

(*b*) If the Court thinks it expedient in the interests of justice to allow a copy of such statement being granted to him.

It might also be noted in this connection that the accused has no right to inspect such writing; he can only inspect a copy of it. The record of such statement in writing being thus inadmissible in evidence except for a limited purpose as indicated above, the question arises whether the Police officer to whom such statement was made and who reduced it to writing can be permitted to reproduce the contents of the statement and can be allowed to refresh his memory by referring to the record made by him of such statement. The Calcutta High Court has however laid down in *Fanindra Mohan Banerji*, I. L. R. 36 Cal. 281: s. c. 13 C. W. N. 197, that sec. 162, Cr. P. C., does not override the general provisions of the Indian Evidence Act as to the proof of the statement of a witness taken under sec. 161, Cr. P. C, by oral evidence and such statement is admissible under sec. 157 of the Evidence Act in corroboration of the evidence of the witness given at the trial.

Besides the diary kept by the Police under sec. 162, Cr. P. C., there is another diary kept under sec. 172 and generally known as the special diary in which the Police officer is required to enter his proceedings day by day and there does not in the list of matters to be entered therein appear any oral statement of witnesses to be recorded. This diary is strictly privileged and may only be used by the Court not as evidence in the case but to aid it in the enquiry or trial. Neither the accused nor their agents are entitled to call for such diaries. By a curious ingenuity, as observed in *Dadan Gazi* v. *Emperor*, I. L. R. 33 Cal. 1023, it became the practice of the Police officers in the Mofussil to incorporate oral statements made to them by witnesses in this special diary under sec. 172 in the belief that by so doing those could be kept from the knowledge of the accused. The Calcutta High Court and the Allahabad High Court both held under the Code of 1882 (*Sheru Shah* v. *Queen-Empress*, I. L. R. 20 Cal. 642; *Queen-Empress* v. *Nasiruddin*, I. L. R. 16 All. 207) that mere entry in the special diary could not protect such statements from being called for and inspected by the accused. The question was however reconsidered by a Full Bench of the Allahabad High Court in the case of *Queen-Empress* v. *Munnu*, I. L. R. 19 All. 390. The majority of the Court in that case held that they came under the protection of sec. 172, Cr. P. C. In view of this conflict of authority and the hardship which the ruling of the Full Bench of the Allahabad High Court might have imposed on the accused in some cases, sec. 162 was re-enacted in the present form.

It conferred on the accused a qualified privilege of using the statements recorded by the Police to impeach the credit of a witness for the prosecution. It gave the prosecution no right to use it for any purpose. The language of the section is however not happily worded and the true view of the law on the subject seems to be that laid down by Mitter and Holmwood, JJ., in *Dadan Gazi* v. *Emperor*, I. L R. 33 Cal. 1023: s. c. 10 C. W. N. 890. Their Lordships have laid down that oral statements of witnesses to a Police officer even though entered in the diary under sec. 172 are admissible under the provisions of sec. 162 and of that section only and the provisions as to the cross examination of the Police officer under secs. 161, 145 of the Evidence Act which refer to his own statements do not apply to the statements of the witnesses. The proper procedure is for the accused at the time the witness whose statement is so recorded appears before the Court to ask the Court to refer to such writing and if necessary furnish the accused with copies. It is open to the defence to ask the Police officer or any other person whether certain statements were made to him by the witnesses for the purpose of impeaching their credit under sec. 155 of the Evidence Act but the Police officer cannot be asked to refresh his memory from diaries which are inadmissible unless admitted under the provisions of sec. 162 and used in cross-examination of the witness. It would be quite improper to accept the Police officer's perfunctory reading of his diary as proof of the statements. It is only where they have been properly brought in under the provisions of the Evidence Act that they may be used if the witness denies making them. But this does not authorise their use for the first time for the purpose of refreshing the Police officer's memory.

In *Emperor* v. *Narayan*, I. L. R. 32 Bom. 111 (F. B.), a witness who had made a statement to a Police officer who recorded it under sec. 161 denied at the trial having made any such statement and the trying Judge admitted the statement in evidence both to discredit the witness and also as evidence against the accused in that it contained statements made to the Police corroborating confessions made by the accused.

It was held by Beaman, J., that the writing ought not to have been admitted at all or its contents to have been allowed to be used by the prosecution for the nominal purpose of contradicting the witness. Russell, C. J., was of opinion that the document might be used to contradict the witness not by putting in the statement but by putting it in the hands of the Police officer to refresh his memory to get him to contradict the statement of the witness. Chandavarkar, J., held that it was the statement contained in the writing which only could be used and that only

to impeach the credit of such witness in the manner provided by the Evidence Act and Batty, J., was of opinion that the writing might have been used for the purpose of refreshing the memory of the witness cross-examined as to the fact of the statement either on behalf of the prosecution or on behalf of the defence provided that it was treated by the prosecution only for the purpose of impeaching the credit or in corroboration of the witness who made it.

CURRENT INDIAN CASES.

(CIVIL.)

Arbitration without intervention of Court.

HARAKBAI *v.* JAMNABAI, I. L. R. 37 Bom. 639.

The second schedule to the Civil Procedure Code does not contemplate a reference to arbitration in a pending suit without the intervention of the Court. The words "any other law for the time being in force" in sec. 89, C. P. C., are applicable to O. 23, r. 3.

Will.

SIRDAR NOWROJI PUDUMJI *v.* PUTTIBAI, I. L. R. 37 Bom. 644.

A Will contained the following clause—"In the event of N coming and meeting us there (after departing from this life) without marrying or if married without any lineal heir his share shall revert equally to his surviving sisters or their heirs.

Held—That the restriction sought to be placed on N's inheritance is nugatory and ought not to be given effect to.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Okura & Company* v. *Fosbacka Jernverks Aktiebolag*. BEFORE THE LORD CHIEF JUSTICE AND LORD JUSTICE BUCKELY AND LORD JUSTICE PHILLIMORE. 13th January 1914.

A foreign Corporation—When is it said to be carrying on business by an agent for the purposes of a suit.

This was an appeal from an order of Ridley, J. The question for determination was as to whether a foreign Corporation could be served with a Writ in England. It was found that the Corporation employed a person as an agent since 1899, but his duty was to place orders without any general authority to make contracts or to bind the Corporation in any way.

The Court below held that the Corporation were not carrying on business in London for the purpose of the suit and that order was affirmed on appeal. LORD JUSTICE BUCKLEY said :—

There were three factors to be considered in coming to a conclusion whether a foreign Corporation was carrying on business in this country. First, the business must be carried on for a substantial period of time, which was the case here ; secondly, the act of carrying on business must be done at some fixed place, which was also the case here ; thirdly, you must find that the Corporation has been doing business here by a person who has been doing business for them. It was not enough to show that they had an agent in this country. That involved the question when a person was carrying on business. Several cases had been referred to, but it would be sufficient to mention three of them. The first was the *Dunlop* case [(1902] 1 K. B., 342). That was a decision on the first of the three essentials—namely, time. There was no difficulty in that case. The next case was *Saccharin Corporation* v. *Chemische Fabrik &c.*, ([1911] 2 K. B., 516). The point there was that the person representing the Corporation was an agent for sale without submitting orders to his principal, but he had authority to enter into contracts for the sale of the Defendants' goods, and therefore was properly served in an action against the Defendants. The third case was *Grant* v. *Anderson and Co.* ([1892, 1 Q. B., 108), which was not a case of a foreign Corporation, but of a foreign firm, the rule relating to which contained the word "carrying on business." It was therefore a direct authority. There the mere employment of an agent in England who had power to collect orders for the firm on commission, but who had no power to accept or reject such orders, was not carrying on business. The facts of that case were very close to the present.

Messrs. Montague Shearman, K. C., and *McCardie* for the Plaintiffs.

Messrs. Leck, K. C., and *Chaytor* for the Defendants.

B. D. *Appeal dismissed.*

KING'S BENCH DIVISION.—*Jay's Furnishing Company* v. *Brand & Co.* Before MR. JUSTICE RIDLEY AND MR. JUSTICE BANKES. 14th January 1914.

A hire-purchase agreement of furniture—Its termination.

This was an appeal from a County Court. The tenant hired some furniture under a hire-purchase agreement from the Plaintiffs. It provided that in case of default the agreement shall *ipso facto* be determined and the hirer shall at his own expense return the goods to the Plaintiffs. Finally the Plaintiffs sent a notice to the tenant that the agreement had been terminated and demanded the return of the goods.

The landlord distrained the furniture for rent. The Plaintiffs relied on sec. 1 of the Act of 1908, but the Defendants pleaded sec. 4 which provided that the Act was not to apply to goods comprised in any hire-purchase agreement made by the tenant. The Court below found for the Defendants. It was contended on appeal that the hire-purchase agreement had been determined

prior to the date of the distress. The Court dismissed the appeal and Mr. JUSTICE RIDLEY said :—

The case of *Hackney Furnishing Company* v. *Watts* (28 T. L. R. 417) was on all fours with the present case, except that instead of the clause which existed in the present case there was a clause which said that in case the hirer should commit any breach of the agreement the owners should be entitled without formal demand to resume possession of the articles, and to enter any premises for that purpose. The Court in giving judgment said that that did not give the owners the power to determine the agreement, but only to determine the bailment. In the present case there was a stronger clause which said that in the event of a breach the agreement should *ipso facto* determine. They had had to consider whether that made any difference, and they thought it did not. Although the agreement stated that it was *ipso facto* to be determined, the same clause went on to say that the owners should be at liberty to enter Bray's premises and retake the furniture. If the owners took possession under that clause they would be treating the agreement as still in existence, and in fact they had tried to do so. They would have no right to enter the premises without the assistance of that clause. *Patrick* v. *Colerickr* (3 M. and W., 483) was a case of interest in connexion with this. It seemed to him that these goods were "comprised" in a hire-purchase ageement within the meaning of sec. 4 of the Act of 1908.

Messrs. Schwabe, K. C., and *Hinde* for the Appellants.

Mr. Grimwood Mears for the Respondents.

B. D. *Appeal dismissed.*

COURT OF CRIMINAL APPEAL.—*Rex* v. *Ryan*. Before LORD CHIEF JUSTICE OF ENGLAND, MR. JUSTICE RIDLEY AND MR. JUSTICE BAILHACHE. 12th January 1914.

Medical practitioner "wilfully" giving false certificates of death.

The Appellant who was a medical practitioner was convicted of wrongfully making false certificates of death and sentenced to 6 months' imprisonment. He certified that he had attended each of the persons, giving the dates that he had found them suffering from certain diseases which were the cause of death. In fact he had never attended them, nor were the persons dead.

On appeal it was contended on his behalf that "wilfully" in sec. 4, Perjury Act, 1911, must refer not only to the wilfully making the false certificate but also to the purpose to which it was to be applied.

The LORD CHIEF JUSTICE said :—

Mr. Merriman had argued that the Judge's summing up was insufficient. He said that "wilfully" should "intentionally" under the statute [of 1874, form.

and that if the jury had taken the view that he had given these false certificates for the purpose suggested, and not for the purpose of being used under the Act of 1874, they could have found that he had not wilfully made any false statement under that Act. Notwithstanding its ingenuity, they were unable to accept that contention. They were of opinion that the view taken by Mr. Justice Avory was right—namely, that "wilfully" meant intentionally, which meant that at the time the Appellant gave these certificates he knew that he was making false statements in relation to documents which purported to be certificates under an Act relating to the registration of births and deaths, and which could be used under the Act.

Mr. Merriman for the Appellant.

Messrs. Gordon Hewart, K. C., and *Comyns Carr* for the Crown.

B. D. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM THE SUPREME COURT OF CANADA.]

THE LORD CHANCELLOR.	DAVID MACLAREN and another, Appellants,
LORD SHAW.	*v.*
LORD MOULTON.	THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC, Respondent.
1914, 28, January.	

Boundary described as extending to a river or highway—The presumption ad medium filum aquœ, *application of.*

In this appeal in the course of their Lordships' judgment delivered by Lord Moulton, the question was discussed as to how far the presumption —*ad medium filum aquœ*—is negatived by specific boundaries, in the following terms :—In some of the judgments in the Courts below the learned Judges have held that the presumption that the bed of the river *ad medium filum aquœ* was included in the grant is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the Letters Patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed. If there is any indication of the parcel going further there is no place for its operation. The application of the rule is strikingly illustrated in the latest case in which the point was considered in the House of Lords (*City of London Land Tax Commissioners*

v. *Central London Railway*, 1913, A. C. 364). In that case the plots under consideration were described in language which undoubtedly represented them as plots terminating at the highway. In one instance the description was—

"Vacant ground formerly two houses and premises situate and known as Nos. 36 and 37, Newgate Street" and in another instance the description was—

"All those pieces of land now or formerly known as 85 and 86, Newgate Street, . . . more particularly delineated and described on the plan hereto annexed marked A and thereon coloured pink."

and on reference to that plan it was seen that the coloration stopped at the edge of the highway. Yet in all these instances their Lordships were unanimously of opinion that the rule ought to be applied, and that the lands up to the middle line of Newgate Street were included in the certificates of redemption of land tax.

In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquæ* or *viæ* the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream. This is precisely what we have here. The land is shown as abutting on the river and is described as bounded by the river, and again as bounded by a line following the windings and sinuosities of the river bank. This clearly makes it abut on the river and gives rise, according to English law, to the presumption in question.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before IMAM AND CHAPMAN, JJ. CIVIL RULE NO. 1378 OF 1913. HALIM *alias* JALISH PRAMANIK AND ORS., Petitioners, *v.* KUTISWAR PAL AND ORS., Opposite Party. 13th March 1914.

Civil Procedure Code, Or. 23, r. 1, Sub r. (6)—*Allowing Plaintiff to withdraw suit at appellate stage—Sufficient ground.*

The Defendants, Opposite Party, obtained a rule on the Plaintiffs, Opposite Party, to show cause why an order allowing the Plaintiffs to withdraw the suit with leave to bring a fresh one unless barred by limitation made by the Subordinate Judge of Pubna should not be set aside.

The Plaintiffs brought a suit for declaration of their alleged title to and recovery of possession of the disputed lands after eviction of the Defendants therefrom. The Munsif dismissed the suit. On appeal, the Subordinate Judge, in the course of the hearing thereof, passed an *ex parte* order permitting the Plaintiffs to put in additional evidence as prayed for. On the Defendants' objection the Subordinate Judge set aside this order. Thereupon the Plaintiffs applied to the Court of the said Subordinate Judge for withdrawal of the suit and the said Court made an order to that effect, although there was no formal defect or any other sufficient grounds as contemplated by Or. 23, r. 1 of the Civil Procedure Code.

Held—Setting aside the order of the Subordinate Judge, that mere vagueness in the written statement was not a sufficient ground as contemplated by Or. 23, r. 1, sub-r. (6) entitling the Plaintiffs to withdraw the suit at the appellate stage with liberty to bring a fresh suit in order to clear up the aforesaid vagueness by adducing additional evidence.

The Rule was made absolute and the Subordinate Judge was directed to reconsider the order refusing to adduce additional evidence.

Babu Mohini Mohan Chakravarti (with *Babu Abinash Chandra Chakravarti*) for the Petitioners.

Babu Debendra Nath Bagchi for the Opposite Party.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., AND WOODROFFE, J. APPEAL FROM APPELLATE DECREE NO. 3056 OF 1912. KAILASH CHANDRA PODDAR AND OTHERS, Defendants, Appellants *v.* GOPAL CHANDRA PODDAR AND OTHERS, Respondents. Heard, 9th and 10th March. Judgment, 10th, March 1914.

Res judicata—*Consent decree—Review, rejected—Suit on same ground as review, if maintainable.*

The present Plaintiffs sued the Defendants and a compromise was alleged to have been effected. A decree was passed in accordance with that compromise. The present Plaintiff No. 1 subsequently came to Court not by way of appeal from an order made under Or. XXIII, but for a review of the decree and his application was based upon the

allegation that he had not consented. The result of his application, however, was unfavourable to him, and it was dismissed. Subsequently this suit was brought, and the applicant for review as well as his co-Plaintiff in the former suit were the Plaintiffs in the present suit. There was the same allegation of no consent and it was further suggested that there was fraud. Fraud was negatived in the Courts below, so that the only ground of relief was the absence of consent.

Held, that as fraud was negatived, the suit should have been dismissed, for the only question on which a decision had been given in the suit in favour of the Plaintiffs was one which was decided adversely in the former litigation.

Ram Gopal v. *Prasanna*, 2 C. L. J. 508, followed.

Mussummat Gulab Koer v. *Badshah Bahadur*, 10 C. L. J. 420, distinguished and not approved.

Babu Brajendra Nath Chatterjee for the Appellants.

Babu Braja Lal Chuckerbutty for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE AND BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 2588 OF 1911. SRIMATI CHAMATKA MOHINI DASI, Plaintiff No. 1, Appellant *v.* PROMOTHA NATH GANGULI AND OTHERS, Respondents. 17th February 1914.

Limitation—Special plea taken in Appellate Court—Nature of tenancy.

The suit was for recovery of possession of immoveable property with mesne profits and was commenced on the 17th June 1899. The case for the Plaintiff was that she purchased the property at a sale held in execution of a decree for arrears of rent at the instance of the landlord, and that the Respondents who were the landlords kept her out of possession. The tenancy was sold in execution of a rent decree and the land in suit constituted a property held by the Plaintiff under the Defendants. The purchase was made by the Plaintiff on the 12th July 1887 and the sale was confirmed on the 14th February 1888. A question of limitation was raised in the written statement and it was stated explicitly that the suit was barred by limitation as delivery of possession had not been obtained within three years from the date of purchase. In the first Court reliance was placed upon Art. 142 of the second Schedule of the Limitation Act and the Munsif held that as the suit had been instituted within 12 years from the date of confirmation of sale the suit was in time. On appeal it was argued before the Subordinate Judge for the first time that the property in suit constituted an occupancy holding and that consequently the suit was barred as it was not brought within 2 years of the date of dispossession by the landlord. It was found that the area of the property was more than 238 bighas. The Subordinate Judge held that although the presumption dispensed with the proof at the first instance, it did not relieve the Court from its duty to enquire into and ascertain the origin of the tenancy on the materials placed before it.

Held, that it was not competent to the lower Appellate Court to decide a question which was not in controversy between the parties. The suit was tried throughout on the assumption that the property constituted a tenure. It was not open to the landlord at a late stage of the suit to raise the question of the nature of the tenancy.

Babus Sarat Chunder Roy Chowdhury and *Dhirendra Krishna Roy* for *Babu Gobinda Chunder Chuckerbutty* for the Appellant.

Babus Surendra Nath Roy and *Satyendra Nath Roy* for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., AND WOODROFFE, J. APPEAL FROM APPELLATE DECREE NO. 1535 OF 1911. NAZIRUDDIN AHAMMAD MOZUMDAR, Defendant, Appellant *v.* MIR SAFDARALI AND OTHERS, Plaintiffs, Respondents. 9th March, 1914.

Will—Bequest to children, some unborn—Mahomedan family.

This was an appeal as to the rights of parties, under the Will of a testator who died in 1893.

By his Will, he gave certain annuities, and among them, an annuity of Rs. 60 a year to Fatima Begum. He then provided in effect that after her death it should go to the children born of her so long as they lived—that after her death it was to be divided among the children born of her: but in case there should be no children then the executor and his heir should not be bound to pay the amount fixed. Fatima Begum died in November 1908, and the claim in the suit was in respect of Rs. 25, a portion of the annuity that had accrued after her death.

Fatima had left three daughters her surviving, Jabeda and two others; of these Jabeda alone was born at the testator's death.

Held, that Jabeda alone was entitled to the annuity.

Advocate-General v. *Karamali Rahimbhai*, I. L. R. 29 Bom. 133, and *Bhogabati Barmanya* v. *Kali Charan Singh*, I. L. R. 32 Cal. 992, followed.

Babus Sarat Chandra Roy Chowdhury and *Gobinda Chunder Chuckerbutty* for the Appellant.

Babu Girija Prasonna Roy Chowdhury for *Babu Upendra Gopal Mitter* for the Respondents.

A. T. M. *Appeal dismissed.*

NOORIJAN SARDAR *v.* BIMOLA SUNDARI GUPTA.

The JUDGMENT OF THE COURT was as follows :—

This Second Appeal arises out of a suit for rent valued at 22 rupees. A preliminary objection was taken that no appeal lay, but we find that in both the Courts an issue was raised as to the amount of the annual rent and it was decided that the annual rent was 12 rupees. It is sought to be argued on the authority of the case in *Baidya Nath Bahara* v. *Dhan Krishna Sirkar* (1), that there must be some contest upon the point, but the law is perfectly clear and so is that decision, that it is only necessary that the Court should have decided the annual rate of rent whether directly or incidentally. In this case a direct issue was raised, so that there can be no doubt about the right of appeal.

The argument of the learned Doctor who appeared for the Appellant raised what is a new point in this country, although it was pointed out as long ago as 1881 by Mr. Justice Field in *Pertab Chandra's* case that such a defence might be taken to a rent suit in Bengal. The learned Doctor took the plea that in this case the Defendant had been evicted by a title paramount, by the Plaintiff's landlord, and that therefore he was not bound to pay any rent to the Plaintiff. Now, it has been laid down by the English authorities that to constitute a good defence in these cases three conditions must be fulfilled, the eviction must be from something actually forming part of the premises demised, the party evicting must have a good title, and the tenant must have quitted against his will. In this case the only difficulty was that there was no forcible expulsion, but this has been held by all English authorities to be unnecessary; all that is necessary is that the landlord should claim the rent and the tenant on such notice attorn to him because he is not entitled to resist the claim. We need only refer to the cases which are quoted in Foa on Landlord and Tenant, 4th Ed., p. 169. *Hill* v. *Saunders* (2) is the leading case, and we entirely agree with the legal doctrine which is here laid down and which is in accordance with common sense. But we find that as a matter of fact no such eviction by title paramount was ever pleaded by the Defendant, and that on the contrary he pleaded something totally different. He made an averment which has been found to be false that he had held this land under an *amaldari* for 12 years at a rent of 6 rupees. Now, it does appear that in the year 1894 there was some talk of *amaldari* but the learned Judge has said that there is no proof of it, and that even if it was given it would not help the Defendant as it was an unregistered document. Be that as it may, this is not the case which the Defendant has to prove.

He has to prove that in the year 1315, after he had himself admitted to the Settlement Officer that the Plaintiff was his landlord the zemindar's *amla* came to him and put pressure upon him and so he had to attorn to the superior landlord who holds the title paramount. It is found by the learned Judge that as a matter of fact after he had admitted his tenancy before the Settlement Officer under the Plaintiff he was approached by the *amla* of the zemindar, but the treatment far from having been in the nature of pressure appears to have been in the nature of a bribe. He argues that they told him he would get his rent reduced to 6 rupees if he would give them

(1) 5 C. W. N. 515 (1900).

(2) 4 B. and C. 529 (1825).

NOORIJAN SARDAR *v.* BIMOLA SUNDARI GUPTA.

a kabuliyat, whereupon he proceeded to give them a kabuliyat. We would be reluctant to hold that this falls within the English law of *quasi*-eviction. We think that the argument in this Court has been based upon the finding of the learned Judge about this settlement proceedings, and that nobody, least of all the Defendant, ever thought of this question of eviction by title paramount before the case came into this Court. The Defendant cannot, we think, be allowed to make a new case of this kind, and at any rate as far as the rent now claimed is concerned the case must fail, for the kabuliyat in favour of the paramount title was not executed till the year 1315.

The Appeal therefore is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SHAW. LORD MOULTON. SIR JOHN EDGE. MR. AMEER ALI. 1913, Heard, 4, 5 and 6, November. Judgment, 10, December.	SRI RAJA VENKATA NARASIMHA APPA ROW BAHADUR ZEMINDAR, [since deceased (now represented by Meka Venkataramayya Appa Row Bahadur and anr., Appellants, *v.* SRI RAJA PARTHASARATHY APPA ROW SAVAI ASWA ROW BAHADUR ZEMINDAR, and another, Respondents.

Will of Hindu—Interpretation, fundamental principles of, common to Hindu and English Wills—Court's duty to give effect to intention as expressed, not to add to Will—Surrounding circumstances to be looked at as aid to interpretation only—Religious opinion and race, in what way relevant—"Liberal construction of native Wills," meaning of—Contemporaneous deed, referred to in Will, and interpretation by persons interested, if may be referred to—English rules of construction, if inapplicable—Joint power of adoption given to two wives—Joint discretionary power to donees personæ designatæ, *if may be exercised by survivor alone—Power to adopt when discretionary, whether given for secular or religious purpose—Intention as expressed—Hindu Law—Joint power to co-wives to adopt, if legal and how to be interpreted—Child if may be received in adoption by more than one wife—Custom if may override logic.*

Only one of several widows left by a Hindu can receive a child in adoption so as to step into the position of being its adoptive mother.

But because this is so it does not follow as a matter of necessity that a power given to more than one wife to adopt must be an invalid power, for in many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view.

The Judicial Committee refrained from deciding, upon the imperfect materials on the record of this case, a question of such far-reaching importance as the validity and the interpretation of a joint power of adoption given by a Hindu by Will to his two wives.

When a discretionary power of adoption was given to the testator's two widows and the power had to be exercised by the joint donees in agreement it was clear law independently of any English legal doctrines or decisions that the death of one of the donees puts an end to the joint power.

When, on a proper construction of the Will, the words of the Will permitting adoption referred only to the period of time when both widows were living and to the

choice and adoption of the two widows acting jointly, and when the Will was silent as to the period after the death of one of the widows, to hold that the surviving widow could adopt would be to provide for a period of time which the testator left unprovided for and unnoticed in the Will and to do so would be to make an addition to the testamentary dispositions.

The words used in the Will being "you (his two wives) should adopt a boy who is our sannihita *(one closely related) whenever it strikes that our* samastanam *(family) should continue:"*

Held—*That the religious motive of procuring for himself an heir by adoption, did not, on the terms of the Will, appear to be so overmastering, that the Court must regard his intentions to be dictated by it alone, but that the language of the Will pointed rather to the predominance in the testator's mind of the secular motive.*

When the exercise of a power is vested in the discretion of joint donees personæ designatæ *the death of one of the donees puts an end to the joint power; the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague. The case is different when the power is vested not in the donees* personæ designatæ *but in occupants for the time being of a specified office such as executors or trustees, which is not the case here.*

In construing a Will, a Court must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things including the race and religious opinions of the testator and influences and aims arising therefrom—but all this solely as an aid to ascertaining the meaning of the language used by the particular testator in the particular Will. Once the right construction is settled, the duty of the Court is loyally to carry out the intentions as expressed and none other. This duty is universal, and is true alike of Wills of every nationality and every religion or rank of life. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If any eventuality arises which the Will leaves unprovided for, there will be intestacy.

This fundamental principle does not clash with the principle that the Court will not necessarily apply English rules of construction to a Will of a Hindu like the present, nor does it clash in any way with what is sometimes called "giving a liberal interpretation to native Wills."

That native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect is one of the most important of the "surrounding circumstances" which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained, they must not be departed from.

It is legitimate in construing a Will to look at a contemporaneous document referred to in the Will which the testator wrote or caused to be written with the express intent to render clear his wishes with regard to his succession.

The interpretation placed on the power by the testator's widows was referred to "for what it was worth."

VENKATA NARASIMHA APPA ROW *v.* PARTHASARATHY APPA ROW.

This was an Appeal from a judgment of the Madras High Court, reported in I. L. R. 29 Mad. at p. 437. There were cross-appeals to His Majesty in Council. Their Lordships of the Judicial Committee had decided one portion of the appeal, namely, that relating to the partibility of the Nidadavole Zamindari, in a previous judgment.

The remaining portion of the appeals related to Medur Estate. Several questions were involved in the determination of this appeal, but their Lordships of the Judicial Committee heard the parties on one question only, namely, whether the authority to adopt given in the Will, dated the 6th December 1864, to two widows jointly was valid and, if so, whether it could be exercised by one widow alone after the death of the other.

The Will was in the following terms :—

"As my illness increased and as I think I would not survive, you both should divide in equal shares my Zamindari Nidadavole and Baharjalli Pergannas and Amberpet Perganna, the cash in the upstair building and all other moveable and immoveable property. It has been arranged that my nephew (sister's son) Chiranjivi Vellanki Venkata Kristna Rao should enjoy hereditarily from son to grandson the profits of the village of Mundur attached to Amberpet Muttah and also of Nagulapalli and Rajupotepalli villages attached to the Taluqdari and that my brothers-in-law Vellanki Jagannadha Rao Garu and Sura Rao Garu should enjoy hereditarily the profits of the village of Undrajavaram attached to Nidadavole Perganna paying every year the peishcush fixed therefor at the Sub-Division according to the *kistbund* (instalments). You both should maintain our Samstanam servants—clerks, *dasis*, and other servants. You should for the most part live in harmony with my younger brother Chiranjivi Venkatadri Appa Rao. You should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our Samstanam should continue. In all matters, you both should act without quarrelling. I have this day alone caused a petition to be written and sent to the Collector of Godavari in regard to this matter. You both should, without fail, act according to the aforesaid *paddhalis* (terms)."

Three Courts expressed their views upon the question. The Subordinate Judge of Kistna in his judgment, dated the 2nd December 1899, held that the surviving widow was competent to adopt. He said :—

"On the authorities quoted in the* margin the Plaintiff's Vakil contended that the 1st Defendant had no right to adopt after the death of her co-widow as the power granted was indivisible and one of the widows to whom it was granted had died before any adoption was made. He said that the Will does not say that, if one of the wives does not agree, the other can adopt and that the test is whether the 1st Defendant could adopt if her co-widow were alive and unwilling to adopt. The argument in fact presumes a dissent from one who had no occasion to dissent and who is no longer alive to dissent. The Vakil admitted, however, that he could not lay his hands on any case exactly in point, *viz.*, one where the power was given by the husband as in F (*a*) and the adoption was made by one of the widows after the death of the other.

The case of *Mondakini* v. *Adinath* (1)

(1) I. L. R. 18 Cal. 69 (1890).

* I. L. R. 18 Cal. 69 (1890) Mayne's H. L. Art. 106.

seems inapplicable here. That was a case where a man died leaving two widows and having given either of them the power to adopt a son, and the younger widow, on the refusal of the elder one to adopt, adopted a son.'

"And there the said High Court held :—

"'That the estate which was in the elder widow was divested by the adoption and that the adopted son took all the estate of his adoptive father.'

"Passing to Art. 106 of Mayne's Hindu Law we find it runs thus :—

"'Where there are several widows, if a special authority has been given to one of them to adopt, she, of course, can act upon it without the assent of the others, and, I presume, she alone could act upon it. If the authority has been given to the widows severally, the junior may adopt without the consent of the senior, if the latter refuses to adopt. In Bombay, it is said that where there are several widows, the elder has the right to adopt even without the consent of the junior widow, but that the junior widow cannot adopt without the consent of the elder, unless the latter is leading an irregular life, which would wholly incapacitate her.'

"Even this does not seem to apply to the circumstances of this case because under F (*a*) power is given to both the widows and the senior exercised it after the death of the junior.

"The contention of the Plaintiff's Vakil seems to me to be quite untenable. So far as I can see all that the testator meant in F (*a*) was that, if the two wives he was leaving behind him should think of continuing the Zemin in his line, they should adopt a boy from amongst his near kindred without any disputes between them.

"If the senior wife alone was authorised the junior would be divested and *vice versa*; but that is not the case here as the permission was given to both and their signatures were secured to the Will containing the same. If only one of the widows adopted during the lifetime of the other and the latter dissented, then there would be *kalatalu* (disputes) as observed in F (*a*) because by such adoption the dissenting widow would lose her share in the estate. It is only in such a case that the adoption by one widow might be contended to be invalid. In the present case, however, one of the widows died long ago and so the first Defendant, the surviving widow, had none to act in harmony with or contend with. There is nothing in the language used in F (*a*) to prevent either widow from adopting a boy after the death of the other. There is no such prohibition or revocation of an authority in it ; nor is there anything therein to lead one to suppose that if the adoption was ever made it should be made by both and that during the lifetime of both and if not, not. The object the testator had in permitting the adoption being the continuance of the estate in his line, the language used in the Will well enables one widow to adopt a boy after the death of the other widow. Otherwise and if the surviving widow construed the Will as if it conferred no right on her to adopt after the death of her co-widow, effect could not be given to the intention of the testator at all regarding the continuance of the Samstanam in his line. In the absence, as here, of any prohibition to the surviving widow to exercise the authority, or of any special disqualification in the first Defendant to give effect to the intention of her husband, certainly it must be conceded and presumed that she has the

right to adopt after the death of her co-widow and that that right did not die out with the co-widow.

"Then again the first Defendant was about 37 or 38 years of age when her husband died. If one of the widows died, the necessity to adopt would not cease on a proper interpretation of the intention of the testator. It is therefore idle to say that the authority to adopt would be at an end if either widow died. When one of the widows to whom the power was given is alive and capable of exercising it, how can the power die out as it is not one that could be divided between the two widows and no part of it would die with the death of either. With the death of one widow what was lost was the effect on the two widows of the provision in the Will to deal amicably and without disputes in making the adoption, and not the authority given to adopt.

"If the argument used by the Plaintiff's Vakil be adopted the first Defendant could not enjoy the estate of her husband after her co-widow's death whereas she has been enjoying the whole of it ever since the latter's death and none has objected to the same till now. If there could be no objection to the 1st Defendant's solely enjoying her husband's estate there could be none to her adopting a boy to take over that estate as desired by him. There can be no doubt that the authority survived to the surviving widow just as the estate survived. In fact the case of the power given to adopt is a much stronger one than the case of the estate because by making the adoption the 1st Defendant divests herself of the whole and not merely a moiety of the estate as the authority creates a *full owner* to the estate. It is only the widows of Narayya Appa Rao that could have adopted to him, and he could have authorised none else to adopt a son to him. Even in the absence of an authority from Narayya Appa Rao the 1st Defendant could have adopted a boy after her co-widow's death with the permission of his *sapindas*; and while so, to say that F (*a*) prevents her from adopting after her co-widow's death seems odd and idle.

"If under the will F (*a*) the authority to adopt did not survive to the 1st Defendant, their Lordships of the Madras High Court would have observed so in the case of *Papamma* v. *Appa Rau* (2) and not considered there the 1st Plaintiff's husband's step-mother's right to give the 1st Plaintiff's husband in adoption on the assumption that the 1st Defendant had the power to adopt him. Their Lordships have distinctly observed at page 396 of the said volume that 'Though Papamma Rao's authority to adopt was denied in the plaint, the Subordinate Judge considered it proved and there is sufficient evidence to warrant the finding.'

"This matter of the authority to adopt seems to be analogous to the survival of trust to the remaining trustees on the death of one of the trustees and the survival of the power to executors and administrators of an estate to administer it on the death of one of the executors or administrators thereof.

"I accordingly find that the first Defendant was quite competent to adopt a boy after the death of her co-widow."

The District Judge held that the joint authority was invalid and if valid, could not be exercised by one widow only.

The High Court (Davies and Benson, JJ.) reversed the decision of the District Judge. In the course of their judgment they said :—

(2) I. L. R. 16 Mad. 384 (1893).

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"It is then contended on behalf of the Defendants that that authority was in itself invalid, because it was a power granted jointly to the two widows, whereas it was decided in the Uthumalai case, reported in *Annapurni Nachiar* v. *Forbes* (3) that only one widow can make an adoption and therefore an authority given to two must be illegal.

"To begin with, there is no such ruling in the case referred to. All that their Lordships have done is to notice with approval a Bengal case where three widows having been authorized to make an adoption, it was held that only one could take the given son in adpotion so as to constitute herself the mother. But so far from the authority given to more than one widow to adopt being held *ipso facto* invalid, the adoption that was actually made in that case by one of the three widows under that authority was not disputed, which it must have been if the authority to adopt was itself illegal. There is, therefore, no ground for this contention.

"The next contention is that the authority in this case being to the two widows jointly could not be exercised after the death of one by the surviving widow. There is no warrant for this proposition in the Will itself. It is true that no provision is made as to what is to happen if one widow dies, no adoption having been made during her lifetime. But there is no prohibition that one widow alone should not adopt after the death of the other. During the lifetime of both it might well be urged that both should combine in making the adoption. But that is no ground for holding that, when one had died, the authority given to both widows was exhausted and did not remain with the survivor. The intention of the testator clearly was that the widows should enjoy the estate so long as they liked. He required no immediate adoption, which would have ousted the widows from the enjoyment of the estate. But he leaves it to them to select their own time for making the adoption for the continuation of his line. He was, of course, anxious that, for this purpose, an adoption should ultimately be made. But this very object would have been defeated if, after the death of one widow, the other was not to exercise the power. We should not impose limits and conditions on a power which the giver of the power has not himself imposed either expressly or impliedly. A Hindu can authorise no one but his widow or widows to make an adoption. He cannot nominate any one else. He, in fact, has no choice in the matter. So that the authority given to the widows here could have been given to them in no other capacity than that they were his widows. It was by virtue of their *status* or position as widows that the authority was conferred, and the giving of the authority to both widows without any restrictions is tantamount to giving authority to each. The case is analogous to that of a power given to a person not in his individual capacity, but as holding a particular office, such as that of an executor. And in such a case, the law is that the power conferred on two is not extinguished by the death of one. The fact that the widows had a right of survivorship in regard to the property is a further good argument that the survivor of them also had the right under the husband's authority to appoint an heir to that property. This disposes of the second objection, and we hold that

(3) L. R. 26 I. A. 246, 252: S. C. 3 C. W. N. 780; I. L. R. 23 Mad. 1 (1899).

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Papamma Row had full power to make an adoption after the death of her co-widow, Chinnamma Row."

Hence this Appeal.

Sir R. Finlay, K. C., and *Mr. L. De-Gruyther, K. C.*, (with them *Mr. A. M. Dunne* and *Mr. K. Brown*) argued that the joint authority to adopt was invalid and if valid, the power could not be exercised by the surviving widow. The joint power to two widows was bad in itself. It was repugnant to have two mothers and mother's relations if both adopted one boy. The terms of the Will shew that it empowered a joint adoption. An authority to adopt with consent of an executor was held invalid, *Amrita Lal* v. *Surnomoyee* (4). An adopted son assumes the same status as a son begotten in the adoptive family. Mayne's Hindu Law (7th Edn.), p. 214; *Kali Komul* v. *Uma Sankar* (5). Adoptive mothers are unknown to the Hindu Law, only one mother adopts. The wife who associates with her husband in adopting would succeed to the adopted son in preference to the one not joining. *Annapurni Nachiar* v. *Collector of Tinnevelly* (6), *Annapurni* v. *Forbes* (3). The parties being Sudras the religious motive for adoption is not so strong as in the case of the twice-born Hindus. Stoke's Hindu Law, p. 588. Further, the power having been conferred upon two persons, it could only be exercised by the two jointly. Macnaghten's Considerations of Hindu Law, p. 171 and Appendix XI (note); *Huradhun* v. *Muthoranath* (7). The opinion of West and Bühler (Hindu Law, at p. 977) where *Dinkar Sitaram* v. *Ganesh Shivram* (8) is referred to that a husband may authorize both widows to adopt is not borne out by the ruling cited. Powers conferred must be strictly followed and where conferred on two persons jointly it cannot be exercised by one of them alone. Reference was made to the following authorities: *Rakhmabai* v. *Radhabai* (9), *Collector of Madura* v. *Mootoo Ramalinga* (10), *Indar Kunwar* v. *Jaipal Kunwar* (11), *Pudum Singh* v. *Oodey Singh* (12), *Mutsaddi Lal* v. *Kundun Lal* (13), *Montefiore* v. *Browne* (14); Farwell on Powers, p. 434 (2nd Edn.); Mayne's Hindu Law, pp. 141, 145, 151; Steele's Local Custom, pp. 48 and 187. The view taken by the District Judge was right.

Sir Edward Clarke, K. C., and *Sir Erle Richards, K. C.*, (with *Mr. Ross, K. C.*, and *Mr. T. Prakasam* of the Madras Bar) for the Respondents contended that the decision of the High Court was right. There was no authority or reason for the Appellant's contention that a joint power was bad and invalid by itself. In Bombay a joint adoption is allowed and Madras differed from Bombay only in that authority to adopt was required there. A joint adoption could not be said to be impossible. The giving of authority to widows is to free them from the incapacity to adopt. None of them may adopt. The terms of the Will only impose one limitation and that is that the two widows are to concur in selecting a boy. She alone who actually receives the boy be-

(3) L. R. 26 I. A. 246, 252: s. c. 3 C. W. N. 730; I. L. R. 23 Mad. 1 (1899).
(4) L. R. 27 I. A. 128: s. c. 4 C. W. N. 549 (1900).
(5) L. R. 10 I. A. 138 (1883).
(6) I. L. R. 18 Mad. 277, 283 (1895).
(7) 4 Moo. I. A. 415, 425 (1849).
(8) I. L. R. 6 Bom. 505 (1879).
(9) 5 Bom. H. C. R. 181 (1868).
(10) 12 Moo. I. A. 397 (1868).
(11) L. R. 15 I. A. 127, 143 (1888).
(12) 12 Moo. I. A. 350, 355 (1869).
(13) L. R. 33 I. A. 55 (1906).
(14) 7 H. L. Cas. 241, 263 (1858).

comes his mother. Adoption means and includes selection of a boy and the actual ceremony of receiving the boy. The widows were required to consent to the selection only and not to the ceremony of receiving or adopting. The power in the Will was given to each widow to adopt but by implication one was to do so with the concurrence of the other. It was not joint but several authority.

The authority was there, and the Court should give effect to it. Such a construction ought to be put on the terms of the Will as will give effect to the natural meaning and intention of the testator. It is the natural wish of a sonless Hindu that an adoption should be made. The presumption is in favour of adoption. A broad and reasonable interpretation ought to be put on the Will of a Hindu made so far back as 1864. The English rules of construction had no application to India. Reference was made to *Bhagabati* v. *Kali Charan* (15), *Annapurni Nachiar* v. *Forbes* (3), *Indar Kunwar* v. *Jaipal Kunwar* (11); West and Bühler's H. L., p. 977. *Sarada Prasad* v. *Ram Pati* (16), *Akhoy Chundra* v. *Kalapahar* (17), *Kannepalli Suryanarayana* v. *Pucha Venkata* (18). The surviving widow could exercise the power. The doctrine of powers had no application to the Hindu widows. *Hunooman Persaud* v. *Munraj Koonwaree* (19), *Bai Motivahoo* v. *Bai Mamoobai* (20), *Rabidat Singh* v. *Indar Kunwar* (21), *Surendra Keshav* v. *Doorga Sundari* (22). Golap Chandra Sarkar on Adoption, p. 245. Mayne's Hindu Law at p. 144 is erroneous and not supported by authority.

Sir R. Finlay, K. C., in reply distinguished the cases cited on behalf of the Respondents. He referred to *Hunter* v. *Attorney-General* (23), *Brassey* v. *Chalmers* (24).

He submitted that the plain meaning of the Will was that one widow was not to adopt without the consent and concurrence of the other.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—The further question now for consideration in these consolidated appeals is the ownership of the Zamindari of Medur. It is common ground that at one time this zamindari belonged to Narayya Appa Row, the son of Venkataramayya Appa Row, who will for convenience be referred to as Narayya the younger. It is also common ground that Narraya the younger died intestate on the 4th August 1895. The points in dispute are whether at the time of his death Narayya the younger had become by adoption the son of Raja Narayya Appa Rao Bahadur Garu, who died on the 7th December 1864 (and who will for convenience be referred to as Narayya the elder), and whether if such adoption took place, it had the effect of divesting him of the Zamindari of Medur. In order that the Respondents in this appeal may sustain their claim to a share of the Zamindari of Medur, it is necessary that they should succeed on both

(3) L. R. 26 I. A. 246, 252: s. c. 3 C. W. N. 730; I. L. R. 23 Mad. 1 (1899).
(11) L. R. 15 I. A. 127, 129 (1888).
(15) L. R. 38 I. A. 54, 64: s. c. 15 C. W. N. 898 (1911).
(16) 17 C. W. N. 319 (1912).
(17) L. R. 12 I. A. 198 (1885).
(18) L. R. 33 I. A. 145: s. c. 10 C. W. N. 921 (1906).
(19) 6 Moo. I. A. 393 (1856).
(20) L. R. 24 I. A. 93, 105: s. c. 1 C. W. N. 366 (1897).

(21) L. R. 16 I. A. 53, 59 (1888).
(22) L. R. 19 I. A. 108 (1892).
(23) [1899] A. C. 309 at p. 313.
(24) 16 Beav. 223, 233 (1852)

these points, inasmuch as their claim by inheritance from Narayya the younger depends on his having been validly adopted into the family of Narayya the elder. Their claim must therefore fail if he was not validly adopted, or if, having been so adopted, he thereby forfeited his right to the Zamindari of Medur, which appears to have been ancestral property in his family of origin.

The alleged adoption took place after the death of Narayya the elder and was made by his widow Papamma. The Respondents claim that this adoption was a valid exercise of the powers given by the last Will of Narayya the elder. The Appellants, on the other hand, contend that the power of adoption which purported to be given by the said Will was in itself invalid, and that even if the power was valid as given in the Will the alleged adoption was not in accordance with that power, and was accordingly of no force or validity. If the Appellant succeed in making good either of these objections to the validity of the adoption, the whole claim of the Respondents admittedly falls to the ground, and their Lordships have therefore considered it desirable that these points should be fully argued in the first instance as preliminary points, and that they should express their opinion on them before considering the other portions of the case.

The Will of Narayya the elder is dated the 6th day of December 1864, *i.e.*, immediately previous to his death. He was a member of the Velama branch of the Sudras caste. He had two wives named respectively Papamma and Chinnamma. So much turns upon the language of this Will that it is advisable to cite it in full. It reads as follows :—

" As my illness increased, and as I think I would not survive, you both should divide in equal shares my Zamindari Nidadavole and Bahargalli parganas and Amberpet pargana, the cash in the upstair building and all other moveable and immoveable property. It has been arranged that my nephew (sister's son) Chiranjivi Vellanki Venkatakrishna Row should enjoy hereditarily from son to grandson the profits of the village of Mandur attached to Ambarpet Muttah, and also of Nagulapalli and Rajupotepalli villages attached to the Taluqdari, and that my brothers-in-law Vellanki Jagannadha Row Garu and Vellanki Sura Row Garu, should enjoy hereditarily the profits of the village of the Undrajavaram attached to Nidadavole pargana paying every year the peishcush fixed therefor at the sub-division according to the kistbund (instalments). You both should maintain our *samastanam,* servants, clerks, *dasis* and other servants. You should for the most part live in harmony with my younger brother Chiranjivi Venkatadri Appa Row. You should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our *samastanam* should continue. In all matters both should act without quarrelling. I have this day alone caused a petition to be written and sent to the Collector of Godavari in regard to this matter. You both should without fail act according to the aforesaid *paddhalis* (terms)."

The Will is signed by the testator and witnessed by four witnesses, and under their names come the words :—

" We both have agreed to act according to the aforesaid terms."

and this is signed by Papamma and Chinnamma.

Chinnamma died in 1881. It was not until the year 1895 that any steps were taken with regard to the adoption of a boy, but in that year the surviving wife Papamma purported to adopt Venkataramayya, the father of Narayya the younger. This so-called adoption of Venkataramayya was declared by the Court to be invalid, and thereupon in the year 1890 Papamma purported to adopt Narayya the younger.

The Appellants contend that the proper construction of the language of the Will is that, it gives a joint power of adoption to the two wives to be exercised when

they shall think it desirable that the testator's *samastanam* should continue. They contend that such a joint power of adoption is in itself invalid, inasmuch as only one wife can adopt, and they further say that, even if this be not so, the occasion for the exercise of the power is when the two wives should jointly decide that it was desirable that the family should be continued, and the act must then be the joint act of the two wives. If this be so, it follows that the power could not be exercised after the death of one of the two wives, since thereafter there could be neither agreement nor joint action.

It is somewhat difficult to set out precisely the contentions of the Respondents on these points. Their Counsel admit that while both the widows were living no adoption could take place without the consent of both. But they contend that the proper interpretation of the language of the Will is that when the two widows should agree on the desirability of adoption taking place and on the person to be adopted, the adoption should be carried out by one of the widows (preferably the first wife) who would thereby become in law the mother of the adopted child. They contend that a joint power of adoption is valid by Hindu Law and must be interpreted in the above sense, and further, that on the death of the one widow the power both of choice and adoption would, under the terms of the Will, pass to the survivor.

Before examining the validity of these contentions it will be well to clear up one or two points upon which their Lordships are of opinion that no reasonable doubt can exist.

In the first place, there could be no power of adoption by either or both of the widows in the present case excepting such as might be derived from the powers given by the Will. In this part of India, at all events, a widow has no power to adopt a son to a deceased husband excepting by express authority given by him in his lifetime or by Will. In the next place, only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance.

But it does not follow as a matter of necessity from these considerations that a power given to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife. But their Lordships are of opinion that the validity of a joint power of adoption and its interpretation are questions of far-reaching importance in Hindu law and that in the present case the materials for deciding them are very insufficient. They would greatly regret to find themselves compelled to decide such questions on imperfect materials and inasmuch as in the view which their Lordships take of this case it is not necessary that these

points should be decided they desire to express no opinion upon them, and will assume for the purposes of their decision that the Respondents are right in their contention that such a joint power of adoption given to the two widows was, if properly interpreted, a valid power, and that if they had agreed to a person to be chosen for such adoption they could have validly executed the power.

There remains the second point, *i.e.*, whether the power given by the Will was exerciseable by the surviving widow alone after the death of the other.

The arguments of the Appellants on this point are that upon a proper construction of the Will it gives a joint power to the two wives to be exercised when they jointly come to the conclusion that it is desirable that it should be exercised, and that it should then be exercised only in case of a boy to be chosen by them jointly. As a mere matter of construction their Lordships are of opinion that the Appellants are right in this contention and in an ordinary case of the giving of a a joint power to two donees the legal consequences claimed by the Appellants would follow.

But the Respondents claim that this must not be treated as a mere question of construction. They submit that the continuation of the line of the testator must be taken to have been for religious purposes in order that he might have the advantages of an heir who could perform the religious ceremonies affecting his future life. They therefore contend that this Board should put aside all rules of law prevailing in England with regard to joint donees of a power and should, as a matter of judicial duty, give effect to the intention of the testator with respect to procuring for himself an heir by adoption, and not permit that intention to be defeated by its becoming impossible of execution by the two donees jointly by reason of the death of one of them.

Their Lordships are of opinion that this reasoning is unsound. In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i.e.*, to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure—"The Court is entitled to put itself into the testator's armchair." Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testament-

ary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of Wills of every nationality and every religion or rank of life.

This fundamental principle does not clash with the principle that the Court will not necessarily apply English rules of construction to such a Will as we have here to deal with. These rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *primâ facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or the surrounding circumstances, the Court can come to the conclusion that it is there used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of immediate vesting of an estate. Such rules are purely an English product based on English necessities and English habits of thought, and there would be no justification in taking them as our guide in the case of Indian Wills. Nor does this fundamental principle clash in any way with what is sometimes called "giving a liberal interpretation" to native Wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the "surrounding circumstances" which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained, they must not be departed from.

Applying these principles, their Lordships have to ascertain the true intentions of the testator from the language used in the Will. The words are "You should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our *samastanam* (family) should continue." Such an adoption would have effects of two very different kinds. In the first place it would provide someone who would offer the customary oblations for the good of the soul of the testator, and in the second place it would change the succession of the property. The devolution after the death of the widows would no longer be to the persons entitled to succeed on an intestacy, but to the heirs of the person adopted. Counsel for the Respondents would have us regard the religious motive as the overmastering one, so that the intentions of the testator must be treated as if they were dictated by it alone. Their Lordships fully appreciate how strong such a motive may be expected to be in the mind of a Hindu. But in their Lordships' opinion the language of the testator points to the predominance of the secular motive. He does not direct that there should be an adoption, as he would naturally have done had he wished in all events to secure that there should be a son to perform the due religious rites. He makes it depend on the opinion of his widows whether and when an adoption should take place. It is common ground that the occasion for an adoption would not arise in the lifetime of the two widows unless they both agreed to use the power, and there is nothing which indicates any intention to interfere

with their freedom of choice in the matter, whether the true interpretation be that the power was joint or several.

But this does not exhaust the materials which we have for arriving at the testator's true intentions. In judging of the light in which the directions of the testator are to be regarded, it is legitimate to look at the contemporaneous document referred to in the Will which he wrote or caused to be written with the express intent to render clear his wishes with regard to his succession. This document has, of course, no testamentary effect, but it is legitimate to look at it as one of the surrounding circumstances in order to test the soundness of the principle of interpretation pressed upon us by Counsel for the Respondents. In the Will the testator writes: "I have this day alone caused a petition to be written and sent to the Collector of Godavari in regard to this matter." This petition, which is signed by the testator and bears the same date as the Will, is substantially a repetition of it, though the language is not precisely the same. The passage relating to adoption reads thus: "That, if it should strike them (*i.e.*, his widows) to continue the *samastanam*, they should adopt a boy who is my *sannihita*." This language emphasizes that which is expressed also in the Will, *viz.*, that the adoption should only take place if and when the widows thought it desirable that such should be the case, or in other words, if and when they thought it desirable that the succession to the property should be changed. Had the testator been moved by an overmastering religious motive to secure that there should be someone to act as his son after his death, it is inconceivable that he would have used such language or made such provisions relating to the future adoption of a son. He would have directed that an adoption should take place and not left it to depend on the problematical concurrence of his widows in their views as to its desirabilty.

For what it is worth, it is clear that this was the interpretation put upon the Will by the widows themselves. It will be remembered that they signed the Will at the date of its execution and promised to act according to its terms. Three days after this they write to the Collector of Godavari referring to these provisions of the Will in the words "and that if it should strike us that the *samastanam* should continue we should adopt a boy who is our *sannihita*." The testator died in 1864 His widow Chinnamma died in 1881 leaving Papamma surviving her. It is not until 1885, four years after the death of Chinnamma, that any steps to adopt a boy are taken It is clear therefore that the widows who were acquainted with the provisions of the testator's Will at the time and undertook to carry them into effect did not interpret them as doing more than leaving them quite free to adopt or not as they might think desirable.

Their Lordships are therefore of opinion that in the present case there is nothing which requires or justifies them in interpreting the provisions of the Will with regard to the adoption in any special way arising from the fact that the testator was a Hindu. They must adhere to the plain meaning of the language used. So construing it they are of opinion that it gives to the widows jointly the power to adopt a son should an occasion arise which in their opinion makes it desirable so to do. The power is a joint power and the occasion on which it is to be exercised depends on their joint opinion. In other words, the exercise of the power

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is vested in the discretion of the joint donees. Now, it is clearly the law that in such a case the death of one of the donees puts an end to the joint power. This is not by virtue of any peculiar doctrine of English law or of any series of English decisions. It flows from the nature of a joint power. If power is given to A. and B. *personæ designatæ* to do an act if and when they think it desirable the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. This cannot be the case after the death of one of them and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague nor can he then do the act, seeing that the authority to do it is only given to the two acting jointly. The case is different when the power is vested not in *personæ designatæ* but in the occupants for the time being of a specified office such as executors or trustees, but that is not the case which we have to consider here.

The point may perhaps be put in a simpler form not involving any appeal to legal doctrines as to joint donees of a power. Their Lordships are of opinion that the words of the Will, when properly construed, relate to choice and adoption by the two widows acting jointly. Hence those words refer only to the period of time when both widows are living. The Will is silent as to the period after the death of one of the widows and if their Lordships were to hold that Papamma could adopt a son after Chinnamma's death they would be providing for a period of time which the testator left unprovided for, and unnoticed in his Will, *i.e.*, they would be making an addition to his testamentary dispositions which is a thing that no Court is entitled to do.

It follows therefore that at the death of Chinnamma the power to adopt given to his widows by the testator came to an end, and therefore the alleged adoption of Narayya the younger is of no validity.

On the consolidated Appeals (judgment in one of which has already been delivered on the 24th July 1913) their Lordships will therefore humbly advise His Majesty to affirm the Decree of the High Court of Madras, dated the 20th November 1905, so far as it dismissed with costs Appeal No. 32 of 1904 and to reverse the said Decree and the Decree of even date therewith so far as they dismissed with costs Appeals Nos. 122 and 123 of 1900, and allowed with costs Appeal No. 41 of 1904, and that it ought to be declared that the adoption of Narayya Appa Row, the son of Venkataramayya Appa Row, the Zamindar of Medur, and Venkataramayya Appa Row, his wife, by Papamma, the widow of Narayya Appa Row, the Zamindar of Nidadavole, was invalid, and that on the death of Venkayamma Row, Rangiah Appa Row and Venkata Narasimha Appa Row, both now deceased, became entitled as reversionary heirs to the estate of Medur and the lands and moveable properties appertaining thereto, and further that the said estate and the lands with mesne profits and the moveable property appertaining thereto, ought to be divided into moieties between the Appellants, *viz.*: (1) Venkatadri Appa Row, the only son of the said Rangiah Appa Row, as to one such moiety, and (2) Meka Venkataramayya Appa Row and Sobhanadri Appa Row, the two sons of Venkata Narasimha Appa Row, as to the other moiety.

With regard to the costs, their Lordships think that as to the Nidadavole estate there ought to be no costs in the Privy

Council, and as to the Medur estate there ought to be no costs either in the Privy Council or in the Courts below.

Solicitors: *Messrs. T. L. Wilson & Co., Chapman, Walker, Shephard* and *Douglas Grant.*

B. D. *Appeal allowed in part.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUITS NOS. 453 AND 737 OF 1912.

W. P. ABRO
v.
PROMOTHO NATH MUKERJEE,
and
PROMOTHO NATH MUKERJEE,
v.
W. P. ABRO.

CHAUDHURI, J.
1914,
Heard,
15, January.
Judgment,
19, January.

Agreement for purchase and sale of immoveable property—Condition for return of earnest-money, on non-approval of title by purchaser's solicitor—Non-approval must be reasonable and not mala fide—*Title, approval or rejection, condition as to, in agreement of sale.*

Where an agreement for purchase and sale contained a condition for the return of the earnest money on the vendor's title not being approved by the purchaser's solicitor and the solicitor disapproved of the title on the ground amongst others that one of the former owners had mortgaged the property pending a partition suit at which the property was sold by auction under directions of Court and purchased by the present vendor's predecessor in title for value and the vendor was unable to furnish any information regarding the mortgage but urged that it was inoperative and that his title being derived from a purchaser without notice was not open to objection:

Held—*That it cannot be said that the solicitor was unreasonable in refusing to accept the title inasmuch as he cannot be expected to go into any question of evidence as to whether the purchase was without notice or not; and, further, there being nothing to show that he acted in bad faith or was unreasonable in advising his client to reject the title, the intending purchaser was entitled to get back from the vendor the earnest money and his solicitor's costs for investigation of title as was stipulated for in the contract.*

This was a suit instituted by the Plaintiff against the Defendant for the recovery of the earnest money of Rs. 1,001 paid by the Plaintiff to the Defendant for the purchase of the premises No. 13, Marsden Street. Cl. 5 of the agreement of sale provided that unless the purchaser's attorney approved the title the sale was not to be completed and the vendor moreover was to pay his costs and to refund the earnest money. The Plaintiff's solicitor was not satisfied with certain particulars of title produced by the Defendant's solicitor. These were principally that the Defendants were unable to furnish particulars as to whether a certain mortgage was subsisting or not and further that an order obtained from the District Judge of Lahore for the sale of an infant's share for the highest price available was indefinite. The Defendant's solicitor offered to get the order of the District Judge amended but could not furnish any information regarding the mortgage but contended that the title of his client was good inasmuch as his predecessor had purchased the property at a sale held under the directions of the Court for value and without notice. The Plaintiff's solicitor would not, however, accept the title and demanded the return of the earnest money and his costs in connection with the investigation of title. The cls. 3, 4 and 5 of the agreement for purchase

Defendant that he had advised his cilent not to accept the title. He asked for the return of the earnest money and for the payment of his bill of costs. In that letter the attorney said that the answers to his requisitions were not satisfactory and he specified the following items: that when this property was sold in a partition suit there was no proof of the payment of the consideration money by the purchaser at the sale directed in the partition proceedings to the commissioner of partition; that he was unable to get any proof of such payment from search in the record of those proceedings; that the order of the Lahore Court authorising the Defendant No. 1 to sell the infant's share was insufficient and unsatisfactory, and an amendment of that order was necessary; that no explanation had been given regarding a mortgage deed affecting this property which he had discovered during his search for encumbrances, the deed appearing to have been executed by one Radha Nath Sircar. In the first requisition on title, the Defendants were called upon to produce certain original documents or authenticated copies thereof. The Defendants said that they had not any in their possession, and they asked Plaintiff's attorney to inspect the records of Suit No. 342 of 1879 in which the partition proceedings had taken place. A search was thereupon made by the Plaintiff's attorney and an objection was taken by him that although the conveyance whlch was the source of the title of the Defendant's father recited that a certificate was to be appended to the conveyance shewing payment to the Registrar of the money derived from the sale of the property directed by this Court in the partition proceedings, yet such a certificate was wanting. It seems that in the records he searched he was unable to find any proof of such payment to the Registrar. No doubt the circumstances showed that the amount must have been paid to the Registrar. Since the institution of the suit and in fact after the first day's hearing upon further time being obtained by the Defendants and upon a search being made by them, the Registrar's Sale Book has been found in which an entry appears shewing payment of the money which the conveyance recited had been paid. Since the attorney searched the records and had taken upon himself the duty of making the search, I do not think that his failure to obtain this evidence was by itself sufficient ground for rejecting the title.

The second objection relates to the Lahore District Judge's order. The order authorised the adult Defendant to sell to the person who offered the highest price. This order seems to me insufficient. There was no difficulty in mentioning the substance of the agreement to the District Judge and getting his sanction to the proposed sale to the Plaintiff and the position taken by the Defendant's attorney, that as the terms of the agreement between the parties were vague, and the actual amount to be paid by the Plaintiff remained undetermined, the agreement to sell to him could not be mentioned in the application for the Judge's sanction. This position does not appear to me to be reasonable. The agreement was for a particular sum liable to deduction at a particular rate, for deficiency, if any, in the quantity of land mentioned in the agreement. The terms are in no way vague, and I cannot say that it was not a just objection on the part of the Plaintiff's attorney that the order authorising the sale was unsatisfactory.

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The next point relates to the mortgage which the Plaintiff's attorney found outstanding upon the search made by him and which appeared to have been executed by one Radha Nath Sircar for Rs. 10,000 in favour of one Ram Gopal Bose. When the Plaintiff's attorney asked for further information about the matter, the Defendants' answer was as follows :—"The vendors have no knowledge whatsoever of the existence of any such mortgage. If Radha Nath executed any such mortgage during the pendency of the Suit No. 342 of 1879, the sale would not be binding upon the purchaser for value without notice at an auction sale ordered in the said suit." They asked whether the mortgage in question was in respect of the premises purchased by the vendors. It appears that the mortgage covered the premises in suit and also other properties. The answer to the Plaintiff's requisition by the Defendants is unsatisfactory. The Defendants suggested that as their father was the purchaser for value without notice, the mortgage was inoperative. Now, the question as to whether the purchase was without notice or not, is matter of evidence, and I am not prepared to say that the Plaintiff was not justified in requiring satisfactory explanation. In the absence of such explanation I do not think he could be forced to take the title offered.

In addition to the grounds taken on the requisitions, two other grounds which do not appear to me of much value have been taken by the Plaintiff's Counsel, namely, that there was nothing to show that the vendors fully represented the interest of Soshi Bhusan Mukerjee. A further ground was taken about the absence of the Trust Deed which was the subject-matter of litigation in the suit above-mentioned and also the absence of other title-deeds. Now, so far as the title-deeds are concerned, they appeared not to be in the possession of the Defendants and they did not even offer to give any copies or procure any copies for the Plaintiff.

In the agreement for the sale to the Plaintiff the express provision was that the title was to be subject to the approval of the Plaintiff's attorney therein named. It seems quite clear from paragraph 4 of the agreement that what was intended was that the title was to be found good and approved of by the purchaser's solicitor. Although in the written statement the rejection of title by the Plaintiff's solicitor was charged to be *mala fide* and unreasonable, learned Counsel for the Defendants stated that he did not make any charge of *mala fides* against the Plaintiff or his attorney but that he rested his case solely on the ground that their rejection was "unreasonable." It is clear that the agreement expressly stipulated for a person therein designated to approve the title on behalf of the Plaintiff. In *Bartlett* v. *Greene* (1), Lord Coleridge, L. C. J., said that such a stipulation was a reasonable stipulation; that it could not be treated as having no meaning; that it was not correct to say that the stipulation for the approval of the solicitor puts into the contract no other terms than what the law would have implied. It was an express stipulation, and therefore effect was to be given to it. Justice Brett in the same case said that the stipulation was an ordinary and important one, and unless the approval of the solicitor was withheld unreasonably or *mala fide* (which was not alleged in

(1) 30 L. T. (N. S.) 553 (1874).

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and sale, which are material to this case, are as follows :—

"3. The vendors shall make over to the purchaser's solicitor all the title-deeds relating to the property on the day following the execution of these presents and the purchase shall be completed within the 15th day of December 1911 provided the title be approved of by the purchaser's solicitor."

"4. If the title be found good and be approved of by the purchaser's solicitor then the vendors will execute a proper conveyance in favour of the purchaser or his nominee or nominees in which the vendors shall make all necessary parties join and the purchaser shall be entitled to the possession of the property from the date of the purchase, all outgoings prior thereto being borne and paid by the vendors."

"5. If the title be not approved by the purchaser's solicitors the vendors shall on demand refund the earnest money and shall pay the costs of the investigation of title and if after the title being approved of, the purchaser fails to complete the purchase he shall forfeit the earnest money as liquidated damages and the vendor shall be entitled to enforce specific performance of his agreement."

The facts of the case are fully stated in the judgment.

The Defendants alleged that in rejecting the title the purchaser's solicitor did not act *bonâ fide* and that in doing so he acted unreasonably.

Mr. N. Sircar (with him *Mr. P. N. Chatterjee*) for the Defendants.—If I show that the purchaser's attorney was unreasonable that is enough. I do not go into the question of *mala fides*. I say that the disapproval was unreasonable.

CHAUDHURI, J.—Some meaning must be attached to a clause of that character?

Mr. Sircar.—We have made out a good title by amendment of order for sale of infant's share. We can get the order amended.

CHAUDHURI, J.—Until that order is forthcoming have you any title to sell?

Mr. Sircar.—Pending the suit Radhanath mortgaged his share in 10 properties.

CHAUDHURI, J.—What has happened to that mortgage?

Mr. Sircar.—I do not know. It is not necessary for us to know. There was a partition of family properties. It may not have been by a suit. It may have been an amicable partition. (Reads conveyance.)

Mr. Sircar.—We have been in possession since 1840. There is a clear admission by the parties. Everything showing that the money was paid.

CHAUDHURI, J.—On the date you entered into an agreement to sell had you any right to sell on behalf of the infants?

Mr. Sircar.—The question whether the person who bought was the highest bidder is a matter which may be difficult to prove. That does not affect my authority to sell. Rejection must not be an unreasonable one. Fry on Specific Performance, p. 143. *Treacher & Co., Ltd.* v. *Mahomedally Adamji Peerbhoy* (6).

Mr. H. D. Bose (with *Mr. S. K. Mullick*) for the Plaintiff contended that when the vendor is able neither to convey himself nor has the power to compel a conveyance from any other person, the purchaser as soon as he finds this to be the case may repudiate: and he is not bound to wait to see whether the vendor can induce some third person who has the power to join in making a good title to the property. Halsbury, Vol. 25, p. 403. Conditions of sale must be construed strictly against the person making them [*Greaves* v. *Wilson* (8)]. Our disapproval of the title was reasonable. There was the outstanding mortgage. The purchaser must have the legal estate and cannot be

(6) I. L. R. 35 Bom. 110, 116 (1910).
(8) 25 Beav 290 (1858).

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compelled to take an equitable estate only. [*Abel* v. *Heathcote* (9), *Freeland* v. *Pearson* (10)]; Williams, p. 472. A vendor cannot make a good title if he is unable to pay off an existing mortgage or procure the mortgagees to release their charges. (Williams, p. 166). Requisitions as to whether there are incumbrances remaining unsatisfied are requisitions as to title. (Halsbury, Vol. 25, pp. 355-6). It is not merely a matter of conveyancing. Purchaser must get such a title as he can force upon a re-purchaser from him. A marketable title is one which at all times and under all circumstances may be forced upon an unwilling purchaser, [*Pyrke* v. *Waddingham* (11)] and to force a title upon a purchaser the opinion of the Court must be so clear that it does not apprehend that another Judge would form a different opinion. [*Rodgers* v. *Waterhouse* (12)]. If purchaser has paid the purchase-money or any part of it and the purchase ultimately goes off without any default on his part he is entitled to a lien on the land for the amount he has paid. This rule extends to costs also. Halsbury, Vol. 25, p. 367; *Kitton* v. *Hewett* (13), *In re Furneaux and Airds Contract* (14). Reference was further made to *Freer* v. *Hesse* (15) and to *Nottingham Patent Brick & Tile Co.* v. *Butler* (16), *Greenslade* v. *Dare* (17); Williams, pp. 131, 134, 143, 166; *Banning* v. *Griffin* (18), *Greaves* v. *Greenwood* (19), *Re Jackson* (20), *Weston* v. *Savage* (21), *Brewer* v. *Broadwood* (22), *Lee* v. *Soames* (23), *Halkett* v. *Dudley* (24), (discussed as bad law in Williams, p. 186).

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

CHAUDHURI, J.—This is a suit for the refund of earnest money paid in view of an intended purchase by the Plaintiff of the premises mentioned in the plaint, with interest and costs. There was an agreement on the 10th November 1911 for the sale by the Defendant to the Plaintiff of the said premises subject to the approval of title by Mr. B. Sreemany, solicitor for the purchaser. Cls. 3 and 4 of which run thus "The vendor shall make over to the purchaser's solicitor all the title-deeds relating to the property on the day following the execution of these presents and the purchase shall be completed within 15th day of December 1911 provided the title be approved of by the purchaser's solicitor—" (Cl. 3). "If the title be found good and be approved of by the purchaser's solicitor then the vendors will execute a proper conveyance in favour of the purchaser or his nominee or nominees in which the vendor shall make all necessary parties join, and the purchaser shall be entitled to the possession of the property from the date of the purchase, all outgoings prior thereto being borne and paid by the vendors"—(Cl. 4). Requisitions of title were sent in. Answers were received, and eventually the Plaintiff's solicitor, Mr. Sreemany, by his letter of the 22nd December 1911, informed the

(9) 2 Ves. J. 99, 100 (1793).
(10) L. R. 7 Eq. 246, 249 (1870).
(11) 10 Hare 1 (1852).
(12) 4 Drewry 329 (1858).
(13) W. N. 21 (1904).
(14) W. N. 215 (1906).
(15) 4 De. J. M. & G. 495, 503 (1853).
(16) 16 Q. B. D. 778, 787, 789, 790 (1886).
(17) 20 Beav. 284, 292 (1855).
(18) 15 East. 293, 294 (1812).
(19) 2 Ex. D. 289 (1877).
(20) 2 Ch. 354 (1907).
(21) 10 Ch. D. 736 (1879).
(22) 22 Ch. D. 105, 109 (1882).
(23) 36 W. R. 884 (1888).
(24) 1 Ch. 590 (1907).

[CIVIL REVISIONAL JURISDICTION.]

CIVIL RULE No. 174 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J
1913,
Heard, 2, 5 &
12, May.
1914,
Judgment,
11, February.]

DARBARI PANJARA and others, Petitioners,
v.
BHOTI ROY and another, Opposite Party.

Indian High Courts Act, 1861, sec. 15—Sonthal Perganas Act (XXXVII of 1855), sec. 1, cl. 2, sec. 2—Sonthal Perganas Justice Regulation (5 of 1893), secs. 7, 9, 15, 27—Regulation 2 of 1886, sec. 25—Regulation 3 of 1872—Bengal Civil Courts Act (XII of 1887), sec. 12, 14—Statutory rules for the guidance of Civil Courts in Sonthal Perganas—Eviction of tenant in execution of decree for rent—Proper court to determine eviction—Sanction of Deputy Commissioner, meaning and effect of—Constitution of Courts in Sonthal Perganas—Jurisdiction of High Court to revise orders of Sub-Deputy Collectors, Sub-Divisional Officers and Deputy Commissioners in Sonthal Perganas.

On the application of the decree-holder landlord for execution of a decree for arrears of rent amounting to less than one hundred rupees by ejectment of the tenants the Sub-Deputy Collector of Deoghur in the Sonthal Perganas by whom the decree was made held that the judgment-debtors might be ejected from a portion of the holding and submitted the record to the Sub-Divisional Officer who recorded his opinion that the tenants should be evicted from the entire holding and with this recommendation forwarded the record to the Deputy Commissioner for orders. The Deputy Commissioner sanctioned eviction from the entire holding:

Held—*That the eviction in execution can be effected only by the Court executing the decree and the proceedings for ejectment of the tenants were not taken in conformity with the provisions of the Regulation and the statutory rules on the subject, inasmuch as the question of ejectment of the tenants from the entire holding never came under the consideration of the Court executing the decree, namely, the Court of the Sub-Deputy Collector.*

That sec. 25 of Reg. II of 1886 which was framed for the protection of the raiyat was never intended to be used to his detriment in the manner in which it had been applied in the present case.

But it was not competent to the High Court to interfere under sec. 15 of the Indian High Courts Act, 1861. The power of superintendence under that section can be exercised only over Courts which are subject to the Appellate Jurisdiction of the High Court; and the Courts of the Sub-Deputy Collector, the Sub-Divisional Officer and the Deputy Commissioner were not Courts subject to the Appellate Jurisdiction of the High Court inasmuch as under sec. 15 of Reg. 5 of 1893 the Court of the Commissioner is constituted the High Court in relation to all suits tried in the Courts of officers appointed under sec. 2 of Act XXXVII of 1855.

The fact that the same person was appointed to act as Sub-Divisional Officer and Subordinate Judge and the same individual was appointed to discharge the duties of the Deputy Commissioner and District Judge did not make their orders as Sub-Divisional Officer or as Deputy Commissioner subject to the superintendence of the High Court in the same manner as orders passed by them in their capacity as Subordinate Judge or District Judge.

That the suit being valued at less than one thousand rupees was rightly tried in the Court of the Sub-Deputy Collector and the execution proceeding was properly commenced in the Court in which the suit had been brought and the decree made, and in relation to that Court the Court of the Com-

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missioner was the High Court. The fact that the market value of the land from which the Petitioners were ejected might be proved to exceed one thousand rupees in value, was immaterial for the determination of the question whether the High Court had jurisdiction to revise the order of the Sub-Deputy Collector.

This was a Rule issued on the 11th of February 1913 against an order of H. Allanson, Esq., Deputy Commissioner, Sonthal Perganas, dated the 11th of July 1912, confirming that of B. A. Guest, Esq., Sub-Divisional Officer, Deoghur, da ed the 14th of June 1912.

The facts of the case are as follows :—

One Bhoti Rai, mustagir of a village in the Sonthal Pergunnahs, got a decree against one Darbari Panjara for arrears of rent in respect of a raiyati holding. The decree not being satisfied, the Sub-Deputy Collector recommended eviction of the tenant from a portion of the holding. On the 17th February 1911, the Deputy Commissioner sanctioned eviction of the tenant from the entire holding. On the 21st December 1911, this holding was settled by the Sub-Divisional Officer with one Beni Roy. Darbari Panjara applied before the Sub-Divisional Officer on the 10th June 1912 for payment of the decretal amount and for getting back possession of the holding. This application was rejected and an appeal preferred against the order of rejection to the Deputy Commissioner was dismissed on the 11th July 1912. The rule was issued to show cause why the said orders should not be set aside.

Dr. Rash Behary Ghose (with him *Babu Naresh Chandra Sinha*) for the Opposite Party.—The High Court has no jurisdiction to interfere. Refers to sec. 15 of the Charter, and secs. 15 and 17 of Reg. V of 1893.

Babu Nares Chandra Sinha followed. The orders were passed according to law. Refers to Sonthal Pergunnahs Civil Rules, sec. 29 and sec. 25 of Reg. II of 1886. The High Court has no Appellate Jurisdiction or power of superintendence over the Deputy Commissioner, Sub-Divisional Officer and the Sub Deputy Collector. Refers to Part II of Reg. V of 1893. The test is, whether the Court in question is subordinate to the Appellate Jurisdiction of the High Court in respect of any class of cases. If not, the High Court cannot interfere under the Charter. The Deputy Commissioner and the other officers concerned are not subordinate to the Appellate Jurisdiction of the High Court in respect of any class of cases. Refers to *Abdul Karim* v. *Municipal Officer* (1), *Municipal Officer* v. *Ismail* (2), *Rhimbai* v. *Mariam* (3), *Khoja Shivji* v. *Hasam Gulam* (6) and *In re Thompson* (4).

Babus Surendra Nath Ghosal and *Pankaj Kumar Ganguly* (*amicus curiæ*) in reply.—The order for total eviction, when the recommendation was for partial eviction is without jurisdiction. Refers to r. 25 of Reg. II of 1886. The High Court has jurisdiction to interfere, as (1) the land is worth more than Rs. 1,000 (refers to the proviso to sec. 2 of Act 37 of 1855) and as (2) the Deputy Commissioner and the Sub-Divisional Officers in respect of suits valued at over Rs. 1,000 are subordinate to the Appellate Jurisdiction of the High Court. Refers to *Abdul Karim* v. *Muni-*

(1) I. L. R. 27 Bom. 575 at p. 584 (1903).
(2) I L. R. 30 Bom. 246 (1905).
(3) I. L. R. 34 Bom. 267 (1909).
(4) 6 B. L. R. 180 ; 14 W. R. 257 (1870).
(6) I. L. R. 20 Bom. 480 (1895).

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that case), a contracting party was entitled to be excused from the contract on the ground of that approval being withheld. It seems that his Lordship used the expression "unreasonable" there as an alternative for the expression "*mala fide*," and practically as co-extensive with it for purposes of the decision in that case. The leading case in this Court is that of *Sree Gopal Mullick* v. *Ram Charan Nuskar* (2). It was decided by Wilson, J., after a careful consideration of the leading English cases up to that date, including *Hudson* v. *Buck* (3), *Hussey* v. *Horne-Payne* (4), containing the dictum of Lord Cairns. His Lordship Mr. Justice Wilson held that the decision of the attorneys was conclusive unless there was some want of good faith, or unless their objections were distinctly unreasonable. In *Hudson* v. *Buck* (3), Lord Justice Fry held that the disapproval to be of no avail must be shewn to be "utterly unreasonable objections to the title." Sir George Jessell, M. R., in that case expressed his approval of the observations made by Lord Justice Fry. In this Court the decision in *Sree Gopal Mullick* v. *Ram Charan Nuskar* (2) has been followed on several occasions; see *Cohen* v. *Sutherland* (5). My attention has been called to the judgment of Mr. Justice Davar in *Treacher & Co., Ltd.* v. *Mahomedally Adamji Peerbhoy* (6), where his Lordship follows the decision in *Black* v. *Wood* (7) after discussing the case of *Sree Gopal Mullick* v. *Ram Charan Nuskar* (2) and the other cases I have mentioned. In *Black* v. *Wood* (7), Lord Justice Lindley held that in order for the vendor to succeed in a suit asking for specific performance of such a contract, it was necessary for him to show that the purchaser's attorney had approved the title, or that such a title had been tendered as made it unreasonable to disapprove it. The way that the cases have dealt with the question of unreasonableness seems to me as almost meaning the same thing as *mala fide*. The expressions "distinctly unreasonable" and "utterly unreasonable" and the juxtaposition of the expressions "*mala fide*" or unreasonable" lead me to that conclusion.

I cannot hold in this case that there was such unreasonableness on the part of the Plaintiff's attorney. It might be that the order from the District Judge of Lahore could have been amended, or that there would have been no difficulty in getting it amended, but the order as tendered to the other side was clearly not an order authorising this particular sale. It may have been the highest value offered for the premises, but there was nothing to show it was. It may also be that so far as Radha Nath Sircar's mortgage was concerned the predecessor of the Defendants purchased the property without notice of the mortgage, but I do not think that I can compel an unwilling purchaser to take title which is dependent upon evidence whether the purchase was with or without notice. An offer was made on behalf of the Defendants that they were ready to reduce the price stipulated for, in order to safeguard the interests of the purchaser in respect of any likely claims against him arising upon the mortgage. But a purchaser cannot be compelled to accept an indemnity or a reduction. It was argued that the facts of the case showed that the mortgage was

(2) I. L. R. 8 Cal. 856 (1882).
(3) L. R. 7 Ch. D. 683 (1877).
(4) L. R. 8 Ch. D. 670 (1878); on appeal L. R. 4 A. C. 311 (1879).
(5) I. L. R. 17 Cal. 919 (1890).
(6) I. L. R. 35 Bom. 110 (1910).
(7) 9 Q. B. D. 276, 280 (1882).

of no value and that in any event it did not affect the title, but was merely a question of conveyancing. The mortgage was one of the year 1886. There is nothing to skew as to what had happened in respect of that mortgage. It may very well be that there are no claims outstanding in respect of that mortgage; but I cannot hold that it is unreasonable for the attorney who had the approval of the title in this case, upon the facts placed before him that he unreasonably rejected the title offered. I notice that he did not receive much help from the Defendants' side. I may add that learned Counsel when he was opening the case for the Defendants was instructed to make statements relating to this mortgage which have since transpired to be utterly incorrect. Up to the date of the hearing of the suit nothing was apparently known by the Defendants about this mortgage. They had taken no trouble to find out anything about it. Even on the day of the hearing they had no information relating to it, although in their letter of the 4th January they said that they would make enquiries and inform the Plaintiff, they had apparently made no enquiries and certainly gave the Plaintiff no information. On the first day of the hearing Defendants' Counsel opened that Radha Nath Sarcar had, pending the Suit No. 342 of 1878, mortgaged his 1-6th undivided share in ten properties including the one in suit. He was instructed that in a partition suit, the number of which he could not give, this property had been dealt with: that he was not certain that there had been any partition suit at all; but, as there were 10 properties, the Defendants would be entitled to require specific performance of the agreement in suit by offering a reasonable reduction in the value. The case was then adjourned to allow further search which however elicited nothing further about the mortgage, except that in the conditions of sale the mortgage was not disclosed nor anything mentioned about it in the notification of sale under which the sale was held in 1887. Reference was made on behalf of the Defendants to their letter of the 13th January in which they had said that they wanted to clear up the title, to which the Plaintiff did not reply. But at no time had the Defendants, up to the time of the suit and even up to the date of the first hearing, given any assistance to the Plaintiff or his attorney. Taking all the circumstances into consideration, the suit must be decreed, namely, the sum of Rs. 1,001 is directed to be refunded to the Plaintiff with interest at 6 per cent. from the date of payment until suit. The Plaintiff is also entitled to the costs of investigating title amounting to Rs. 57-3-9. He is also entitled to the costs of the suit on Scale No. II. The parties having agreed that no evidence was to be given in the counter action and that it was to be governed by the decision in this case, I dismiss that suit, but do not award the Plaintiff in the first suit any further costs except the costs of filing his written statement in the counter suit. I will allow the costs of the written statement and the preparation of three briefs. Interest at 6 per cent. on the decree.

Babu Bhringessur Srimany, Solicitor for the Plaintiff.

Messrs. Mukerjee and Dutt, Solicitors for the Defendants.

A. K. G. *Suit decreed.*

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cipal Officer (1), *Municipal Officer* v. *Ismail* (2), *Rhimbai* v. *Mariam* (3), *Khoja Shivji* v. *Hasam Gulam* (6), *In re Thompson* (4), *Pirbhai* v. *B. B. & C. I. Ry.* (7).

The JUDGMENT OF THE COURT was as follows :—

This Rule raises a question of first impression as to the true scope of sec. 15 of the Indian High Courts Act, 1861. The solution of the question raised is by no means free from difficulty, which has been enhanced by the circumstances that the Petitioners appeared in person in support of the application. But we have received considerable assistance from Babu Surendra Nath Ghosal who acted as *amicus curiæ*, and not only placed before us a full and clear statement of the facts of the case but also drew our attention to the legislative provisions applicable to the matter.

The facts, so far as it is necessary to state them for the elucidation of the question of law involved, may be briefly narrated. The Petitioners were tenants under one Bhoti Roy in Rohini within the Sonthal Perganas. On the 1st April 1910, the landlord obtained a decree for Rs. 82-8-0 which was the arrear of rent due for the year 1315 and the first three quarters of the year 1316. This decree was made by the Sub-Deputy Collector of Deoghur. On the 16th January 1911, the decree-holder applied to the Sub-Deputy Collector for execution by ejectment, on the allegation that the judgment-debtors had no moveable property and previous applications to realise the judgment-debt by attachment and sale of moveables had failed. The Sub-Deputy Collector held that under these circumstances the judgment-debtors might be ejected from a portion of the holding and submitted the record to the Sub-Divisional Officer for orders on the 16th January 1911. On the 4th February 1911, the Sub-Divisional Officer recorded his opinion that the tenants should be evicted from the entire holding, and with this recommendation forwarded the record to the Deputy Commissioner for orders. On the 17th February 1911, the Deputy Commissioner sanctioned eviction from the entire holding. The records were then returned to the Sub-Divisional Officer who proceeded to eject the judgment-debtors and called upon the Sub-Deputy Collector to arrange for resettlement of the lands. No tenant, however, came forward to take settlement upon payment of the arrears due. The judgment-debtors also expressed their inability to pay the arrears. The Sub-Divisional Officer thereupon ordered that the decree-holder might keep possession for one year after which the lands should be returned to the judgment-debtors. Subsequently one Beni Roy offered to take settlement, and his application was granted. The judgment-debtor thereupon objected substantially on the ground that this Beni Roy was no other than the decree-holder himself but their objection was overruled both by the Sub-Divisional Officer and the Deputy Commissioner, although they offered to pay up the judgment-debt in full. We are now invited to set aside these proceedings for eviction as irregular and without jurisdiction. There is little room for controversy that the proceedings have been throughout irregular.

Under paragraph 29 of the Statutory

(1) I. L. R. 27 Bom. 575 (1903).
(2) I. L. R. 30 Bom. 246 (1905).
(3) I. L. R. 34 Bom. 267 (1909).
(4) 6 B. L. R. 180 (1870).
(6) I. L. R. 20 Bom. 480 (1895).
(7) 8 Bom. H. C. R. 59 (1871).

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Rules for the guidance of Civil Courts in the Sonthal Perganas issued by the Local Government on the 18th August 1905 under sec. 27 of Reg. V of 1893 read with sec. 1, cl. 2 of Act XXXVII of 1855, a tenant whose right is not saleable may, in execution of a decree for rent, be with the Deputy Commissioner's consent evicted, and the land may then be resettled. It is plain that the eviction in execution can be effected only by the Court executing the decree. This view is not affected by sec. 25 of Reg. II of 1186, which provides for the exemption of raiyats from liability to ejectment except by order of the Deputy Commissioner. In the case before us, the question of ejectment of the tenants from the entire holding never came under the consideration of the Court executing the decree. Sec. 25 of Reg. II of 1886 which was framed for the protection of the raiyat, was never intended to be used to his detriment in the manner in which it has been applied in the case before us. The procedure contemplated by the Legislature is that the Execution Court determines whether or not the decree is to be executed by ejectment, and the safeguard is provided that if the Execution Court decides in favour of ejectment, the order is not to be carried out until it has been sanctioned by the Deputy Commissioner. It could never have been intended that the scope of the order as made by the Execution Cou t should be widened by the Deputy Commissioner ; as a matter of fact, this has been done in the present case without any notice to the raiyat. It is further plain that even after the Deputy Commissioner has given his sanction, there may be no ejectment in fact, because, if the decree is satisfied, it is open to the Execution Court to terminate the proceeding. In these circumstances, we are opinion that the proceedings for ejectment of the Petitioners have not been taken in conformity with the provisions of the Regulation and the Statutory Rules on the subject.

The question now arises whether it is competent to this Court to interfere in the exercise of the powers conferred on it by sec. 15 of the Indian High Courts Act, 1861. This power of superintendence can be exercised only over Cours which are subject to the Appellate Jurisdiction of the High Court. The question is consequently reduced to this, *viz.*, whether the Courts of the Sub-Deputy Collector, the Sub-Divisional Officer and the Deputy Commisssioner are Courts subject to the App llate Jurisdiction of this Court. To determine this ques ion, we must examine the constitu ion of these Cour s as defined in Reg. V of 1893 which was framed wi h a view to make provisions for the administration of criminal and civil justice in the Sonthal Perganas. Sec. 7 of this Regulation provides for the establishment under the Bengal Civil Courts Act, 1887, of two grades of Courts, *viz.*, the Court of the District Judge, and the Courts of the Subordinate Judges. Sec. 12 provides for the establishment by the Local Government under the Sonthal Perganas Act, 1855 (Act XXXVII of 1855) of four grades of Courts, *viz.*, the Court of the Commissioner, the Court of the Deputy Commissioner, the Courts of the Sub-Divisional Officers and the Courts of the Depu y Collectors not in charge of a Sub-Division, and Sub Deputy Collectors. Sec. 9 of the Regulation defines the jurisdiction of the District Judge and of the Subordinate Judges, and restricts it to suits of which the value exceeds one thousand rupees, and which are not

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excluded from their cognizance by Reg. III of 1872. Sec. 14 similarly deals with the question of the jurisdiction of the Court of Deputy Collectors or Sub-Deputy Collectors, Sub-Divisional Officers or the Deputy Commissioner. It is sufficient to state for our present purpose that a Sub-Deputy Collector has jurisdiction to try suits of the value of one hundred rupees, provided such suits are not cognizable either by a Court established in the Sonthal Perganas under the Bengal Civil Courts Act or by a Settlement Officer under the Sonthal Perganas Settlement Regulation. It is consequently plain that there is a fundamental distinction made in the Regulation between the two classes of Courts, namely, the Courts established under the Bengal Civil Courts Act, and the Courts established under the Sonthal Perganas Act. This distinction is accentuated by two circumstances. In the first place, sec. 2 of the Sonthal Perganas Act, 1855, read with sec. 9 of the Sonthal Perganas Justice Regulation, 1893, provides that in the trial of civil suits in Courts established under the Bengal Civil Courts Act, the general laws and Regulations are to be applied, whereas by sec. 1, cl. 1, of the Sonthal Perganas Act, 1855, the trial of suits in the Courts of officers appointed under the Sonthal Perganas Act is removed from the operation of the general laws and Regulations and by sec. 1, cl. 2 is governed by "directions" issued by the Lieutenant-Governor. In the second place, under sec. 15 of Reg. V of 1893, the Court of the Deputy Commissioner is constituted the District Court and the Court of the Commissioner is constituted the High Court in relation to all suits tried in the Courts of officers appointed under sec. 2 of Act XXXVII of 1855. The position plainly is that the Legislature contemplated the establishment of two entirely distinct series of Courts in the Sonthal Perganas, each invested with jurisdiction over specified classes of cases to be tried according to the procedure prescribed for each class. In the case before us, as already stated, the suit for rent was valued at less than one thousand rupees, and was rightly tried in the Court of the Sub-Deputy Collector. The execution proceeding was properly commenced in the Court in which the suit had been brought and the decree made. In relation to that Court, the Court of the Commissioner is the High Court, and it is impossible for us to hold that the Court of the Sub-Deputy Collector is a Court subject to the Appellate Jurisdiction of this High Court. In has been contended that the market value of the land from which the Petitioners have been ejected may be proved to exceed rupees one thousand in value. But this is a circumstance obviously immaterial for the determination of the question raised before us. The Sub-Deputy Collector had unquestionably jurisdiction to entertain the suit for rent, to make a decree therein, and to execute that decree, if need be, by ejectment of the judgment-debtors from their holding. The Court of the Sub Deputy Collector in this matter is subordinate to the Court of the Sub-Divisional Officer, the Deputy Commissioner and the Commissioner; it cannot in any sense be deemed subject to the Appellate Jurisdiction of this Court. It has finally been argued that inasmuch as the same person is appointed to act as Sub-Divisional Officer and Subordinate Judge, while the same individual is appointed to discharge the duties of the Deputy Commissioner and the District Judge, their orders as Sub-Divisional

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Officer or as Deputy Commissioner are subject to the superintendence of this High Court precisely in the same manner as the orders passed by them in their capacity as Subordinate Judge or District Judge. This argument is obviously fallacious. We are concerned not with the individuals who preside over Courts, but the Courts as Institutions or Tribunals empowered to hear and determine controversies between parties litigants. From this point of view, the Court of the Sub-Divisional Officer is entirely distinct from the Court of the Subordinate Judge. The case before us has no analogy to the cases to which our attention was drawn on behalf of the Petitioners, namely, *Abdul Karim* v. *Municipal Officer* (1), affirmed by the Judicial Committee in *Municipal Officer* v. *Ismail* (2) ; *Rhimbai* v. *Mariam* (3) in which the question arose as to the status of the Resident and Assistant Resident at Aden, and *In re Thompson* (4), where the question arose as to the status of the Court of Record of Moulmein. No useful assistance can be derived from these cases, as the question raised before us must be determined in view of the nature of the constitution of the Courts in the Sonthal Perganas established under sec. 2 of the Sonthal Perganas Act, 1855. The view we take is in accord with that adopted in *Gholam Najaf Mian* v. *Panchanon Gupta* (5).

The result is that this Rule is discharged, but we make no order as to costs.

Rule discharged.

(1) I. L. R. 27 Bom. 575 (1903).
(2) I. L. R. 30 Bom 246 (1905).
(3) I. L. R. 34 Bom. 287 (1909).
(4) 6 B. L. R. 180 (1870).
(5) Unreported : Rule 3973 of 1908, decided by Doss and Richardson, JJ, on the 18th January 1909.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1986 OF 1913.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
16, January.

MANINDRA CHANDRA GHOSE, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 306, 439—Indian Penal Code, secs. 34, 307—Quashing of proceedings—Verdict of not guilty on charge of conspiracy in favour of co-accused at previous trial—Effect on accused in supplementary trial on charge under sec. 307 read with sec. 34, I. P. C.—Recalling of warrant after acquittal of co-accused—Jurisdiction of District Magistrate to issue fresh warrant on same materials—Verdict of jury, repugnancy in, effect of, in Indian law—Opinion of Judge and jury, weight to be attached to—Sec. 34, I. P. C., necessary elements in.

In a previous trial two persons were tried for having conspired with one B (against whom a warrant had been issued but who was not before the Court) and two others named and others unknown to kill one M or to cause grievous hurt to him. They were acquitted by the unanimous verdict of the jury whereupon the warrant against B was recalled, but subsequently the District Magistrate issued a fresh warrant against B and proceedings were started against him under sec. 307 read with sec. 34, I. P. C.,

Held (on an application by B for the quashing of the proceedings)—*That the District Magistrate had jurisdiction to take cognizance of the case and issue fresh warrant without further materials or enquiry if he was of opinion that the evidence brought the accused within the purview of the law.*

As to the contention that the case for the prosecution in the previous trial being one of conspiracy between the accused then before the Court and the present accused and that charge having failed, the present proceeding could not go on :

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Held, *agreeing with the view expressed in* ROMESH CHANDRA BANERJEE *v.* THE EMPEROR (1)—*That the repugnancy in the verdict of a jury in India is not in itself sufficient to justify the quashing of a conviction; and the technicalities which are borrowed from the English law and founded on ideas as to the sacred character of a verdict by a jury whose findings of fact are unknown, cannot be imported so as to give to verdicts of juries in India a character which by the express provisions of law does not attach to them.*

Where two of the accused at the previous trial were acquitted by the Judge agreeing with the jury on account of the evidence of their identification being weak:

Held—*That this did not affect the evidence of identification of the present accused even by the same witnesses, as the question of his identification was not before the jury at that trial.*

That, in the circumstances, where the Judge had expressed a clear opinion and the jury had expressed none, the High Court ought not to interfere with the ordinary course of justice by quashing the proceedings against the present accused.

In this country the opinion of the Judge is to be weighed by the High Court in exactly the same balance as the opinion of the jury.

Sec. 34, I. P. C., does not involve abetment and therefore does not imply any conspiracy and does not require proof that any particular accused was responsible for the commission of the actual offence and the present proceeding under sec. 307/34, I. P. C., could not be quashed on the ground that there was no suggestion at any stage of the previous trial that any particular accused was responsible for the offence.

(1) 18 C. W. N. 498 (1913).

This was a Rule to show cause why the proceedings taken against the Petitioner pending in the Court of the Deputy Magistrate of Hughly should not be quashed.

The Petitioner with two persons, named Netai Ghosh and Laloo Ghosh, was accused of complicity in an alleged attempt to kill by shooting one Monmohan Ghosh. Nitai and Laloo alone were sent up for trial, although a warrant had issued against the Petitioner. These two persons were convicted by the Sessions Judge of Hughly agreeing with the verdict of the jury but on appeal to the High Court a re-trial was ordered.

In the re-trial which was held before the Sessions Judge of 24-Pergunnahs, the jury returned a verdict of 'not guilty' on all the charges and the Sessions Judge accepted the verdict and acquitted the accused. The charge against the accused generally was that they with the Petitioner who was not before the Court were concerned in an attempt to kill by shooting one Monmohan Ghose in British Chandernagor. The first set of charges were that the two accused, Netai and Laloo with Binoo (the Petitioner), Kanti, Koilash and others unknown conspired together to kill Monmohan Ghose or to cause grievous hurt to him and in pursuance of that conspiracy Monmohan Ghose was shot. The other two charges in the alternative were the same except that Kanti, Koilash and others unknown were omitted.

After the acquittal of the two accused, Netai and Laloo, the warrant against the Petitioner was withdrawn but subsequently the District Magistrate of Hughly issued a fresh warrant against the Petitioner who surrendered before the District Magistrate and proceedings under

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sec. 307 read with sec. 34, I. P. C., were started against the Petitioner. The case was then transferred to the file of the Deputy Magistrate. The Petitioner moved the High Court for the quashing of the proceedings.

Mr. Norton, *Babus Manmatha Nath Mukerjee* and *Jyotish Chandra Hazra* for the Petitioner.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling on the District Magistrate of Hughly to show cause why further proceedings for conspiracy to commit murder against the Petitioner, Manindra Chandra Ghose *alias* Binoo, should not be stayed on the ground that the two alleged co-conspirators having been acquitted there is no possibility of a conviction being obtained against the alleged conspirator who now stands alone, and upon the other grounds mentioned in the petition.

As regards the specific ground which is first mentioned in this Rule it has not been argued before us and it is clear that there is no charge of conspiracy at present against the Petitioner, and the fact that there was an acquittal of the other two would not conclude the matter inasmuch as there are two persons named as conspirators who have not yet been tried and it is stated that others unknown also conspired, so that the ground that the Petitioner is the only alleged conspirator remaining can no longer be sustained.

We therefore turn to the grounds which were actually taken by the learned Counsel in the petition. The first was that the warrant against the Petitioner having been recalled and there being no fresh materials or enquiry in the matter the issue of warrant again against the Petitioner was illegal, that is to say, that the proceedings are without jurisdiction. The answer to that is that the proceedings are not, as the Petitioner appears to have imagined from paragraph 14 of the petition, re-instituted by the complainant Monmohan Ghose, but they were re-instituted by the officer in charge of the Hughly Police station under the direction of the District Superintendent of Police who could not appear himself but who had been instructed by the District Magistrate on the advice of the law officers of the Crown that this case can go on on the evidence. We do not desire to express any opinion upon this evidence whether it is sufficient or not, but it certainly gave jurisdiction to the District Magistrate to take cognizance of the case if on taking legal advice he was of opinion that the evidence brought the accused within the purview of the law. Of the jurisdiction of the District Magistrate to take these proceedings there can be no doubt, and it is the District Magistrate and not the complainant who has re-instituted these proceedings.

Then as regards the second ground that the case for the prosecution in the previous trial was one of conspiracy between two youths who have been acquitted and the present accused, and that charge having failed the present proceeding ought not to be allowed to go on, this has been argued by the learned Counsel from the point of of view that the opinion of the Jury in this country necessarily covers the whole of the indictment and has the same sacrosanct character that such a verdict has in England. This doctrine has very recently been dealt with in an unreported case of this Court by Woodroffe and Beachcroft, JJ., in *Romesh Chandra Banerjee* v. *The Emperor* (1), and we may express our con-

(1) Since reported, 18 C. W. N. 498 (1913).

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currence with the view expressed by Mr. Justice Beachcroft where he says :—" The repugnancy in the verdict of a Jury in India is not in itself sufficient to justify the quashing of a conviction and that the technicalities which are borrowed from the English law and founded on ideas as to the sacred character of a verdict by a Jury whose findings of fact are unknown cannot be imported so as to give such a character which by the express provisions of law does not attach to Jury verdicts in this country." However that may be, the Jury certainly did not and could not have formed any opinion much less expressed it as regards the case of the present Petitioner who was not before them. But it is argued that the evidence is precisely the same against him as against the others. The learned Deputy Legal Remembrancer appearing for the Crown has shown us that this is not so. There is distinct evidence against the present Petitioner, and the fact that the wounded man did not satisfactorily identify the two youths does not in our opinion in any way affect the identification which he made or may not have made of the present Petitioner, because that was a matter which was not in any way before the Jury and has never been adjudicated upon. It may be, as the learned Deputy Legal Remembrancer has told us, that he had better knowledge of the present accused, or he had better opportunities of seeing him. We have not purposely gone into the evidence because we do not wish in any way to prejudge the case. But it is clear that the evidence as regards identification of one person may be quite different to that as regards the identification of two others, even although it proceeds from the mouth of the same witness, and the learned Judge clearly stated that the identification of these two youths showing that the crime was committed by these two youths appeared to him to be weak, and on that ground he agreed with the Jury in acquitting the accused. In this country the opinion of the Judge is to be weighed by this Court in exactly the same balance as the opinion of the Jury. Where the Judge has expressed a clear opinion and the Jury has expressed none it would be in our opinion an unwarrantable thing for us to interfere with the ordinary course of justice in a case of this nature.

Then the further ground that is taken is that there being no suggestion at any stage of the two previous trials that any particular accused was responsible for the offence the present proceeding ought not to be allowed to go on. This particular ground has not been urged before us by the learned Counsel, but it is necessary to glance at it, for this reason that at present the proceedings against the Petitioner to which he has to answer come under sec. 307 read with sec. 34, I. P. C., and sec. 34 does not involve abetment and therefore does not imply any conspiracy and does not require proof that any particular accused was responsible for the commission of the actual offence.

The fourth ground stated in the petition refers to the unanimous verdict of the Jury of 'not guilty' on all charges against the two youths who were formally on their trial, and the Judge having held that the evidence of identification was weak and there being no suggestion that any new or further evidence would be available the proceedings are fit to be quashed. We have already dealt with this above and there is no need to say anything further.

The last ground is as to the nature of the evidence which we decline now to go into and also upon the opinion of the Civil

Surgeon which is referred to in the petition and which we may at once say relieves the Petitioner of any necessity of showing that he had not certain marks of injury on his person which might have been caused by the explosion of a gun. That portion of the evidence, if it was ever seriously put forward, seems to have entirely broken down and no doubt will not again be revived ; but this is a very minor point and has nothing to do with the other considerations which we have already set out.

Having given this case our most careful consideration we are of opinion that it would not be in any way justifiable to interfere with the ordinary course of justice at the present stage of the proceeding. We therefore direct that this Rule be discharged and the proceedings do continue from the point they had already reached. The Petitioner will remain on the same bail.

Rule discharged.

[CRIMINAL REFERENCE.]

No. 232 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
19, November.

RAMJIWAN RAI,
Complainant,
v.
ABILAKH BARAI,
Accused.

Criminal Procedure Code (Act V of 1898), sec. 247—Summons case, hearing of, when concludes—Non-appearance of complainant on date fixed for argument and consequent acquittal of accused, if proper.

Where in a summons case, after the examination of the witnesses for the prosecution and the defence, the Magistrate adjourned the case for argument for the purpose of the documentary and oral evidence being explained to him, and on that adjourned date the complainant did not appear and the accused was acquitted under sec. 247, Cr. P. C.

Held—*That although the Code of Criminal Procedure makes no provision for argument in a case governed by Chap. XX of the Code the hearing of the case did not end with the examination of the witnesses for the parties and sec. 247 had application to the circumstances of the case.*

This was a Reference under sec. 438, Cr. P. C., dated the 28th of August 1913 made by the District Magistrate of Sarun, recommending that the order of the Sub-Deputy Magistrate of Gopalgunj, dated the 11th of August 1913, acquitting the accused under sec. 247, Cr. P. C., of the charge of offences under sec. 352, I. P. C., and, sec. 24, Act I of 1871, may be set aside.

On the complaint of one Ramjiwan Rai the accused was placed on his trial under sec. 352, I. P. C., and sec. 24 of the Cattle Trespass Act, before the Sub-Deputy Magistrate of Gopalgunj who after examining the witnesses for the prosecution and the defence and holding a local enquiry fixed a date for argument and judgment but since the complainant failed to appear on that date the Magistrate passed the following order—

"The complainant is absent. Accused is present. Accused is acquitted under sec. 247, Cr. P. C."

The complainant thereupon moved the District Magistrate who made a reference under sec. 438, Cr. P. C., to the High Court recommending that the order of acquittal should be set aside on the following ground—"There is no provision in the Criminal Procedure Code for the hearing of argument in summons cases. The prosecution and defence witnesses had been heard and under the law it remained for

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Contents.

NOTES.

Constitutional crisis—Authority of Civil Government over the Military.

The resignation of army officers in connection with the orders of the Government in England to serve in Ulster forebodes a grave constitutional crisis in England. The question, under what circumstances the Civil Government can order troops to fire on citizens is also one of great constitutional moment. But the Common Law of England as interpreted by eminent English Judges may be said to furnish a safe guidance to the question. If His Majesty's Ministers turn troops against citizens arbitrarily and cause destruction of life or property, their conduct may be called in question before the law Courts and it will rest with an English jury to say whether the Ministers have transgressed their powers. Nor is a soldier or officer who carries out the orders of the Ministers in such a case protected by such orders; it is thus no doubt a difficult question to say whether and when he would be justified in refusing to carry out the orders of the Civil Government. Ordinarily such refusal would mean an end of Civil rule and the ascendency of the Military over Civil Government. In any settled form of Government, when the Ministers take full responsibility for ordering troops and for the consequences of their acts before the judicial tribunals, they may rightly urge that it is not for the Military to question the propriety of their orders. Even in times of civil commotion the Civil Government have the legal and the constitutional right to insist that their orders be implicitly obeyed by the Military. It is also clearly within their rights to order the immediate dismissal of officers or men who refuse to carry out their orders, put them under arrest and appoint a Court Martial for their trial.

It is not within the province of the Military to question the propriety of any order passed by the Civil Government. The Civil Government under the English constitution rests with the King in Parliament. But the executive authority for the time being rests with the Ministers of the Crown. Although all executive acts and orders are done and issued under the seal of His Majesty, the responsibility for them rests with the Ministers. These Ministers are primarily responsible to the House of Commons for their acts. The moment their acts are opposed to the views of the House of Commons, they go out of power. But so long as the Ministers command the confidence of the House it is as much obligatory on the Military as it is on the Civil authorities to obey their orders implicitly. Only the judiciary are not under their commands and for the improper use of force against citizens, as we have already said, they may be made responsible before a Judge and a jury. Even to His Majesty the King they are not directly responsible, since they are primarily responsible to the House of Commons and also indirectly to the judicial tribunals of the country. They are ultimately responsible to the people of the country and not to the King. His Majesty, however, has this control and authority over them that if any of their acts, measures, or policies seem to His Majesty to be opposed to the popular view or likely to prove oppressive to his subjects or any section of it he can dismiss his Ministers and by dissolving the Parliament bring about a General Election to determine whether the policy or measure has the approval of the country. These are the limits of the constitutional powers of the King and that is why the form of Government in England is styled a Constitutional Monarchy.

It is therefore absurd to suggest that His Majesty had in any way interfered in reinstating the officers or did anything to supersede the orders of his Ministers to the army. His Majesty would be quite within his constitutional powers, if he was of opinion that the orders of his Ministers would lead to civil war in any part of the Kingdom, to call upon his Ministers to reconsider the order and to avoid a civil commotion. If the Ministry cannot enforce their measure or policy, without resort to force, against people who are opposed to the measure, but are otherwise loyal, it is their bounden

duty not to enforce the measure against their opponents at the point of the bayonet but to appeal to the country and abide by its decision. But all the same we must say that although His Majesty may get the Ministers to countermand their orders in this mrnner at a moment of such national crisis, yet no officer or soldier would be justified in disobeying the orders of the Ministers of the Crown *suo motu* or impose on the Civil authorities the conditions and limitations under which they would perform their military duties. So long as "Do or die, never question why" continues to be the motto of British soldiers, Great Britain will continue to be the mistress of the world and it wil be an evil day for her when soldiers begin to dabble in politics. The resignation of officers or men under orders practically amounts to forcing a revolution. If they disobey orders for political reasons and the Civil Government cannot reckon upon their support with regard to the enforcement of any measure, Civil Government is practically superseded by Military rule and the Military virtually become the dictators of the country. The vital issue which has thus been precipitated before the country is of much graver constitutional importance and is fraught with much more serious consequences than the question of Home Rule in Ireland or the inclusion or exclusion of Ulster.

AGRARIAN RIOTS—RIGHT OF PRIVATE DEFENCE.

I.—INTRODUCTORY.

Agrarian riots are of rather frequent occurrence in this province and cases of such riots constantly come before the Criminal Courts. In these cases the usual plea is that the accused were acting in the exercise of a right of private defence of property. It will therefore not be unprofitable to discuss the law on the subject, with special reference to the law of private defence.

II.—TITLE, WITHOUT POSSESSION, NO DEFENCE.

It is clear from the wording of cl. 4 of sec. 141, I. P. C., that the forcible exercise of a right by a party not in possession falls within the purview of that section. Even where the accused's party have a clear and perfectly valid right to the possession, and the other party are manifestly in wrongful possession, they are not justified in taking the law in their own hands. There is no question of a right of private defence in such cases and their action would clearly fall within the meaning of the words "enforce a right or supposed right" as used in cl. 4, sec. 141, I. P. C.

This view is supported also by the following rulings:—

In *Moher Sheikh*, I. L. R. 21 Cal. 392 (1893), there was a fight between two parties regarding the right to fish in a *beel*. Two of the accused and partners fished in a *khata* in the *beel* throughout the whole of the year, until 5 days before the occurrence. The complainant's party were in possession of the *khata* during this period of 5 days. When complainant's party were fishing, accused's party went there to turn them out by force. It was held that there was no question of a right of private defence, as the other side were in possession, though it may have been wrongful possession.

In *Jairam*, I. L. R. 35 Cal. 103 (1907), the accused went with 3 ploughs on land of which complainant was in possession. The land was complainant's ancestral raiyati holding. The accused claimed it under a *thika* from the zemindar and alleged that it was landlord's *khudkhast* or private land, that the lease in favour of complainant had already expired and that, therefore, the zemindar had a right to re-enter the land on expiry of the lease. Held, that though the accused had a right to the land, they were not justified in taking the law into their own hands. In *Bepin Behari Guha* v. *Pranakul Majundar*, 11 C. W. N. 176 (1906), where two persons were jointly entitled to possession of land, but one party was in sole possession and the servants of the other party went out armed and succeeded in obtaining possession, without having had to use any force, it was held that the conviction under sec. 143, I. P. C., was right.

In this connection, the following remarks made by Mayne in explaining the scope of cl. 4 of sec. 141, I. P. C., are worth quoting:—"Under this clause it is immaterial whether the possession or enjoyment sought to be recovered was claimed under colour of title, or without it, and whether the right which is asserted is a valid or invalid one. The object of the clause is to prevent breaches of the peace, by compelling every one who desires to enforce a disputed right, to do so under the authority of the law. The principle is the same as that under which the Magistrate is authorised, in cases where the breach of the peace is apprehended, to maintain the party in possession, or to restore to possession one who has been dispossessed by criminal force. . . . . . . This provision is one of those rare instances in which an act, which, though, in the view of the Civil law, is legal and gives no right of action to the person affected by it, is still punishable criminally on account of its injurious consequences to the public peace."

III.—IS POSSESSION ALWAYS A GOOD DEFENCE? CONFLICTING RULINGS.

But the question as to whether the section applies only to cases in which a claimant being out of possession of the right in question seeks to oust the person in possession, or it also extends to cases in which a party in peaceful possession of the disputed right uses the necessary force to

prevent being dispossessed, does not appear to be so simple. It is held, on the one hand, that the expression "to enforce a right or a supposed right" cannot apply to a party in possession, as a construction of that section so as to include maintenance of possession would be inconsistent with the right of private defence which is permitted by law. This view is supported by the earlier rulings on the subject. In *Mitto Singh*, 3 W. R. Cr. 41 (1865), where there was an affray respecting land, in the course of which a man of complainant's party was killed and there had been litigations between the parties about the land in which the right and possession of Sankar (one of accused's party) had been legally decided in his favour, it was held that "the latter provision (to enforce a right or supposed right) applies to an active enforcement of a right not in possession." In *Birjoo Singh* v. *Khub Lal*, 19 W. R. Cr. 66 (1873), the complainant's party attempted to cut a *bund*, which the accused's party attempted to prevent. His Lordship Couch, C. J., observed as follows:—"The Magistrate seems to have considered that it was the duty of the Rajapur people (accused's party) to offer no opposition to the cutting of the *bund*; that they were to go away and seek the Magistrate who migh be at a great distance and obtain an order from him, and if they failed in that, they were to be left to a Civil suit to recover compensation for injury to their crops whom it might be difficult to identify as those who actually committed the mischief and from whom, if identified, it might not be possible to recover the amount of the compensation. I think this is a view which cannot be supported. This Petitioner was, so far as the evidence goes, doing nothing more that what he might properly do to prevent mischief being done to what was found to belong to his village and to have an old *bund*." There is another old case, *viz.*, *Sankar Singh* (*Pachgachia people*) v. *Burmah Mahto* (*Amba people*), 19 W. R. Cr. 25 (1875), in which the accused were acquitted on the ground that they were in possession. The High Court made the following observations in the case:—"Every one has a right to protect himself in the actual enjoyment of his property and in the actual exercise of his rights, unless the case be such that the third clause of sec. 99, I. P. C., applies, *i.e.*, where there is time to have recourse to the protection of the public authorities, in which case there is no right of private defence. The Magistrate, no doubt, says as regards the right of private defence of property: 'I don't think, considering the Police outpost was only 2 miles distant, that the danger was sufficient to justify the resort to force.' But he comes to no finding as to how long the Pachgachia people (accused's party) were aware of the intention on the part of their opponents to interfere with the passage of the water, which they went to prevent if necessary. Although the outpost was only 2 miles off, it might be that the parties had not time to send for and get the assistance of the Police, soon enough to anticipate the coming of their adversaries. They had, at any rate, the right to go to the ground themselelues and at most, they would be bound to refrain, even in their own defence, from using force against the other side until the Police authorities would come up, provided the circumstances were such that the Police might have been brought upon the spot in time. They were not bound, under all circumstances, to stand quietly by, while their opponents wrongfully and by force committed serious mischief. On this part of the case, there is no finding as would be needed to take away from the Pachgachia people the right to protect themselves, while they were actually in enjoyment of an undoubted right."

It will be seen from the quotation just made that it recognizes the fact that the right of private defence is subject to a very important qualification, namely, that there was no time to have recourse to the protection of the public authorities, and (by implication) further, that the fact of the accused's party being in actual possession of the right claimed is not always a good defence in a case of rioting. Instances are not wanting among the old cases in which a conviction for rioting was upheld by the High Court, in spite of the fact that the accused were in actual possession of the subject of the right in question, *vide Joe Lal*, 7 W. R. Cr. 34 (1867), *Mana Singh*, 7 W. R. Cr. 103 (1867), *Kalu Bepari*, 1 C. L. R. 521 (1878). In each of these cases, both parties to the dispute were convicted.

It was, however, the well-known case of *Ganouri Lal Das*, 16 I. L. R. Cal. 206 (1889), that demolished the old view that the words to "enforce a right" cannot apply to a party in actual possession of the subject of the dispute. This decision brought the Indian law in line with the English law on the subject. Their Lordships who decided that case observed as follows:—"We apprehend that there can be no doubt that, according to English law, the assembly in this case would be an unlawful assembly, or, that executing their purpose as they did, there would have been a riot, for which every member of the assembly would be liable."

The facts proved in this case were that a party of persons, consisting of 5 *peadas* and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of M for the purpose of either repairing or renewing a bund across it to cause the water to flow down a channel on to the lands of their master T. The river at the time was almost dry and the party did not go armed ready for a fight. Having arrived at the spot at 10 A.M., they proceeded to work at

the *bund* until the afternoon. At about 4 P.M., a body of men, consisting of about 1200 in all, many of them armed with *lathies* and headed by the accused who were servants of M, which had been seen collecting together during the day proceeded to the spot and about 25 or 30 of them attacked T's men, some 5 of whom were more or less severely wounded. It was *held* that the accused, the servants of M, had been rightly convicted of rioting.

As regards the question as to whether an act of "defending a right" can be called "enforcing a right," their Lordships observed as follows:—"It is dangerous to attempt to lay down any general rule and there may perhaps be cases in which an assembly to defend a right may not be unlawful; at least we shall not now affirm that there cannot be. But to accept the general proposition enunciated would be a very difficult matter. There are many rights of which it may be affirmed that when they are interfered with, the defence of them consists in exercising them in despite of the interference, that is or may be, in enforcing them. There are modes of enforcing a right which are not prohibited by sec. 141, I. P. C., what it prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of 5 or more persons. And rights the defence of which can only be effected by enforcing them may come within its provisions." Then as regards the question whether the words "to enforce a right" can apply to a party in possession, their Lordships made the following observations:—"The section refers to 'right or supposed right.' This would make a division into (1st) rights in actual enjoyment when interfered with, (2nd) rights claimed though not in actual enjoyment, when interfered with. And this would again indicate that the section in some cases, at any rate, makes unlawful an assembly which by force, etc., defends the right by restoring the *status quo ante* and with it the actual enjoyment. If the proposition contended for be true, then not merely the right to the actual occupation of property in physical possession, but a right of way, a right to draw water from a well, a right to enjoy ancient light, and many others, if interrupted, may be vindicated by force or show of force. So long as they are uninterrupted, they are in possession, so far as such rights can be. To defend them by force against interruption is to enforce them, and this, if done by five or more, is in many, if not in most, cases, forbidden by the law."

[The contrary view is that the expression "a right," as opposed to "a supposed right," means a real right, *i.e.*, a right or title claimed about the validity of which there can be no doubt; and that the expression "a supposed right" means a right or title claimed which is of doubtful validity, *i.e.*, a title claimed which may or may not be valid.]

All the three old cases which are regarded as conflicting authorities were considered in this case. The case of *Mitto Singh*, 3 W. R. Cr. 41, was expressly dessented from; and as regards *Birjoo Singh* v. *Khub Lal*, 19 W. R. Cr. 66, and *Sankar Singh* v. *Burmah Mahto*, 19 W. R. Cr. 25, it was held that in the special circumstances of those cases, there was the right of private defence. In the case under consideration, it was found that there was no right of private defence and that for two reasons:—(1st) that there was time to have recourse to the protection of the public authorities; (2nd) that as T's men were acting in the exercise of a *boná fide* claim of right, their action in going to the spot did not amount to criminal trespass but only to civil trespass which did not occasion the exercise of the right of private defence.

After the decision in this case, the pendulum seems to have at once swung to the other extreme. For it seems to have created the impression that it has practically done away with the right of private defence in riot cases. This impression seems to have arisen from that case having laid down the law that there is no right of private defence against acts of aggression done in the exercise of a *boná fide* claim of right. In a case on the subject from Bombay, namely, *Bana Punja*, I. L. R. 17 Bom. 260 (1892), *Ganouri Lal's* case was cited with approval, with the following observations:—"The accused were members of an unlawful assembly the common object of which was to enforce a right to take earth from a dry tank by show of force and it is immeterial in point of law whether the right existed or not."

The authority of *Ganouri Lal's* case has, however, been much weakened by the decision in *Pach Kauri's* case, I. L. R. 24 Cal. 686 (1897), in which the accused, receiving information that complainant's party were about to take forcible possession of a plot of land which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed and went to the land in question and while they were engaged in ploughing, the complainant's party came up (some of them being armed) and interfered with the ploughing and a fight ensued, in the course of which one of complainant's party was grievously wounded and subsequently died and two of accused's party were hurt. It was held, on the authority of *Narsing Pathabai*, I. L. R. 14 Bom. 441 (1890), and the three old Calcutta rulings, *viz.*, *Mitto Singh*, 3 W. R. Cr. 41, *Birjoo Singh* v. *Khub Lal*, 19 W. R. Cr. 66, *Sankar Singh* v. *Burma Mahto*, 19 W. R. Cr. 25, that if the accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required and using such force or violence as were necessary to

prevent the aggression and that, therefore, they could not be held to be members of an unlawful assembly. Though this case does not expressly dissent from *Ganouri Lal's* case (their Lordships merely professed to distinguish *Ganouri Lal's* case), it has thrown a great doubt on the correctnees of the proposition that there is no right of private defence against a mere civil trespass, *i.e.*, a trespass committed in the exercise of a *bonâ fide* claim of right.

Mayne maintains in sec. 220 of his commentary, that there is no right of private defence against mere civil trespass, where the injured party would obtain sufficient redress by an appeal to law. In order to illustrate his remarks, he has cited two reported cases, *viz.*, *Guru*, 14 W. R. Cr. 29, and *Gour Chand*, 18 W. R. Cr 29. In the former case the accused were found to be justified in using force to prevent the other party from cutting paddy grown by the accused on land of which they had been in peaceful possession. But in the latter case, where the accused's party came out armed to prevent the ploughing of their land by the opposite party and after a few words of remonstrance killed two of that party and wounded a third, it was held that the acts were not justifiable. The act of ploughing under the circumstances did not harm and could have been redressed by an appeal to the authorities. On this principle he has suported the finding in *Ganouri Lal's* case. Since then there have been cases both ways.

In the following cases, the conviction was upheld inspite of the fact that the accused were in actual possession of the subject-matter of the disputed right :—

Prag Datta, I. L. R. 20 All. 459 (1898), where the dispute was over a strip of waste land and where the complainant's party, one of whom was armed with a gun and the others with *lathies*, went to the land and gave orders for the demolition of a mud-wall, about 3 feet high, round a *neem* tree, and the accused's party, one of whom had a gun, interfered and begged that the matter might be referred to Court and a fight ensued and the gun was fired from the side of the accused, killing a man on the complainant's side, it was held that there was no right of private defence, as the dispute was practically over the removal of a mud-wall which could have at any moment been reconstructed at a nominal cost and the demolition of which would not dissipate all possibilities of recovery of possession, if recourse had been had to the Courts of law. Their Lordships who decided the case observed :—"When a body of men are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who, on the other hand, are equally determined to vindicate, by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself; but each side is trying to get the better of the other."

Ananto Pandit v. *Madhu Sudan Mandal*, I. L. R. 26 Cal. 874 (1899), where the party of the accused accompanied by R went armed with *lathies* to fish in a tank in which R had 2 as. share and the complainant who with some other co-sharers representing 11 as. share in the tank went and protested that R had no share in the tank and a fight ensued, in the course of which some of the complainant's party received slight injuries, it was held that though R was in actual possession of 2 as. share in the tank, the law applicable to this case was that laid down in *Ganouri Lal's* case, rather than in *Pach Courie's* case.

Kaliji alias *Kali Singh*, I. L R. 24 All. 143 (1901), where the accused's party sowed a crop in a field, to the possession of which apparently they were entitled, and the other party, claiming the field and the crops as theirs, entered upon the land and began cutting the crop whereupon the accused's party attacked them and in the fight grievous hurt was caused, it was on the authority of *Prag Datta*, I. L. R. 20 All. 459, held that it was not open to the accused to plead that they were acting in the exercise of their right of private defence, it being found that they had resorted beforehand to make an assault under the pretence of cutting their crop. The case of *Pach Courie*, I. L. R. 24 Cal. 686, was relied upon in defence but it was not followed by their Lordships and the case of *Narsingh Pathabhai*, I. L. R. 14 Bom. 441, was distinguished.

Kabiruddin, I. L. R. 35 Cal. 368: s. c. 12 C. W. N. 384 (1908), where a large body of men belonging to Chero (accused party) went armed to the Pathari Pyne to throw up an *alang*, taking earth from the dry channel for their purpose and while they were so engaged, the opposite party came up similarly armed and inspite of the remonstrances of two constables who had been sent from the thana (4 miles from the place of occurrence and 1 mile from Chero) on the information of two chowkidars, a fight ensued in the course of which one man was killed and several others wounded, it was held that on the date of the occurrence there was no pressing necessity to throw up any earth on the Chero side of the pyne, the rainy season being some months after the occurrence and that consequently there was no right of private defence in circumstances such as those of this case and so it was unnecessary to attempt any adjudication of the question as to the respective rights of the parties.

In the following cases the accused were acquitted on the ground of being in actual possession of the subject of the disputed right.

Pares Nath Sircar, I. L. R. 33 Cal. 295

(1905). In this case, Rampini and Mookerjee, JJ., came to altogether two different findings as to the facts. The case was therefore referred to Woodroffe, J., who agreed with Mookerjee, J., both on points of fact and law. The facts as found by them are that sometime ago, there was a proceeding under sec. 145, Cr. P. C., about the possession of a *chur* between A and some of the accused in which the Magistrate found the latter party in possession of the *chur*, except the homestead of complainant Arshed, which he was found to have occupied for more than two months before the date of the proceedings. The accused's party afterwards managed to get possession of the homestead when it was vacant and Arshed then attempted to recover possession by force, which led to the disturbance. *Held*, that the case fell within the rule laid down in *Pach Couri's* case.

Ram Khelawan Singh, I. L. R. 36 Cal. 827: s. c. 13 C. W. N. 827 (1909), where some tenants, who held their lands on the *batai* system under which harvested crops should be taken to the village *khalihan*, went in a large body, armed with *lathies*, with the avowed intention of removing them to their own houses and were making up the crops already cut into bundles, whereupon the zemindar's watchmen remonstrated and a number of their amlas went to the spot, armed with *lathies*, and a fight ensued, in the course of which some of the tenants were wounded, and it further appeared that 4 days before the occurrence, the zemindar's people had sent an urgent appeal to the Police for protection against serious breach of peace which seemed imminent. *Held*, that the common object of the accused was to protect the zemindar's rights over the crops and that, therefore, they were not guilty of rioting.

Silajit Mahto, I. L. R. 36 Cal. 865: s. c. 13 C. W. N. 801 (1909). There was a long standing dispute and litigation between two parties about the possession of some lands. The accused were in possession, but the complainant's party claimed the land from time to time, though they never succeeded in obtaining possession. On the date of the occurrence, the accused went in a large body, armed with *lathies*, and prepared in anticipation for a fight, and began reaping the paddy grown by them, when complainant's party came up and a fight ensued, in which a man was seriously wounded and died subsequently. *Held*, that the common object of the assembly was not to enforce a right but to maintain undisturbed the actual enjoyment of a right.

Meher Sirdar, 16 C. W. N. 46 (1911), in which it was held that the accused being in possession of the disputed land, were justified in using sufficient force to prevent the other party from removing their crops and the fact that the Police station was only 9 miles off did not take away the right of private defence, for the right of private defence commences, when reasonable apprehension of danger to the property commences, and when persons have begun to cut and carry off your paddy, it cannot be said that you are bound to go 9 miles off to fetch the Police, and the same consideration applies to the remedies in the Civil Court. *Kunja Bhuiya*, I. L. R. 39 Cal. 896 (1912), where a body of about 10 men, including the accused, went on behalf of the decree-holder with a Civil Court peon upon a plot of land in the joint possession of the judgment-debtors to take symbolical possession thereof and the drummer was assaulted by one of the latter whereupon the decree-holder's party, replied by an attack on their opponents, in the course of which one of the decree-holder's party not before the Court, fractured the skull of the drummer's assailant and the accused continued to beat him, after he had fallen helpless on the ground. *Held*, that the accused had, under the circumstances, the right of private defence that their common object was, therefore, not unlawful and that the conviction under sec. 147, I. P. C., was bad, but that the accused having beaten the wounded man after he had fallen helpless on the ground, they were guilty under sec. 325, I. P. C.

Jhalku Tewari, 17 C. W. N. 1081 (1913), in which there was a riot owing to a dispute about the possession of a plot of land admittedly belonging to M. C. The complainant's party alleged to have received settlement of the lands from some relations of M. C. whilst the accused's party alleged that they received settlement from M. C. herself and it was found that the accused's party were in possession, had grown the paddy and were entitled to harvest and remove the crops. *Held*, conviction under sec. 148, I. P. C., was not sustainable.

In most of the cases noted above where the accused were convicted inspite of their being in possession of the subject of dispute, the main ground,—I may say, the only ground,—for disallowing the plea of self-defence was that there was sufficient time to have recourse to the protection of the public authorities; and it seems to me, on a careful analysis of the reported cases, that it is upon the answer to the question as to what is meant by "sufficient time to have recourse to the protection of the public authorities," rather than upon the interpretation of the words "to enforce a right," that the divergence in the judicial decisions in riot cases mainly turns. In those cases in which the accused were convicted inspite of their being in possession, the view taken of the provisions of cl. 3 of sec. 99, I. P. C., is, in effect, this, that if the injury intended to be caused by the aggressors to a person is such as can be repaired by subsequent litigation, it can-

not be said that there is any pressing necessity for the person to take the law in his own hands and that therefore there can be no right of private defence under such circumstances. Mayne seems to have accepted this view of the law. According to him the use of force by a party for the purpose of resisting the wrongful cutting of paddy is not unlawful, but the use of force by a party for the purpose of resisting wrongful ploughing of their land is unlawful, for whereas paddy, if not protected, is likely to be irrecoverably lost, no harm is done to a land by ploughing it. But this is putting too narrow a construction on the provisions of the law. A more liberal and reasonable view of the provisions of that section of the law seems to have been taken in those reported cases where the accused have been acquitted on the ground of being in possession of the disputed rights. There are some very apt observations, which have already been quoted, on the subject in *Birjoo Singh* v. *Khub Lal*, W. R. Cr. 66 (1873) and *Sankar Singh* v. *Burmah Mahto*, 19 W. R. Cr. 25 (1875) and *Meher Sirdar* 16, C. W. N. 46 (1911). The following observations on the same subject in *Sohun*, 2 W. R. Cr. 59 (1865), are also worth quoting:—"It never was intended that a man should submit to the deprivation of his property in his possession without exercising any right of self-defence and trust to recover it by the tedious operation of a case in the Civil Court, with all the weight of possession, onus of proof, &c., against him. Generally this point is neglected. . . . . Now, a future remedy in a Civil Court is a very different thing from possession and there are no Courts or authorities which would have protected the possession of the accused if they had not helped themselves." In *Narsingh Pathabhai*, I. L. R. 14 Bom. 441 (1890), one of the accused received information one evening that the other party intended to go upon his land on the following day and uproot the seed sown on it. On the following morning, at 3 A.M. he received information that the other party had entered on his land and were ploughing up the seed. He then proceeded to the land with the other accused and a fight ensued in which both sides received serious injuries and the leader of the other party killed. *Held*, that the 3rd clause of sec. 99, I. P. C., should be read with the 1st clause of sec. 105, I. P. C., that the right of private defence of property commences when reasonable apprehension of danger to the property commences, that before such apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities, that the apprehension which justifies a recourse to the authorities ought to be based on some information of a definite kind as to the time and place of the danger threatened, that as the accused had no reason to apprehend a night-attack on the property, they were not bound to act on the information received on the previous evening and seek protection of the public authorities. In *Fuzarali*, 14 C. W. N. ccxix (1910), it was held that when one's property is actually invaded, he is not bound to remain inactive and send for Police help, leaving his property to be destroyed in the meantime and the fact that the Police station is near by does not deprive him of his right of private defence.

This liberal spirit of interpretation of the law of private defence, which is illustrated in the judicial decisions noticed above, is particularly in evidence in the latest decision on the subject in the case of *Ram Nandan Prasad Singh*, 17 C. W. N. 1132 (1913), in which the complainant's party, without permission of accused, constructed a dam across a pyne exclusively belonging to the accused who had obtained injunction from the Civil Court restraining the complainant's party from interfering with the accused in their use and occupation of the pyne and the accused's party in attempting to cut the dam were opposed by complainant's men, two of whom were struck by the accused's party. It was held that after the Civil Court decree and injunction, the presence of the complainant's party in opposing the accused was a criminal trespass which entitled the accused to a right of private defence and so the accused could not be held to be "enforcing a right" within the meaning of sec. 141 (4), I. P. C. It was further observed in the case that the phrase "to enforce a right" could only apply when the party claiming the right have not possession over the subject of the right, that therein lay the distinction between "enforcing a right" and "maintaining a right" and that the party in possession was entitled to resist and repel an aggression and his action in so doing would be in the maintenance of his right. This is reverting to the old law on the subject laid down in *Mitto Singh*, 3 W. R. Cr. 41 (1865), which was expressly dissented from in the leading case of *Ganouri Lal Das*. It has already been pointed out that *Ganouri Lal's* case laid down the law too widely when it ruled that there was no right of private defence against acts of aggression done in the exercise of a *bonâ fide* claim of right. But the decision in that case, in so far as it laid down that when there was time to have recourse to the protection of the public authorities, there could be no justification for the use of force to maintain one's possession, has always been accepted as a sound exposition of the law. This decision is apparently in conflict with the statement of the law as contained in the recent decision in the case of *Ram Nandan Prasad Singh*. But if we accept the more liberal and rational interpretation of the provisions of cl. 3 of sec. 99, I. P. C., it would be found that there is very little scope for the application of *Ganouri Lal's* case and that the rule as laid down

in the other case, is, for all practical purposes, a quite sufficient statement of the law; for it must be in extremely rare cases, that a party can apply for the protection of the public authorities in time to prevent an aggression on his property by the opposite party.

Though an assembly, the common object of which is to maintain possession, is lawful, the right of private defence may be exceeded by (1) the use of excessive violence by one or more members of the assembly, *i.e.*, by violation of the provisions of cl. 4 of sec. 99, I. P. C., or (2) by continuing to use force, even after the danger to the property has ceased, *i.e.*, by violation of the provisions of cls. 2-5 of sec. 105, I. P. C. In such cases whether the whole assembly becomes unlawful by reason of the right of private defence being exceeded by some individual members of it, will depend upon the particular facts of each case. If the whole assembly aid and abet those who inflict unnecessary violence, then the whole assembly becomes unlawful. *Baijnath Dhanuk*, I. L. R. 36 Cal. 296: s. c. 9 C. W. N. 677 (1908). But if the excessive violence be merely the acts of individual members of the assembly for which the assembly itself was not responsible, then the assembly does not become unlawful, by reason of such excessive violence; *Kalu Mandal*, 10 C. L. R. 278 (1882), *Ram Khelwan*, I. L. R. 36 Cal. 827: s. c. 13 C. W. N. 827 (1909), *Runja Bhuia* I. L. R. 39 Cal. 896: s. c. 16 C. W. N. 1053 (1912). Where the assembly continue in their acts of violence on the other party, even after the latter had stopped their operations and began to retreat, then the whole assembly, though not unlawful in the beginning, became so afterwards. *Ambica Lal*, I. L. R. 35 Cal. 443 (1908). It may be added here that in cases where the complainant's party are the aggressors, it is often alleged that they were chased by the accused's party after they had begun to retreat. Such allegations should always be received with very great caution, as in such cases, this is the only way to incriminate the other party.

Next arises the question as to whether the party in actual occupation of the subject of the dispute, for the time being, should always be regarded as being in possession thereof so as to be entitled to a right of private defence against the other party. In deciding this question, the length of time during which a party has been in occupation of the subject of the dispute, seems to be of some importance. In *Jairam*, I. L. R. 35 Cal. 103 (1907), it was held that where the disputed land had all along been in the possession of the complainant, the fact that the accused were ploughing the land and were thus in occupation of it for a few hours before the [illegible]rence, did not constitute possession of the [illegible]fied in [illegible] as to entitle them to a right of private [illegible] other party. *Meher Shekh*, I. L. R. 21 Cal. 392 [illegible] held that possession for 5 days only, though manifestly a wrongful one, by the complainant's party, of a *katha* in a *beel* which had all along been in the possession of the accused's party, deprived the accused of the right of private defence.

IV.—Cases in which neither party in possession.

We have hitherto been dealing with cases in which either the complainant's party or the accused's party are in exclusive and peaceful possession of the subject of dispute. There may, however, be cases in which the respective rights of the parties are in an undefended state and neither party is in exclusive and undisturbed possession. In such cases, neither of the parties is justified in using force in the assertion of his rights and whichever party uses force to secure the right he claims would be punishable. (1) *Peary Mohan Sircar*, I. L. R. 9 Cal. 639 (1883), (2) *Kadhu Singh*, I. L. R. 24 All. 298 (1902).

S. Sen.

CURRENT INDIAN CASES.

(Civil.)

Limitation Act (IX of 1908), Sch. I, Art. 116.

Lalchand Nauchand Gujar v. Narayan Hari, I. L. R. 37 Bom. 656.

Sch. I, Art. 116 covers suits for debts or sums certain due upon registered instruments.

Court of Small Causes—Jurisdiction.

Puttangowda v. Nilkanth, I. L. R. 37 Bom. 675 (F. B).

A Court of Small Causes can entertain a suit the principal purpose of which is to determine a right to immoveable property provided the suit in form does not ask for this relief but for payment of a sum of money.

Trial of suit—Permission to Plaintiff to produce evidence after close of hearing.

Bai Kashibai v. Shidapa Annapa, I. L. R. 37 Bom. 682.

After the hearing is finished the Plaintiff should not be permitted to produce documents to counteract the documents filed by the Defendant after all the witnesses have been examined.

Court of Small Causes—Jurisdiction.

Bhikoji v. Radhabai, I. L. R. 37 Bom. 700.

The Plaintiff alleged that she and the Defendant were both sharers in a kulkrani vatan and that the Defendant had received the profits of the office and did not pay to Plaintiff her share for a certain number of years. The Defendant admitted that he had received the profits and admitted the Plaintiff to be a sharer but disputed the quantum of her share.

Held—That the suit was one for money had and received by the Defendant for the use of the Plaintiff and could be tried in a Court of Small Causes.

VAN RAI v. ABILAKH BARAI.

the Magistrate but to pass judgment and he could not avoid this duty merely on account of the absence of one of the parties."

Babu Baikuntha Nath Mitter in showing cause against the Reference submitted that sec. 247, Cr. P. C., lays down that if the summons has been issued on complaint and upon the day appointed for the appearance of the accused or on any day subsequent thereto to which the hearing may be adjourned the complainant does not appear the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day. The direction under this section is imperative and the Magistrate was bound to act under this section. This procedure has been approved of by the High Court in *Mudoosoodun* v. *Hari Dass* (1).

The JUDGMENT OF THE COURT was as follows :—

This is a Reference by the Officiating District Magistrate of Sarun asking for the setting aside of an order of acquittal passed by the Sub-Deputy Magistrate of Gopalgunj under sec. 247, Cr. P. C., on account of the absence of the complainant at the time of the hearing of the argument in the case. The case that was before the Sub-Deputy Magistrate was a summons case and therefore governed by the procedure laid down in Chap. XX of the Code of Criminal Procedure. The principal point on which the District Magistrate has asked for our interference with the acquittal is that the Code makes no provision for argument in a case governed by Chap. XX, and therefore the presence of the complainant at that stage was not required by law. It is true that

(1) 22 W. R. Cr. 40 (1874).

Chap. XX of the Code makes no provision for argument in a summons case, but we are not prepared to say that the hearing of a case is concluded with the examination of the witnesses for the parties. As a matter of fact the case had been adjourned by the Sub-Deputy Magistrate to be heard again for the purpose of the documentary and oral evidence being explained to him. In that view the hearing of the case did not end and therefore sec. 247 of the Code of Criminal Procedure had application to the circumstances of the case.

In the case of *Mudoosoodun* v. *Hari Dass* (1), it was laid down that "under sec. 208 of the Code of Criminal Procedure of 1872, (sec. 247 of the present Code), the Magistrate may dismiss the complaint if the complainant does not appear on the day to which the hearing has been duly adjourned, even though the complainant and his witnesses have been examined and their further attendance seems unnecessary." Regard being had to the authority of the case we have just now cited we are unable to interfere with the order of acquittal passed by the Sub-Deputy Magistrate.

Reference discharged.

(1) 22 W. R. Cr. 40 (1874).

PRIVY COUNCIL.

[Appeal from Allahabad.]

Lord Shaw.
Lord Moulton.
Mr. Ameer Ali.
1913,
Heard,
9, December.
1914,
Judgment,
6, February.

Musammat Bakhtawar Begam, Appellant,
v.
Musammat Husaini Khanam and anr., Respondents,
and
Musammat Husaini Khanam and anr., Appellants,
v.
Musammat Bakhtawar Begam and others, Respondents.

Indian Limitation Act (XV of 1877), Sch. II, Art. 148—Suit for redemption of mortgage by conditional sale, limitation—Time, running of, from end of term or from time of payment where there is option to pay before end of term—Possession, right to recover, accrual of.

Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property.

So where in a case of mortgage by conditional sale there was a condition that the mortgagors were to be entitled to recover the property within nine years on the liquidation of the debt with the usufruct of the property, and the Plaintiff mortgagors brought a suit for redemption and stated that the mortgage debt had been satisfied by the usufruct eight years after the mortgage but the suit was brought just within sixty years computed from the end of the said term of nine years but after more than sixty years from the time of the satisfaction of the mortgage as aforesaid:

Held—*That the time ran from the time of satisfaction of the mortgage debt, the right to recover possession having accrued then; the suit was, therefore, barred by limitation.*

This was an Appeal from a Judgment of the Allahabad High Court, dated the 11th November 1907, reversing the judgment of the Subordinate Judge of Cawnpore. The suit brought on the 6th January 1899 was to recover possession by redemption of property mortgaged on the 6th January 1830. The mortgage by conditional sale was for a term of 9 years although redeemable before the expiry of the term. The main provision of the mortgage is quoted in their Lordships' judgment. The defence contended that the suit was barred by 60 years' limitation starting from the date of the mortgage. Reliance was placed upon paras. 2 and 8 of the plaint (quoted in their Lordships' judgment) which showed that according to the allegations of the Plaintiffs themselves the mortgage was redeemable within and before the expiry of the term of 9 years.

The Subordinate Judge held that the suit was barred. He said in his judgment:—

"The mortgage was no doubt for a term of nine years; but it is admitted by the Plaintiffs in the plaint that there was a distinct provision authorizing the mortgagors to redeem the property on payment of the mortgage money before or after the stipulated period, and that there was also a provision that the mortgage would be redeemed in case the mortgage money was paid off before the stipulated period out of the usufruct, and the Plaintiffs have come into Court on the allegation that the debt was actually satisfied out of the usufruct before the expiry of the stipulated period

of nine years. The Defendants accordingly argue that "the right to redeem or to recover possession" within the meaning of Art. 148, Sch. II to the Limitation Act, accrued on the date of the mortgage (16th January 1830) and at all events before the expiry of nine years from that date. This argument is supported by the following remarks in *The Maharaja of Benares* v. *Sita Ram Naik* (1), *viz.*, 'If in this case it could be shown that the mortgage of the 27th March 1819 was under conditions such as to enable the mortgagor, whom the Plaintiff now represents, to come and redeem at any time before the lapse of the ten years' term fixed therein, I should have had no hesitation in holding that this present suit which was not instituted till the 1st December 1885, was a suit barred by the imperative order of the Legislature' (p. 136). The present suit is on all fours with the hypothetical case referred to in the above extract.

"Moreover, it has been repeatedly held that where time is not of the essence of the contract the mortgagor can redeem even before the expiry of the stipulated period, *Chaturbhuj* v. *Raghubar Dyal* (2), and thus when it is optional with the mortgagor to redeem whenever he likes, the period of limitation will run from the date of mortgage, *Anwari Husain* v. *Lalmir Khan* (3). Having regard to the terms of the mortgage in this case and to the Plaintiff's allegations I am bound to hold following the above rulings that the period of limitation in this case will run from the date of the mortgage, *viz.*, the 6th January 1830, and consequently the suit was beyond time on the 6th January 1899 when it was instituted.

"The learned pleaders for the Plaintiffs attempted to argue that the mortgagors had no power to sue for redemption before the expiry of nine years from the date of the mortgage. But this argument is opposed to the express and unequivocal language of the plaint itself."

But the High Court (Sir John Stanley C. J., and Burkitt, J.) held otherwise. In the Course of their judgment they said:—"If the meaning of this contemporaneous agreement was that the mortgagors might redeem at any time within the period of nine years, the Plaintiff's claim is barred by limitation. If, on the other hand, the intention of the parties was that the debt should remain outstanding for a period of nine years certain, then the right to redeem only accrued at the expiration of that period. Ordinarily a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation [*Brown* v. *Cole* (4)]. Westropp, C. J., in his judgment in *Vadju* v. *Vadju* (5) says, 'The general principle as to redemption and foreclosure is that in the absence of any stipulation expressed or implied to the contrary the right to redeem and the right to foreclose must be regarded as co-extensive.' In that case the stipulation in the mortgage-deed was that the mortgagor would pay the debt within ten years and redeem the mortgaged property, and it was held that a suit for redemption instituted within the ten years

(1) Weekly Notes for 1889, p. 135.
(2) Weekly Notes for 1901, p. 36.
(3) Weekly Notes for 1903, p. 228.

(4) 14 Sim. 427 (1845).
(5) I. L. R. 5 Bom. 22 (1880).

was premature; the mere use of the word 'within' not being a sufficient indication of an intention that the mortgagor might redeem in a less period than ten years. So in *Raghubar Dayal* v. *Bhudhu Lal* (6), in which the stipulation was that the principal and the interest should be paid at the promised time (that was in ten years), it was held that the advance by the mortgagee to the mortgagor was for a period of ten years certain, and that the mortgagor was not entitled before that period had expired to redeem the property. The principle acted upon in these cases is embodied in the Transfer of Property Act. Sec. 60 provides that 'at any time after the principal money has become payable,' the mortgagor may redeem. Sec. 62 prescribes in the case of an usufructuary mortgage, that the mortgagor has a right to recover possession of the property where the mortgagee is authorised to pay himself from the rents and profits the interest of the mortgage debt, 'when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money, etc.' Also in sec. 67 in which the right of foreclosure or sale is prescribed, the language is as follows:—'In the absence of a contract to the contrary, the mortgagee has at any time after mortgage money become payable to him, etc.,' a right to obtain an order for foreclosure or sale. The principal money only becomes payable when the payment becomes obligatory upon the mortgagor. Lindley, M. R., in the case of *De Braam* v. *Ford* (7), commenting on the meaning of the words 'time of payment' contained in a bill of sale, observes:—'To my mind the expression is unambiguous; it means the time at which payment is to become obligatory, the time at which the borrower must pay and after which if he does not pay he can be sued for payment.'

On the evidence afforded by the proceeding before the Collector, we are of opinion that the agreement of the parties was that the advance made by Ataullah Khan was to be left outstanding for a period of nine years, and that within that period the mortgagee could not foreclose the mortgage, nor could the mortgagor redeem it. The learned Subordinate Judge appears to have been of this opinion also, for he says in his judgment: 'The mortgage was no doubt for a term of nine years,' but then he holds that by reason of the statement by the Plaintiffs in the plaint, that the debt was actually satisfied out of the usufruct within the period, the Plaintiffs could not rely on this fact. He also seems to hold that it was optional with the mortgagor to redeem whenever he pleased, and that therefore the period of limitation ran from the date of the mortgage. After referring to some rulings he says, 'having regard to the terms of the mortgage in this case and to the Plaintiff's allegations, I am bound to hold, following the above rulings, that the period of limitation in this case will run from the date of the mortgage, *viz.*, the 6th January 1830, and the suit was beyond time on the 6th January 1899, when it was instituted.' We are unable to agree with him as to this. The time began to run, we think, from the expiration of the term of nine years, and the mere fact that the Plaintiffs alleged that the mortgage debt was satisfied within this period, does not affect the question."

Hence this Appeal.

(6) I. L. R. 8 All. 95 (1886).
(7) [1900] 1 Ch. 142 (1899).

MUSAMMAT BAKHTAWAR BEGAM *v.* MUSAMMAT HUSAINI KHANAM.

Mr. L. DeGruyther, K. C., and *Mr. Bhagwandin Dubè* for the Appellants submitted that the view taken by the Subordinate Judge was right. The suit was clearly barred on the case as made in the plaint itself under Art. 148 of Act XV of 1877. Paras. 2 and 8 left no doubt that the Plaintiffs had a right to redeem the mortgage before the expiry of the term of nine years. The period of limitation commenced to run from the date of the mortgage. In any case the Plaintiffs in the accounts attached to the plaint stated that the whole mortgage-debt was satisfied out of the profits realized by the mortgagee in 1245 Fasli (*i.e.*, September 1837-38). In other words the Plaintiffs meant that their right to recover possession of the mortgaged property accrued in September 1838 at the latest. Even then the suit was clearly barred. The plaint ought to have been rejected on the face of it under cl. (c), sec. 54, Civil Procedure Code, 1882.

Sir Erle Richards, K. C., and *Mr. Ross, K. C.*, for the Respondents submitted that the term of nine years was fixed and certain and that the mortgage was really not redeemable before the expiry of the term. The mortgage-deed was in the possession of the Appellants but they withheld it. The High Court was right in finding that according to the true meaning of the mortgage it was not redeemable before the end of the nine years. The accounts filed with the plaint were incorrect. The Appellants themselves asserted that for the first two years they were out of possession. The statements in the plaint were after all pleadings drawn up by pleaders and they were really inferences incorrectly drawn from certain papers. The Respondents were not absolutely bound by the words of the plaint.

The Plaintiffs' cross-appeal was not argued.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The Suit which has given rise to these consolidated Appeals from a Decree and Judgment of the High Court of Allahabad was instituted by the Plaintiff-Respondent in the Court of the Subordinate Judge of Cawnpore for the redemption of a mortgage executed so long ago as the 6th of January 1830. The Suit was brought on the 6th of January 1899, and the only and vital question presented at the Bar for determination in this case is whether the claim is barred by the Statute of Limitation (Indian Act XV of 1877).

The Plaintiff, Husaini Khanam, alleges that on the 6th of January 1830 her farther, Aga Fateh Ali, in conjunction with another relative named Aman Ali, executed a mortgage by way of conditional sale in respect of 12 villages lying within the district of Cawnpore in favour of one Ata Ullah Khan, since deceased. The other Plaintiffs are persons who have acquired title from Husaini Khanam. The principal Defendant in the action was one Ali Husain Khan, who was the representative of Ata Ullah. He died since the decision by the High Court in the Appeal from the Decree of the Subordinate Judge, and he is now represented by his widow, Bakhtawar Begam, the Appellant. The remaining Defendants are assignees of interests created by the original mortgagee or his representatives in the mortgaged premises.

The mortgage deed is not forthcoming, but both the Courts in India have found that the contract between the parties to the transaction is, for all material pur-

poses, substantially set forth in the Proceeding of the Collector's Court, dated the 18th of September 1830, on an application for mutation of names in the Revenue Register.

The contract of mortgage by conditional sale is a form of security recognised throughout India, and its incidents have been embodied in sec. 58 of Act IV of 1882 (the Transfer of Property Act). The form it usually takes is for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee who on his side executes an agreement covenanting that on the liquidation of the debt, according to the terms of the contract, the sale would be cancelled, and he would re-convey the property to the mortgagor. On the breach of the condition relating to repayment the contract executes itself, and the transaction becomes one of absolute sale.

The Proceeding which contains the contract in this case is set out in full in the judgment of the High Court. The only material part to which their Lordships need refer is the clause relating to repayment, which runs as follows :—

"On being asked Sital Parshad, attorney of Ataullah Khan, stated that his client had executed and made over to Mirza Aman Ali and Fateh Ali an agreement to the effect that the sale would be cancelled on payment of the amount of consideration in nine years, and that, therefore, the sale was not an absolute but a conditional sale."

The period of limitation under the Indian Statute for suits for redemption or for recovery of possession of mortgaged property is sixty years from the date of the accrual of the right to redeem or to recover possession (Art. 148, Sch. II, Act XV of 1877). The Subordinate Judge was of opinion that limitation began to run from the date of the contract, and accordingly held that the suit was barred. The High Court of Allahabad on appeal have taken a different view. The learned Judges considered *inter alia* that the right to redeem in respect of the seven villages which were in the possession of the mortgagee's representatives accrued only on the expiration of the period of nine years for which the contract was made, but that as regards the five villages which had been transferred by the mortgagee to third parties the claim was barred. They accordingly decreed the Plaintiffs' claim in respect of seven villages and dismissed it with regard to the rest.

The Defendants have appealed from the first part of the High Court decree, against which there is a cross-appeal on the part of the Plaintiffs.

The first question to determine is whether the Plaintiffs' right to redeem is affected by 60 years' limitation, for in that case her claim must fail *in toto*. The learned Judges dealing with this point give expression to their opinion in the following passage in their judgment :—

"If the meaning of this contemporaneous agreement was that the mortgagors might redeem at any time within the period of nine years, the Plaintiffs' claim is barred by limitation. If, on the other hand, the intention of the parties was that the debt should remain outstanding for a period of nine years certain, then the right to redeem only accrued at the expiration of that period. Ordinarily, a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation."

And they refer to a number of cases in support of their conclusion. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the

mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor. In the present case had the matter depended only on the construction of the contract as given in the Proceeding of the Collector, much might be said in support of the High Court's conclusions. The expression that "the sale would be cancelled on payment of the consideration in nine years" is certainly ambiguous.

But here the Plaintiffs' case is that the mortgagors were entitled to recover the property within the period of nine years on the liquidation of the debt with the usufruct of the property. In the second paragraph of the plaint the Plaintiffs state as follows :—

"The terms of the mortgage as agreed were that the mortgagee should remain in possession of the said mortgaged villages . . . that the amount of profits, if any, which shall remain after paying the Government revenue, interest, and pay of the persons making the collections would be owned by the mortgagors and applied in the payment of the principal, and that whenever the mortgage money would be satisfied (out of the usufruct) or paid (by the mortgagors) before or after the stipulated time the mortgaged property should be redeemed."

And the fact is emphasised in para. 8 which is in these terms :—

"The whole amount of the principal mortgage money with interest mentioned in the mortgage-deed was paid up at the end of the year 1245 Fasli according to the account which is annexed to this Plaint and forms part of it. No portion of the mortgage money, interest or any other demand is now due; on the other hand, there is a surplus amount due to the Plaintiffs."

In their Lordships' judgment this is not a case of a wrong construction of a clause or condition in the contract. It is a distinct allegation of fact on which the right to recover possession is founded. But the matter does not rest there. The Plaintiffs produced with the Plaint a statement of accounts in respect of the 12 villages based on the settlement records to show the amounts realised by the mortgagee from 1830 to 1897. In this document it is clearly stated that the whole debt was satisfied in 1245 Fasli (4th September 1837—4th September 1838). From that time the balance of the realisations by the mortgagee after deduction of the legitimate outgoings is treated by the Plaintiffs as sums retained by him without any right.

If the fact be, as the Plaintiffs allege, that the mortgage debt became satisfied under the contract in 1838, the right to recover possession accrued then, and the suit is clearly barred.

Their Lordships are, therefore, of opinion that the Decree of the High Court partly decreeing the Plaintiffs' claim should be set aside, and the suit dismissed, which will involve the dismissal also of the cross-appeal.

With regard to the costs their Lordships think that Jamna Narain, who represents the original assignee of the five villages in respect of which the Plaintiffs' suit has been dismissed by both the Courts in India, is entitled to the costs decreed in the Court of the Subordinate Judge and in the High Court, and to the costs of these Appeals to His Majesty in Council. As regards the other parties, their Lordships think that the Plaintiffs should bear the costs decreed against them in the First Court, but that each of the parties should bear their respective costs of these Appeals and of the Appeals

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to the High Court, including the costs incurred in the Proceedings on remand.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. T. C. Summerhays & Son* for the Respondents.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]
LETTERS PATENT APPEAL
No. 40 OF 1912.

JENKINS, C. J. MOOKERJEE, J. 1913, Heard, 2, July. Judgment, 3, July.

PROTAP CHANDRA SAHA, Plaintiff, Appellant, *v.* MAHOMED ALI SARKAR, Defendant, Respondent.

Evidence Act (I of 1872), secs. 92, 93—Rate of interest on arrears of rent—Kabuliyat *omitting to mention whether rent monthly or annual—Oral evidence to supply deficiency if admissible—Prior transactions—Custom*

Where a kabuliyat *executed by the tenant provided that interest on arrears of rent would be paid at the rate of 1 anna per rupee, but the document did not expressly state whether interest at this rate was payable monthly or annually:*

Held—*That direct oral evidence to the effect that at the time the parties entered into the contract of tenancy they agreed that interest would be payable at the rate of 1 anna per rupee per month was inadmissible under the provisions of secs. 92, 93 of the Evidence Act.*

MONMOTHA NATH *v.* NABIN CHANDRA (1) *explained.*

MAHOMED SUMSOODDEEN *v.* ABDOOL HUQ (2) *distinguished.*

Admissibility of evidence of prior transactions between the parties to the contract and to prove customs of trade tacitly incorporated in the contract, discussed.

This was an Appeal under sec. 15 of the Letters Patent preferred on 12th of April 1912, against the judgment of Mr. Justice Coxe, dated the 15th of March 1912, passed in Appeal from Appellate Decree No. 89 of 1910, which had been preferred against a decree of Babu Hari Prasanna Mukerjee, Subordinate Judge of Tipperah, dated the 5th of October 1909, modifying a decree of Babu Madon Mohan Saha, Munsif of Chandpur, dated the 27th of February 1909.

This appeal arose out of a suit for rent based on a *kabuliyat.* The original *kabuliyat* could not be obtained and secondary evidence was given of it. The only point that arose in the appeal related to the rate at which the landlord Plaintiff was entitled to recover interest on the arrears of rent found due to him from the tenant Defendants.

The stipulation in the *kabuliyat* which relates to interest was that in the event of default in the payment of rent the tenant should pay interest at the rate of $6\frac{1}{4}$ per cent. After the words six and a quarter, came another word which had been penned through; and another word had been substituted. This last word could not be deciphered. The document itself did not show for what period this rate of $6\frac{1}{4}$ was. The landlord's case was that this rate was the rate per mensem and that the ordinary rate of interest in this country was the rate per mensem.

The Munsif allowed oral evidence to be given as to whether the rate mentioned in the *kabuliyat* was the rate per annum or the rate per mensem, and came to the conclusion on the evidence that it was

(1) 14 C. W. N. 1100 (1910).
(2) W. R. [1864] p. 379.

the latter and gave the Plaintiff a decree accordingly. On appeal the Subordinate Judge held that the document was ambiguous but oral evidence of the character was inadmissible under sec. 93 of the Evidence Act. In the result he gave the Plaintiff damages at 25 per cent. on the arrears found.

On Second Appeal by the Plaintiff, Coxe, J., held as follows :—

"As to the contention that the rate of interest in any vernacular document in this country must be presumed to be a rate per mensem, that is certainly not a presumption of law which I am bound to take for granted. It is a matter which will have to be proved by evidence like any other fact.

"It was held in the case of *Monmotha Nath Chowdhury* v. *Nabin Chandra Sanyal* (1), that extraneous evidence can be given to clear up an ambiguity of the nature and it appears in this case that evidence of that kind was given. The learned Subordinate Judge, however, has not considered that evidence but has proceeded exclusively on the document itself. It appears to me that in this the learned Subordinate Judge erred in law. If the document itself was ambiguous and extraneous evidence could be given to clear up the ambiguity the Subordinate Judge should in my opinion have considered that evidence and on the strength of that evidence should have arrived at some conclusion as to what was the intention of the parties, that is to say, whether the rate of interest agreed upon by them was 6¼ per mensem, or per annum, or per kist or any other rate. The case must, I think, go back to him for a finding on this point. It has also been argued that the rate claimed, should not be allowed as it is a hard and unconscionable rate. No doubt, it was held in *Narendra Kumar Ghose* v. *Gora Chand Poddar* (8) and *Kalinath Sen* v. *Trailakhya Nath Roy* (9), that a stipulation for excessive interest need not be enforced by the Courts if it is thought to be exorbitant. The rulings on this point, however, were not necessary for the purposes of the decisions and I find some difficulty in understanding how the Courts could decline to enforce such stipulations in the absence of any proof of undue influence or fiduciary relations. But I think that I need not go into the point because it was not raised apparently in the Courts below. In the Subordinate Judge's Court, of course, the Defendant succeeded, and it was not necessary for him to raise this point. But in the Munsif's Court he failed and the rate claimed by the landlord was decreed. It is clear from the judgment of the Munsif that it was not pressed before him and no evidence was given to show that this rate was one that ought not to be enforced, even if it had been agreed to by the tenant. I think therefore that it is undesirable to make any further inquiry on that point.

"Accordingly the appeal will be allowed and the case will go back to the learned Subordinate Judge in order that he may come to a finding after consideration of all the evidence in the case as to what was the intention of the parties with reference to the rate of interest the tenant was to pay and the case will be disposed of according to that finding.

"Costs will abide the result."

The Plaintiff preferred this further appeal under sec. 15 of the Letters Patent.

(1) 14 C. W. N. 1100 (1910).

(8) I. L. R. 33 Cal. 683, 688 (1906).
(9) I. L. R. 25 Cal. 815 (1899).

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Dr. Sarat Chandra Bysak for the Appellant.

Babu Kritanta Kumar Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the Plaintiff landlord under cl. 15 of the Letters Patent against the judgment of Mr. Justice Coxe in a suit for rent. The substantial question in controversy between the parties is as to the rate at which interest is payable upon the amount of rent in arrears. The contract between the parties is embodied in a *kabuliyat* executed on the 20th of June 1872. This document recited that interest would be paid by the tenant upon rent in arrears at the rate of 1 anna per rupee: The document does not expressly state whether interest at this rate was payable monthly or annually.

The Court of first instance allowed evidence to be given as to what was intended, and came to the conclusion that the interest intended to be payable was at the rate of 1 anna per rupee per month, that is 75 per cent. per annum. A decree was made accordingly in favour of the landlord. Upon appeal the Subordinate Judge held that the document was ambiguous, and that evidence could not be admitted to show what was really intended, in view of the provisions of sec. 93 of the Indian Evidence Act. In this view, the Subordinate Judge allowed damages at the rate of 25 per cent. upon the amount in arrears. The landlord then appealed to this Court and upon his appeal Mr. Justice Coxe has set aside the judgment of the Subordinate Judge and remanded the case for reconsideration upon the evidence. The learned Judge has held upon the authority of the decision in *Monmotha Nath* v. *Nabin Chandra* (1), that evidence is admissible to show that the words used in the contract of tenancy were intended to provide that interest at the prescribed rate should be calculated monthly. The Plaintiff is not satisfied with the order of remand which has been made in his favour and has preferred this appeal under the Letters Patent. His contention is that upon a true construction of the contract of tenancy, interest ought to be decreed in his favour at the rate of 75 per cent. per annum. He has convinced us that the order of remand is erroneous, but he has failed to satisfy us that the interpretation he puts upon the contract is correct.

In view of the provisions of secs. 92 and 93 of the Indian Evidence Act, it is plain that oral evidence was not admissible to show what was intended by the parties: the intention must be gathered from the language used by them in the instrument. The case of *Monmotha Nath* v. *Nabin Chandra* (1) is really of no assistance. The learned Judges who decided that case did not specify the evidence which would be admissible to interpret the instrument: they relied merely upon the decision in *Mahomed Sumsooddeen* v. *Abdool Huq* (2), which was decided before the Indian Evidence Act was placed on the Statute Book. In that case Mr. Justice Campbell held that where money had been advanced on an agreement to pay interest at 5 per cent., evidence was admissible to show, on the basis of a previous transaction between the parties and the custom of the country, that what was intended was that interest at 5 per cent.

(1) 14 C. W. N. 1100 (1910).
(2) W. R. [1864] p. 379.

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was payable per month and not per annum. It is not necessary for our present purpose to determine whether evidence of this description would be admissible under the provisions of the Indian Evidence Act. It may be pointed out, however, that evidence of previous transactions between the parties or of the custom of the country may be admissible for a limited purpose. Thus to take one illustration—it has been held that evidence may be allowed to be given in anticipation of some obvious defence, for instance, evidence of prior transactions between the parties, to construe a term in a contract, in rebuttal of a possible customary meaning ; *Bourne* v. *Gatliff* (3) ; similarly in *Robinson* v. *Mollette* (4), it was held that though a writing is conclusive as to the terms of the contract expressed thereby, and though what is not in the writing cannot be part of the terms, yet evidence may be given of customs of trade tacitly incorporated in the contract, provided that the express terms of the writing are not so inconsistent with the custom as to exclude it. In the case of *Cumming* v. *Shand* (5), evidence was allowed to be given, of course of dealing between a person and his Bank, to prove that the Bank had agreed to honour the customer's cheques drawn against the cash part of his account, notwithstanding that the balance of account of cash and goods was against him. To the same effect is *Garnett* v. *M'kewan* (6), where it was assumed that evidence of usage or course of dealing would be admissible to show that when a person has accounts at two branches of a Bank, the bankers had undertaken to cash cheques at one branch, though the whole account showed that the customer had no sufficient balance. Again in *Rowcliffe* v. *Leigh* (7), evidence of custom as also of previous transactions between the parties was allowed to be given for a limited purpose. In the case before us, however, no such consideration arises, because the only evidence upon which the Plaintiff relies is direct oral evidence to the effect that at the time the parties entered into this contract of tenancy they agreed that interest would be payable at the rate of 1 anna per rupee per month, although in the contract itself all that was inserted was that interest would be payable at the rate of 1 anna per rupee. In our opinion, evidence of this description is clearly not admissible under the provisions of the Indian Evidence Act. This view is fortified by ill. 6 to sec. 93 of the Indian Evidence Act which is to the following effect : A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled. If, for instance, in this particular case the contract had said that interest would be payable at the rate of 1 anna per rupee per, and there was a blank, it would not be permissible to the parties to show whether the word intended to be inserted in the blank space was "year" or "month." We are therefore clearly of opinion that the order of remand ought not to have been made by the learned Judge.

The result is that the Appeal is allowed, the order of Mr. Justice Coxe set aside and the decree of the Subordinate Judge restored.

We are not in a position to consider the propriety of the judgment of the

(3) 11 Cl. and F. 45 (1844).
(4) L. R. 7 H. L. 802 (1875).
(5) 5 H. and N. 95 : 120 R R. 498 : 29 L. J. Exch. 129 (1860).
(6) L. R. 8 Ex. 10 (14) (1872).
(7) 6 Ch. D. 256 (1877).

Subordinate Judge because there is no appeal by the Defendant against that judgment.

There will be no order for costs of this Appeal.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2920 OF 1909.

NEWBOULD, J. RAY, J. 1913, Heard, 14, and 15, August. Judgment, 15, August.	MONMOHAN GHOSH, Plaintiff, Appellant, *v.* EQUITABLE COAL COMPANY, LIMITED and others, Defendants, Respondents.

Specific Relief Act (I of 1877), sec. 42—Assignee from tenant, if may sue landlord for recognition of his tenant rights and declaration of incidents of tenancy—Landlord and tenant.

The Court has power to pass a declaratory decree in a suit by an assignee of a lease against the lessor to have it declared that the lease is a permanent, heritable and transferable one, that the rent was fixed in perpetuity and that the lessor was bound to recognise the Plaintiff as tenant of the leasehold.

The law laid down in earlier rulings to the contrary has been modified by sec. 42 of the Specific Relief Act.

This was an Appeal preferred on the 6th of December 1909 against the decree of D. H. Kingsford, Esq., Judicial Commissioner of Chota Nagpore, dated the 25th of August 1909, reversing the decree of Dr. V. Rai, Munsif of Giridih, dated the 23rd of December 1908.

The suit out of which this appeal arose purported to have been instituted under sec. 42 of the Specific Relief Act.

The Plaintiff's case was that Defendant No. 2 obtained a lease of the land in suit, measuring more or less 12 cottahs according to local measurement, from Defendant No. 1 and executed and registered a *kabuliyat* in Asar 1290 (July 1883); that the lease was a permanent, heritable and transferable one and was obtained for building purposes; that Defendant No. 2 erected a *pucca* building thereon and owned and possessed the land till June 1889, when he sold the land with the buildings to the husband of Defendant No. 3; that Defendant No. 3's husband who was recognized by Defendant No. 1 as tenant held and occupied the leasehold till his death, and after his death, his widow, the Defendant No. 3, sold the property in July 1905 to the Plaintiff's father who occupied the land and houses to the knowledge of the Defendant No. 1 and made considerable additions and alterations to it; that the Plaintiff's father died in Bhadra 1312 and his rights vested in the Plaintiff as the sole executor of his estate, that through the influence of designing persons the Defendant No. 1 sued the original lessee, Defendant No. 2, for rent ignoring the subsequent purchasers and occupiers and got an *ex parte* decree, that the Plaintiff coming to know of the decree, deposited the decretal amount, the rent having been really in arrears, and in his application he put forward his right and the decree was entered as satisfied; that Defendant No. 1 having failed in his attempt to wrest the property from the Plaintiff's hand, instituted an enhancement suit against the same original lessee and that Plaintiff applied to be made a party in that suit, but his petition was rejected as being made too late and likely to delay the decision of the case and as the decision in that suit could not bind the Plaintiff; that the above decrees having thrown a

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cloud on Plaintiff's right he gave formal notice to the manager of the Defendant No. 1, a limited Company and remitted the amount of rent in arrears ; that the rent was refused and no notice was taken of Plaintiff's formal notice. That in consequence the Plaintiff brought the suit for a declaration, (1) that the lease of 14th July 1883 created a permanent, heritable and transferable leasehold and that the rent thereof was fixed, (2) that Defendant No. 1 was estopped from denying the permanant hereditary character of the leasehold, (3) that the Defendant No. 1 was bound to recognize the Plaintiff as tenant of the leasehold, (4) that the decrees for arrears of rent and for enchancement of rent were not binding on the Plaintiff, and (5) that the latter decree was not binding on the leasehold. The Plaintiff also claimed costs and asked that any other relief to which he might be found entitled, might be granted to him.

The Defendant No. 1 contested the suit and denied that there was any cause of action against them, asserted that the rent-suit and the enhancement suit were entirely proper and denied that they were instituted from wrong motives. They denied the transfers and all knowledge of the transfers and urged that transfers without their knowledge were not binding on them. They stated that the lease was of 12 cottahs of land according to standard measurement and that the tenancy now comprised 1 bigha 18 cottahs of land, that the tenancy was bound by the enhancement decree, that none of the alleged successors of the original lessee made any attempt to have his or her name registered in their *sherista*, and that they had sent a reply to the Plaintiff's formal notice. They further asserted that Plaintiff had wrongly described the eastern and the western boundaries of the land originally leased out. They denied that the lease created a transferable tenancy or one with fixed rent.

Several issues arose out of these pleadings, of which the following two are material for the purposes of this report :—

"First—Has the Plaintiff any cause of action.

"Fifth—What is the standard of measurement according to which the area of the lease has to be calculated."

The Munsif decided all the issues in favour of the Plaintiff and decreed the suit in terms of the prayer in the plaint. On the fifth issue, he held that the standard of measurement was as the Plaintiff alleged "6 cubits to a cottah" and not "4 cubits to a cottah" as contended by the Defendant No. 1.

On appeal, the Judicial Commissioner held that the standard of measurement was "4 cubits to a cottah" as alleged by the Defendant and that worked out the rent to Rs. 19 which was the rent decreed in the enhancement suit. On the first issue, he agreed that the Plaintiff had a cause of action, but he was of opinion that on the facts the Plaintiff was not entitled to any declaration and that if he sent the Company a proper notice of assignment and agreed to pay the rent of Rs. 19, the Company were ready and willing to recognise him. He accordingly dismissed the suit.

Plaintiff preferred this Second Appeal.

Babu Tara Kishore Chowdhury for *Babu Sib Chandra Palit* for the Appellant.

Mr. B. C. Mitter and *Babu Manmatha Nath Mukerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff in this suit is an assignee of a lease which was granted by the first

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Defendant to the second Defendant. The Plaintiff brought this suit to have it declared that the lease was a permanent, heritable and transferable one, that the rent was fixed in perpetuity and also that Defendant No. 1 was bound to recognise the Plaintiff as tenant of the leasehold in dispute and for other reliefs.

It is now admitted that the lease created a permanent, heritable and transferable tenancy and that the transfer to the Plaintiff is a valid transfer. But it is contended that the circumstances of the case are not such as would justify granting a declaratory decree. The learned Standing Counsel who appears for the first Defendant-Respondent has cited several rulings in support of this contention. But all these rulings were before the passing of the Specific Relief Act. Illustrations to sec. 42 of the Specific Relief Act show that it has introduced a considerable change in the law on this point. We have no doubt in our mind that we have the power to grant a declaratory decree in this case. The granting of such a decree is discretionary. We think that it is desirable to grant such a decree so that there may be a final decision on the points in dispute about which the parties have been litigating. As a Court of Second Appeal we are bound to accept the finding of the lower Appellate Court that the word "cottah" in the lease means a cottah of four cubits and also the finding that the rent payable by the Plaintiff is Rs. 19 annually. That is to say, the Plaintiff has succeeded in his claim that he is entitled to recognition; but he has failed so far as he has tried to avoid payment of rent at a higher rate. For this reason we allow this Appeal by granting the Plaintiff a decree declaring that the lease of the 14th July 1883 granted by Defendant No. 1 to Joynarayan Sarkar, Defendant No. 2, created a permanent, heritable and transferable tenancy and that the rent thereof is a rent at a fixed rate per cottah of four cubits and that the annual rent is now Rs. 19. And it is also declared that the Defendant No. 1 is bound to recognise the Plaintiff as the tenant holding the tenancy.

Having regard to the success and failure of the parties we direct that each party will bear its own costs throughout.

Appeal allowed in part.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES Nos. 178 AND 179 OF 1910.

STEPHEN, J.
MULLICK, J.
1914,
Heard, 4 and 5, February.
Judgment, 5, February.

SRINIBASH PROSHAD SINGH, Plaintiff, Appellant,
v.
RAM RAJ TEWARY and another, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 52 (1), (b), 180 (1)—Diara *land, tenant holding—Reduction of rent upon diluviation, if may be claimed by him.*

A raiyat who holds diara *land cannot until he has acquired occupancy right in his holding by twelve years' continuous possession demand a reduction of rent under cl. (b) of sub-sec. (1) of sec. 52 of the Bengal Tenancy Act.*

"Holding" in sub-sec. (1) of sec. 180 of the Act means the holding as the tenant received it from the landlord.

JAHANDER BAKSH MULLIK *v.* RAM LAL HUZRA (1) *referred to.*

This was an Appeal preferred on the 10th of May 1910 against the decrees of Babu Kishori Mohan Sikdar, Subordinate

(1) 14 C. W. N. 470 (1910).

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Judge of Zillah Arrah, dated the 1st of December 1909.

The two rent suits out of which these appeals arose were based on two registered kabuliyats, dated the 10th November 1903 and 8th March 1905, respectively. Suit No. 197 was based on the first kabuliyat and the Suit No. 108 on the second kabuliyat. The first kabuliyat was executed for 200 bighas of land at a rental of Rs. 1,443-12 annas. The second kabuliyat was executed for 229 bighas 9 cottahs 19 dhurs of land at a rental of Rs. 1,689-4-6 pies. The amount claimed was Rs. 7,218-12 annas, including damages, in Suit No. 107, and Rs. 8,446-6-6 pies, including damages, in Suit No. 108, for the years 1312 to 1315.

The Defendants pleaded reduction of rent on the ground of diluvion as also under an alleged village usage under which no rent is payable for sandy unculturable lands.

A commission was issued for the purpose of ascertaining by what quantity of land, if any, the Defendants' holdings had been diluviated and what quantity, if any, was sandy unculturable land.

According to the report of the Commissioner, the Plaintiff's agents pointed out two plots of land measuring 100 bighas 6 cottahs 8½ dhurs, as appertaining to the holding which was the subject-matter of Suit No. 107, out of which 8 bighas were partly culturable and 9½ bighas 6 cottahs 18½ dhurs were purti and jungle.

In Suit No. 108 the Plaintiff's agents pointed out 6 plots measuring 113 bighas 3 cottahs 13 dhurs, as appertaining to the holding of the Defendant of this suit, out of which 38 bighas 3 cottahs 4 dhurs were culturable and 75 bighas 9 cottahs were purti and bijmar.

It appeared from the report of the Commissioner that out of the holding, which was the subject-matter of Suit No. 107 about 110 bighas 10 cottahs 3 dhurs had been diluviated and 92 bighas 6 cottahs 18½ dhurs are purti and jungle and out of the holding which was the subject-matter of Suit No. 108, 115 bighas 16 cottahs 7 dhurs had been diluviated and 75 bighas 9 cottahs were purti and jungle.

The Subordinate Judge held that the Defendants were entitled to a proportionate reduction of rent on account of the lands which had been diluviated and also that it was clearly proved by the evidence adduced on behalf of the Defendants that according to local usage, no rent was payable for sandy unculturable lands; that there was no doubt a stipulation in the kabuliyats of the Defendants to the effect that no objection as to any usage or custom should be allowed; and under proviso 5 to sec. 92 of the Evidence Act, evidence of usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contract may be given, if such usages or customs are not expressly mentioned in the contract. But the kabuliyats were in a printed form usually used in the Raj estate, and the stipulation in question was in such vague and general terms that it ought not to preclude the Defendant from claiming reduction of rent on the ground of usage. The Subordinate Judge added that the lands were *diara* land: of which the culturable area varied according to the nature of the silt deposited during the rainy seasons, and it was therefore very reasonable that tenants holding agricultural leases should be made liable for the culturable lands only.

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In the result he held that Defendants were liable for the rent of the culturable areas only which were in their possession, *viz.*, in Suit No. 107, on 8 bighas and in Suit No. 108, on 38 bighas 3 cottahs 4 dhurs. The Defendants, he held, were liable for the rent of these lands only, and the rent payable for these lands would bear the same proportion to the entire jumma as the culturable areas found bore to the entire area.

The Plaintiff appealed.

Babus Provash Chandra Mitra and *Susil Madhub Mullick* for the Appellant.

Babu Tarakeshwar Pal Chowdhury for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

These Appeals arise out of two decrees in two suits which were tried together. The Plaintiff sued on two kabuliyats, one executed on the 10th November 1903 and the other on the 8th March 1905. They were couched in similar terms.

The defence set up by the Defendants is that a great portion of the land which they took under the kabuliyats has either been washed away by the river or rendered unfit for cultivation by reason of the accumulation of sand and other matters upon it. Looking into the case from the point of view of facts it is necessary for the Defendants to prove that the land became unculturable during the whole or part of the period in respect of which the Plaintiff is suing for his rent. This, the Defendants have, in our opinion, failed to do. Their case, as made out in the written statements as amended by their subsequent petition, and by their evidence, is that the damage was done to the land referred to in the kabuliyats in 1311 which is equivalent to 1904, that is to say, at all events after they had executed the first kabuliyat and before they had executed the second. If the land had been so damaged it is impossible to suppose that they would have executed the second kabuliyat after the damage was done. We therefore cannot place any reliance on the evidence given by the Defendants or that of their witnesses as to the date of the damage caused. They have therefore failed to prove that the damage was caused during the period in suit. The land was investigated by an officer of the Court below after the actions had been brought, at a reasonably early opportunity and there is no doubt that in a holding of 200 bighas there were then found only 8, culturable, and in another holding of 229 bighas there were only 28 bighas found culturable. The damage therefore must have been caused before them, but the Defendants have failed to prove, as they should have proved in order to establish their case, when the damage did actually occur. The Defendants' case therefore must fail in point of fact. Nor would their case be any better if the contention advanced as to the date of the damage to the land in question were allowed to prevail. The two kabuliyats which are in the same form contain clauses which we read as providing that neither celestial or terrestrial disturbances nor any village practice or usage not specified in kabuliyat shall be allowed as a ground for non-payment of the full rent reserved. No custom or usage of the village is so specified. In the first place the Defendants set up before the lower Court a plea that there was a custom in the village that when lands were damaged by the river, reduction should be made in the rent : and this contention was allowed by the Court

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below. In this, we think the lower Court was wrong; for, in the first place, such a claim is met by the specific provision in the kabuliyat which we have just quoted. In the second place it is met by the fifth proviso to sec. 92 of the Evidence Act. The Defendants therefore can make no case on the point of custom in the village.

In the next place, the Defendants rely on the provisions of sec. 52, cl. (1), sub-cl. (*b*) of the Bengal Tenancy Act and say that they are entitled to a reduction of rent, on it being proved that there is a deficiency in the holding which they took under the kabuliyats. The answer, however, to this contention is to be found in sec. 180 of the Bengal Tenancy Act wherein it is provided, that notwithstanding anything in the Act, a raiyat who holds *diara* lands (and these lands are admitted to be *diara* lands) does not acquire any right of occupancy till he has occupied them for 12 continuous years; and that until he acquires such right he is liable to pay such rent for his holding as may be agreed upon between him and his landlord. In this section the words "his holding" must be taken to mean the holding as he received from his landlord, and consequently the provisions of sec. 52 of the Bengal Tenancy Act to which we have referred, do not apply. After a careful consideration, we are of opinion that this is the effect of the words of the section as they stand. There is no direct authority on the point, but the view which we have expressed is consistent with the application of the section which was given effect to in a decision in the case of *Jahander Baksh Mullik* v. *Ram Lal Huzra* (1).

The result is that these Appeals must be allowed and the landlord is entitled to his full rent for the two holdings for the period in suits, that is to say for the full amount claimed in the plaint.

The Appellant is entitled to his costs in this Court and also in the Court below.

Appeals allowed.

(1) 14 C. W. N. 470 (1910).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 653 OF 1911.

MOOKERJEE, J.
MULLICK, J.
1913.
5, June.

ASKAR ALI, one of the Defendants, Appellant, *v.* GOUPEE MOHAN CHOWDHURY & anr., Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 86 (6)—Non-transferable holding, transfer of portion of—Collusive surrender by transferrer to landlord—Landlord if may eject transferee.

Where after transferring a portion, a raiyat surrenders the whole of his holding to the landlord:

Held—*That, if the surrender be collusive, the tenancy subsists; and, so long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding.*

Quære:—*Whether a purchaser of a portion of a holding is not protected under sub-sec. (6) of sec. 86, Bengal Tenancy Act.*

TAMIZUDDIN KHAN *v.* KHODA NAWAZ KHAN (4) *commented on.*

GAGAN CHANDRA CHOWDHURY *v.* ALEK CHAND SAHA (6) *distinguished.*

This was an Appeal preferred on the 20th of March 1911 against the decree of Babu Satkari Haldar, Officiating Subordinate Judge, 1st Court of Tipperah, dated the 5th of December 1910, modifying

(4) 14 C. W. N. 229 (1909).
(6) 17 C. W. N. 698 (1913).

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the decree of Babu Madhu Sudan Roy, Officiating Munsif, 2nd Court at Nabinagar, dated the 18th of December 1909.

The material facts will appear from the judgment.

Babu Gobinda Chandra Dey Roy for the Appellant.

Babus Harendra Narain Mitra and *Upendra Kumar Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the second Defendant in an action in ejectment. The subject-matter of the litigation consists of nine parcels of land, which, the Plaintiff alleges, are comprised in a tenancy held by the thirteenth Defendant under him. The case for the Plaintiff is that in 1903 the tenant unlawfully transferred a portion of the holding to the contesting Defendants, that thereafter, on the 27th May 1908, the tenant surrendered the holding in his favour, and, that consequently, he is entitled to recover possession thereof. The Court of first instance found with regard to two of the plots, namely, the *first* and the *third*, that they were not included in the tenancy of the thirteenth Defendant. As regards the surrender, the Court found that it was fictitious, as notwithstanding the execution of the deed of release, the tenant had continued in occupation of the remainder of the land. In this view, the Court of first instance dismissed the suit. Upon appeal, that decree has been reversed by the Subordinate Judge. On the question of the genuineness of the surrender, the finding of the Subordinate Judge is ambiguous. He states that even if the deed be collusive and intended to cheat the transferee, the latter has his remedy against the transferrer. In the opinion of the Subordinate Judge the Plaintiff is entitled to re-enter even though there has been no real surrender in his favour. The second Defendant has now appealed to this Court, and on his behalf the decree of the Subordinate Judge has been assailed on two grounds, namely, *first*, that the Plaintiff cannot succeed inasmuch as there is no real surrender in his favour ; and, *secondly*, that the Plaintiff is not entitled to re-enter, because even if the surrender represents a real transaction, it does not affect the interest or prejudice the position of the transferee.

In so far as the first point is concerned, it is plain that the Subordinate Judge has not reversed the clear findings of the Court of first instance. That Court found that notwithstanding the execution of the deed of surrender, on the 27th May 1908, the tenant has continued in occupation of the homestead and a portion of the remaining land of the tenancy. That finding is not displaced by the Subordinate Judge. On the other hand, the Subordinate Judge holds that the tenant, no withstanding the execution of the deed of relase, has continued in occupation with the permission of the landlord. In our opinion, there is no room for doubt that the alleged surrender was collusive. It has been argued, however, that even if the surrender was collusive, the Plaintiff is entitled to re-enter. We are of opinion that there is no foundation for this contention. If the surrender was collusive, the tenancy of the thirteenth Defendant has not yet terminated, and, so long as that tenancy subsists, the Plaintiff is not entitled to eject the transferee. It has been ruled in a series of cases of this Court, amongst which may be mentioned those of *Chandra Mohun* v. *Bisseswar* (1), *Durga Prosad*

(1) 1 C. W. N. 168 (1892).

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Sen v. *Doula Gazee* (2) and *Kabil Sardar* v. *Chandra Nath Nag Chowdhury* (3), that as long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding. The first ground must consequently succeed.

In so far as the second ground is concerned, reliance has been placed by the Respondent upon the case of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (4) to show thar a purchaser of a portion of a holding is not protected under sub-sec. (6) of sec. 86 of the Bengal Tenancy Act. In the view we take of the rights of the parties with reference to the first question raised before us, it is not necessary to decide whether the case of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (4) furnishes a correct exposition of the law. We may point out, however, with regard to that decision that there are at least four points which require consideration. In the first place, the learned Judges adopted, for the purposes of the interpretation of sec. 86 which finds place in Chap. IX of the Bengal Tenancy Act, the definition of the term 'incumbrance' given for the purpose of Chap. XIV alone. In the second place, the decision of this Court in the case of *Chandra Sakai* v. *Kali Prasanna* (5), shows that an exchange is an encumbrance within the meaning of sec. 161 of the Bengal Tenancy Act, and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale. In the third place, the effect of the decision is to place the purchaser in a worse position than a mortgagee or lessee under sub-sec. (6) of sec. 86. In the fourth place, it may be a question, whether there can be a surrender effective for the purposes of sec. 86 when the conditions mentioned in sub-sec. (5) cannot be fulfilled. But as we have already said it is not necessary for us to determine, whether the case of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (4) was correctly decided, and we reserve our opinion upon the question involved in that litigation.

It has finally been urged that the case of *Gagan Chandra Chowdhury* v. *Alek Chand Saha* (6) assists the contention of the Respondent. That case, however, is clearly distinguishable. There, it was ruled, upon the authority of the earlier decisions in *Badan Chandra Das* v. *Rajeswari Debya* (7) and *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt* (8), that when there has been a surrender of a part of a holding by a tenant the landlord is entitled to re-enter, even though he is aware that there is some one else in possession claiming under a title derived from the tenant. But it has been overlooked by the learned Vakil for the Respondent that in *Gagan Chandra Chowdhury* v. *Alek Chand Saha* (6), there was no encumbrance secured by a registered instrument within the meaning of sub-sec. 86.

The result is that this Appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance. restored. This order will carry costs, both here and in the Court of Appeal below.

Appeal allowed.

(2) 1 C. W. N. 160 (1894).
(3) I. L. R. 20 Cal. 590 (1892).
(4) 14 C. W. N. 229 (1909).
(5) I. L. R. 23 Cal. 254 (1895).

(4) 14 C. W. N. 229 (1909).
(6) 17 C. W. N. 698 (1913).
(7) 2 C. L. J. 570 (1905).
(8) 12 C. W. N. 878 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1037 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
27, February.

PARBATI and another, Plaintiffs, Appellants,
v.
TOOLSHI KAPRI and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 106, 107—Suit dismissed for default of Plaintiff, after evidence of Defendants taken and examined—Formal decree drawn up—Order of dismissal if appealable—"Decision," meaning of, if excludes dismissal for default.

The decision of a Settlement Officer to which the force and effect of a decree of a Civil Court is given by sec. 107 of the Bengal Tenancy Act does not include an order of dismissal of a suit under sec. 106 of the Act for default, the word 'decision' implying an adjudication on the merits.

Where in such a suit, the Plaintiff being absent, the Court received the evidence of the Defendants, expressed an opinion on the merits but ultimately made an order of dismissal for default under r. 8 of Or. 9 of the Civil Procedure Code :

Held—*That the order was, as it could only have been made, under r. 8 of Or. 9. The Court should not have received the Defendants' evidence or examined the merits of the case.*

That a formal decree which was unnecessarily drawn up did not alter the nature of the order which was not a decree and was not open to appeal.

This was an Appeal preferred on the 4th of May 1911 against the decree of J. C. Twidell Esq., District Judge of Zillah Bhagalpore, dated the 16th of January 1911, affirming the decree of Babu Suresh Chandra Chackrabartty, Assistant Settlement Officer of Monghyr, dated the 13th of August 1910.

The material facts will appear from the judgment.

Babus Ram Chandra Mitra and *Jogendra Nath Mukerjee* for the Appellants.

Babu Bepin Behary Ghose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal against an order by which the Court of Appeal below has dismissed an appeal as incompetent. The Appellant was the Plaintiff in a suit under sec. 106 of the Bengal Tenancy Act, which was dismissed for default on the 13th August 1910. The Court in the absence of the Plaintiff, received the evidence of the Defendants, expressed an opinion on the merits of the case, but ultimately made an order of dismissal for default under r. 8 of Or. 9 of the Code of 1908. The Plaintiff did not apply under r. 9 for restoration of the suit, but preferred an appeal to the Special Judge who dismissed the appeal on the 16th January 1911. We are now invited to set aside this order and to hold that the appeal was competent, inasmuch as the Court of first instance had recorded the evidence of the Defendants and had drawn up a formal decree. We are of opinion that there is no substance in this contention.

The order, on the face of it, purports to have been made, and could only have been made under r. 8 of Or. 9. As was pointed out by Jackson, J., in *Buldeo Misser* v. *Syud Ahmed Hossein* (1), and by Couch, C. J., in *Mohesh Chunder* v. *Thakoor Das* (2), the Court should not have received the evidence on behalf of the Defendants nor should the merits have been examined, it was also unnecessary to draw up a

(1) 15 W. R. 143 (1871).
(2) 20 W. R. 425 (1873).

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formal decree. The fact that the decree was drawn up obviously cannot alter the nature of the order which must depend upon the circumstances under which it was made. Now it is clear that under sec. 2 of the Code of 1908 this order of dismissal for default is not a decree, and is not liable to be challenged by way of appeal. As was pointed out by this Court in the case of *Rukminimayi Dasi* v. *Paran Chandra Bhera* (3), the Code of 1908 has in this respect altered the pre-existing law. But much stress has been laid upon sec. 107 of the Bengal Tenancy Act, which it has been argued, controls the effect of sec. 2 of the Civil Procedure Code. In our opinion, sec. 107 does not assist the Appellants. The section merely provides that a suit under sec. 106 is to be tried in accordance with the procedure laid down in the Civil Procedure Code for trial of suits and that the decision in every such proceeding shall have the force and effect of a decree of a Civil Court in a suit between the parties. The term 'decision' plainly implies an adjudication on the merits and does not include an order of dismissal of the suit for default. The conclusion follows that the appeal presented to the Special Judge was incompetent, and has been rightly thrown out. The present Appeal consequently fails and is dismissed with costs. We assess the hearing-fee at one gold mohur.

Appeal dismissed.

(3) I. L. R. 39 Cal. 341 (1910).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1134 OF 1911.

SHARFUDDIN, J.
RICHARDSON, J.
1913,
Heard, 22, and 23, July.
Judgment, 30, July.

JEHETO SHEIKH, Plaintiff, Appellant,
v.
JAIBANNESSA BIBEE, Defendant, Respondent.

The Indian Evidence Act (I of 1872), sec. 33—The Indian Registration Act (III of 1877), secs. 7, 72, 73, 74, 75—Mortgage bond—Denial of execution, refusal of registration—Examination of attesting witnesses by Registrar—Compulsory registration—Death of attesting witnesses—Suit on mortgage—Evidence recorded by registrar if admissible under sec. 33, Evidence Act—Special Registrar or Sub-Registrar at head-quarters, powers of.

A mortgage bond was presented for registration by the mortgagee before the Special Registrar. The executant denied execution and the Special Registrar, acting for the Registrar, refused registration but after making an enquiry during which he examined the attesting witnesses registered the document. Subsequently, the mortgagee brought a suit on the mortgage but during the interval the attesting witnesses, all but one, had died and the depositions recorded during the registration enquiry were tendered as evidence:

Held—*That the evidence given by the deceased attesting witnesses who were duly cross-examined before the Special Registrar was relevant and admissible in the present suit under sec. 33 of the Evidence Act.*

This was an Appeal preferred on the 8th of May 1911 against a decree of B. C. Mitra, Esq., District Judge of Zillah Murshidabad, dated the 8th of February 1911, reversing a decree of Babu Tinkari Chow-

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dry, Munsif of Lalbag, dated the 26th of February 1910.

The facts will sufficiently appear from the judgment.

Babus Ram Chunder Mojumdar and *Upendra Narain Bagchi* for the Appellant.

Moulvi Syed Mahomed Tahir for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff, who is the Appellant, brought this suit or a mortgage bond against the Defendant who is a *purdanashin* lady. The facts antecedent to the institution of the present suit are these:—

The document in question was presented by Jehali Sheikh, the mortgagee, on the 2nd October 1901, before a Special Registrar, *viz.*, Mahomed Amiruddin, who, it appears, was at the time acting for the Registrar. On the denial of execution by the executant (Defendant in the present suit), the Special Registrar, still acting for the Registrar, refused registration of that document. He however after making an enquiry during which he examined the attesting witnesses, registered the document on the 11th March 1902. He signed this order describing himself as acting for the Registrar.

On the 17th August 1909; the present suit was instituted by the mortgagee. It appears however that during the interval all the attesting witnesses but one died. During the trial of the suit before the Munsif the depositions recorded during the registration enquiry were tendered as relevant evidence under sec. 33 of the Evidence Act. That Court admitted that evidence and relying on it gave a decree to the Plaintiff. The Defendant thereupon preferred an Appeal to the District Judge who allowed the appeal and dismissed the suit on 8th February 1911. The Plaintiff has now appealed to this Court and the only question raised in the present Appeal is whether under sec. 33 of the Evidence Act the deposition of the deceased witnesses are admissible or not. The finding of the lower Appellate Court is against the admissibility of that evidence. The lower Appellate Court has however observed to the following effect regarding the statement of the deceased witnesses:—

"If that evidence can be accepted as legally admissible I must hold that the finding of the lower Court is correct and that the appeal should be dismissed." The above finding is tantamount to this that if the lower Appellate Court had ruled in favour of the admissibility of those statements it would have dismissed the appeal and affirmed the decree passed by the first Court. We have therefore to see as to whether these statements are relevant and admissible.

The word "evidence" means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry: such statements are called oral evidence (sec. 3 of the Evidence Act).

The word 'Court' includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence (sec. 3, Evidence Act).

Let us now turn to sec. 33 of the Evidence Act. It, no doubt, relates also to evidence given by a witness before "any person authorised by law to take it." It is further provided by that section that the proceeding should be between the same parties or their representatives in interest, that the adverse party in the first proceeding had the right and opportunity to

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cross-examine and that the questions in issue were substantially the same in the first as in the second proceeding. Let us now see whether the necessary requirements of this section of the Evidence Act were present or not at the time when the depositions were tendered in evidence. The witnesses whose statements were tendered were dead at the time : the proceeding before the Special Registrar was between the parties to the present suit. It appears from the record that those witnesses were cross-examined on behalf of the Defendant and the question in issue in the previous proceeding as in the suit itself was whether the Defendant had executed the document in question. The only thing to be seen is whether the previous proceeding was a judicial proceeding or whether the Special Registrar was authorised by law to record the statements of those witnesses. We find from the record that those statements were made on solemn affirmation.

The Appellant's contention is that the registration proceeding was a judicial proceeding or at any rate the Special Registrar was a person authorised by law to take that evidence. We have been referred to sec. 75 of the Registration Act (Act III of 1877 which was then in force) which empowers the Registrar for the purpose of any enquiry under sec. 74 " to summon and enforce the attendance of witnesses and compel to give evidence, as if he were a Civil Court." This is a power given to the Registrar : we have therefore to see whether the Special Registrar who is a Sub-Registrar had any power to summon and enforce the attendance of any witness and compel him to give evidence before him. Before we decide this question we have to observe that under sec. 72 of the Act no appeal is allowed to the Registrar if the Sub-Registrar refuses to register a document on the ground of denial of execution by the executant. Sec. 73 of the Act provides that in the case of a refusal by a Sub-Registrar, on a denial of execution, the aggrieved party "may apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered." Sec. 74 provides that in the case of a refusal by a Sub-Registrar as also where such denial is made before a Registrar, the Registrar can make an enquiry. Then comes sec. 75 which empowers the Registrar "to summon and enforce the attendance of witnesses and compel them to give evidence, as if he were a Civil Court."

On behalf of the Respondent it has been contended that the Special Registrar was the officer who in the first instance had refused the registration, and it was improper on his part to order the registration of that document because it amounted to sitting on appeal against his own order and we have been referred to the proviso of sec. 7 of the Act which runs thus :—

"Provided that no such authorisation shall enable a Sub-Registrar to hear an appeal against an order passed by himself under this Act."

There can be no doubt that the whole proceeding in the Registration office would have been improper if the law had allowed an appeal against an order of refusal by a Sub-Registrar on a denial of execution by the executant but as already pointed out no appeal is allowed by the Act when such a refusal order is passed by a Sub-Registrar. The aggrieved party may approach the Registrar in such a case with an application "in order to establish his right to have the document registered." Such a procedure cannot be

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treated as an appeal and hence sec. 7 of the Act has no application.

We have now to determine as to whether the Special Registrar was a person authorised by law to record the statements of witnesses in an enquiry under sec. 74 of the Registration Act.

Sec. 69 empowers the Inspector-General to make rules consistent with the Act. The rules so made are required to be submitted to the Local Government for approval and after such approval they are further required to be published in the Official Gazette. On such publication those rules have the force of law.

With reference to sec. 7 of the Act the rule framed by the Inspector-General is to the following effect:—

"The Sub Registrar at the head-quarters of a District (Special Registrar) whose office has been amalgamated with that of the Registrar, will, besides performing his own duties as Sub-Registrar act as the working Deputy of the Registrar exercising as a matter of routine all the functions of a Registrar, except the powers of supervision and control under sec. 68, and that of hearing appeals against orders refusing to register under sec. 72. On such occasions the Sub-Registrar should describe himself as acting for the Registrar." Under sec. 69 of the Act this rule has the force of law. It is therefore clear that excepting the power of hearing an appeal against an order of refusal by a Sub-Registrar on the ground of a denial of execution by the executant, he can, in accordance with the above rule, act for the Registrar in the case of an application under sec. 73. If under sec. 73 of the Act an application is made to the Registrar, the Sub-Registrar on the strength of the above rule can exercise the powers of a Registrar as given in cl. 4 of sec. 75 of the Act.

The above being the view that we have taken of the law on the subject we hold that the Sub-Registrar, Mahomed Amiruddin, had the power to summon witnesses and to compel their attendance before him to give evidence. That being our view we are of opinion that the proceeding during which the Sub-Registrar summoned the witnesses, examined them and recorded their statements on solemn affirmation and when the Defendant cross-examined those witnesses, was not an improper one. The evidence given by the deceased attesting witnesses is relevant and admissible in the present suit. The lower Appellate Court has found that if those statements had been admissible it would have dismissed the appeal and affirmed the finding of the first Court. We have already found that the statements of the deceased attesting witnesses are relevant and admissible in the present suit.

For the above reasons we set aside the judgment and decree of the lower Appellate Court and decree the suit by restoring the judgment and decree of the first Court. The Respondent will pay the costs of the present Appeal to the Appellant.

RICHARDSON, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 966 OF 1911.

CARNDUFF, J. RICHARDSON, J. 1914, Heard, 29, January. Judgment, 11, February.

KUMUD LAL RAY and others, Defendants, Appellants, *v.* JOGENDRA MOHAN RAY and others, Plaintiffs, Respondents.

*Co-sharer, sole occupation by, of joint land—Ouster—Suit for joint possession—Justice, equity and good conscience—*Statu quo *when maintained.*

Where it is found that a portion of the joint land was marshy and was jointly possessed by all the co-owners although they had other lands in separate possession and that when the marsh silted up one of the co-owners occupied the silted up land to the exclusion of others :

Held, in a suit by one of the co-owners for joint possession—*That there was ouster and Plaintiff was entitled to recover joint possession without bringing a suit for partition.*

Where parties are contented with joint possession of a portion of the joint land and separate possession of the rest, from the point of view of justice, equity and good conscience the statuo quo *ought to be restored and the party dissatisfied relegated to a suit for partition.*

This was an Appeal preferred on the 24th of April 1911 against the decree of B. B. Newbould, Esq., District Judge of Zillah Dacca, dated the 29th of December 1910, confirming the decree of Babu Kishori Lal Sen, Subordinate Judge of of that District, dated the 23rd of May 1910.

The facts of the case are shortly these :—

Plaintiffs stated in their plaint that the disputed lands were formerly in marshy state and they were in joint possession with other co-owners by settling the *jalkar* with fisherman. That when the *jalkar* silted up partially and the lands became culturable the Defendants took exclusive possession but the Plaintiffs were in possession of the remaining *jalkar*. The defence was that Plaintiffs had no title and possession, that the suit was barred by limitation ; that the Plaintiffs were not entitled to joint possession but must bring a suit for partition as each co-owner was in separate possession of portions of the joint estate. The first Court decreed the suit upon the findings that Plaintiffs were in possession while the disputed lands were marshy by recovering *jalkar* rent from the fishermen ; but he also found that the co-owners were in separate possession of portions of the joint estate. The Court of Appeal below affirmed the decision of the Court of first instance.

The Defendants preferred this Second Appeal.

Babu Dwarka Nath Chuckerbutty (with *Babu Jnanendra Nath Sarkar*) for the Appellants.—In this case the Plaintiff cannot get a decree for joint possession upon the findings of the Courts below. It is found that each co-owner is in possession of separate parcels of joint property and it is found that there is no evidence that the Defendants are in possession of more lands than they would be entitled to in their own share. The case of *Surendra* v. *Hari* (1) does not apply here. Reliance was placed upon the case *Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (2), *Mahesh* v. *Nowbat* (3), *Watson* v. *Ram Chand Dutt* (4), *Dwijendra* v. *Purnendu* (5).

(1) I. L. R. 33 Cal. 1201 (1906).
(2) 18 C. W. N. 328 (1913).
(3) I. L. R. 32 Cal. 837 (1905).
(4) I. L. R. 18 Cal. 10 (P. C.) (1890).
(5) 11 C. L. J. 189 (1910).

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Dr. Rash Behary Ghose (with *Babu Bankim Chandra Mukerjee*) for the Respondents.—I submit that the decree passed in favour of my clients is correct. In the first place I want to point out that the Plaintiffs do not seek to recover *khas* possession of the lands in suit by ejecting the tenants settled by the Defendants but only the proportionate share of the rent from the tenants. The Defendants are not in actual occupation of the lands in suit. In this view the case of *Basanta Kumari Dassay* v. *Mohesh Chandra Shaha* (2) is distinguishable. I must also point out that the Defendants in their written statement assert an exclusive title in themselves and adduced evidence of adverse possession to the knowledge of the Plaintiffs for more than 12 years. The Courts below have disbelieved that evidence. The circumstances clearly show that there was ouster and the Plaintiffs were entitled to joint possession. The case in *Mahesh* v. *Nowbat* (3) is distinguishable as in that case there was no assertion of hostile title by the Defendants. The Defendants in that suit on the other hand stated that Plaintiff was at liberty to quarry the mines in his share. *Watson's* case (4) is in my favour. There money compensation was allowed. The Defendants were in actual occupation in *Watson's* case (4) ; that is not the case here. Cited, *Ram* v. *Jnanada* (6). Also the judgment of Fletcher and N. R. Chatterjea, JJ., in *Sarat Chandra* v. *Rajendra Lal* (7).

[CARNDUFF, J.—In this case the lower Courts find that there are separate parcels of the joint land in the separate possession of one co-owner or the other and that there is no evidence that the Defendants were in possession of more lands than they would be entitled to in their share. Under these circumstances how can you claim joint possession.]

Dr. Ghose.—I submit that the Plaintiffs can claim joint possession upon the findings. These lands were formerly marshy and it is found that the Plaintiffs were in possession of the marsh by receiving *jalkar* rent from the fishermen. When the marsh silted up, the Defendants took exclusive possession in denial of the title of my clients. As to the other lands of the joint estate of which the co-owners are in separate possession my submission is that that was under an arrangement between the co-owners and if that be so there is no cause of action with regard to those lands as there is no ouster. The co owners hold them by common consent. So far as the lands in suit are concerned there is an ouster and my clients can claim joint possession. It is for the other side to bring a suit for partition if they are dissatisfied with the previous state of possession of the co-owners. Here the finding is that when the lands became silted up 'the Defendants were the first in the field and they gave the word of command.' Upon this finding the case in *Surendra Narain* v. *Hari Mohan* (1) applies. Refers to Freeman on Co tenancy and Partition, s. 348.

Babu Dwarka Nath Chuckerbutty in reply.

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—This is an Appeal against

(1) I. L. R. 33 Cal. 1201 (1906).

(2) 18 C. W. N. 328 (1913).

(3) I. L. R. 32 Cal. 837 (1905).

(4) I. L. R. 18 Cal. 10 (P. C.) (1890).

(6) 5 C. L. J. 267 (1900).

(7) Since reported in 18 C. W. N. 420 (1913).

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an appellate decree giving the Respondents joint possession along with the Appellants, their co-sharers, of certain land appertaining to the estate which they hold in common.

I have had some difficulty in ascertaining what are the precise facts found. For in the Court of first instance the findings are not consistent, while the learned District Judge in the Court of Appeal below has not stated with any fulness his own findings or expressly declared how far he accepts those of the Subordinate Judge. The appellate judgment is, however, one of affirmance, and I think that a careful study of it along with the judgment of the first Court will show that the following are the facts which have been found, and with which we have now to deal.

The land in dispute forms part of what was once a marsh. The marsh was occupied by the co-sharers in common, the Respondents receiving from the fishermen who fished in it their share of the *jalkar* rent. Subsequently the process of silting began, and the land now in suit became culturable. Of it the Appellants at once proceeded to take entire possession by settling tenants upon it and recovering from them the whole rent. They admitted that they had done so, and their contention was and is that they were within their rights as co-owners, specially in view of the circumstance, as found, that there are other parts of the joint estate in the separate possession of one co-sharer or another. They further asserted, but failed to prove, that they had reclaimed the land at their own expense or spent any money in protecting the common title or inducting tenants.

The first Court found that there was no ouster because the Respondents "were never in actual possession of the disputed land" and have "never before this suit claimed to be admitted into possession," of it. But it had already found it "established beyond doubt that they had always received their share of their *jalkar* rent, and were still in receipt of such rent; and this can mean only one thing, namely, that before the silting process commenced, they were in joint possession of the marsh, receiving their share of the only rent then recoverable, and that they are even now obtaining their share of the *jalkar* rent in respect of so much of the original marsh as is still unculturable. Consequently the first Court's findings as to possession must be taken to refer to the land since it appeared above water, and all that they amount to is that the Respondents have never been in possession of the land in its culturable state. That is, of course, exactly the Respondents' case: for what they complained of is the action of the Appellants in pouncing upon the land as soon as it emerged and securing through tenants possession of it in its altered condition for themselves alone and to the exclusion of the Respondents.

The question is whether this was an ouster or not. In my view it was. True it is that it has been found that there is no evidence that the Appellants ever came upon the land save as the co-owners of the Respondents, or that they ever set up any other title. But the fact remains that they disturbed the Respondents' joint possession, and that seems to me to be ouster, almost *exvitermini*. The Respondents were the injured party, and I fail to appreciate the contention that they ought, if they find that they are now left with less than their proper share, to seek a remedy in a suit for partition. Before the land became culturable the

KUMUD LAL RAY *v.* JOGENDRA MOHAN RAY.

parties appear to have been contented with joint possession of the marsh and separate possession of some of the lands outside it, and it seems to me that, from the point of view of justice, equity and good conscience, *statu quo* ought to be restored and the Respondents relegated to a suit for partition, if they are dissatisfied with what they seem to have been satisfied with before.

Several cases have been cited before us, but they are all distinguishable. That which most nearly resembles the present case is, I think, *Surendra Narain* v. *Hari Mohan* (1), where it is held that a co-sharer cannot seize any land newly added by accretion to the present joint estate and occupy it to the exclusion of his co sharers. The facts connected with *Basanta Kumari* v. *Mohesh Chandra* (2), on which the Appellant has chiefly relied, are very different from those before us now. In the latter each of the co-sharers concerned was admittedly in sole occupation of *khamar* land appertaining to the joint property, and one of them commenced to build on the land he occupied. No substantial injury by reason of this was alleged, and it was held that his conduct was not inconsistent with the joint ownership of the property as a whole, and that, in the circumstances, there had been no ouster.

I would dismiss this Appeal with costs.

RICHARDSON, J.—The fact that the Plaintiffs and the Defendants are in separate possession of other parts of the joint property has, as it appears to me, nothing to do with the matter. The question is what are the rights of the parties in respect of the lands in dispute and whether in respect of those lands, the Defendants have so acted as to justify the Plaintiffs in bringing a suit in the nature of a suit for ejectment. Now it is clearly found that the improved value of the lands is not due to any expenditure of labour or capital on the part of the Defendants but is due to the operation of natural causes. It is not suggested that the lands are in any sense an accretion to lands of which the Defendants were previously in possession, or that before the lands became valuable and productive, the Defendants had any more possession over them than any other co-sharer. On the contrary, I concur in the view which has been expressed that the findings arrived at by the lower Courts must be taken to include a finding that the Plaintiffs had some possession of the lands in the original state by the exercise of fishery rights. In my opinion upon the facts as they appear to have been found there has clearly been an ouster of the Plaintiffs by the Defendants, and that being so, I agree that the Appeal should be dismissed.

Appeal dismissed.

(1) I. L. R. 33 Cal. 1201 (1906).
(2) 18 C. W. N. 828 (1913)

CIVIL REVISIONAL JURISDICTION.

RULE No. 27 OF 1914.

STEPHEN, J. MULLICK, J. 1914, Heard, 10, February. Judgment, 16, February.	MAHOMED MUSA and another, Defendants, Petitioners, *v.* ABDUL HASSAN KHAN and others, Plaintiffs, Opposite Party.

Civil Procedure Code (Act V of 1908), secs. 24, 92—Bengal Civil Courts Act (XII of 1887), sec. 8—Suit relating to public charity—Additional District Judge, appointment of, by Local Government without specific authority to entertain suit under sec. 92, C. P. C.—Transfer of suit by District Judge without assignment of powers

MAHOMED MUSA *v.* ABDUL HASSAN KHAN.

under sec. 92, C. P. C.—Jurisdiction of Additional Judge to entertain suit under sec. 92, C. P. C., on transfer from District Judge.

Where a suit under sec. 92, C. P. C., instituted before the District Judge was transferred by the District Judge to the Additional District Judge under sec. 24, C. P. C., and it appeared that the Local Government in appointing the Additional District Judge had not empowered him to receive suits under sec. 92 nor had the District Judge in his order of transfer assigned to the Additional District Judge the functions of a District Judge in respect of sec. 92:

Held—*That the Additional District Judge had no jurisdiction to try the suit and the order transferring the case made by the District Judge was of no effect.*

This was a Rule granted on the 9th of January 1914 against the order of the District Judge of Patna, dated the 2nd of January 1914, transferring the case to the file of the Additional District Judge of Patna.

On 2nd September 1913, a plaint was filed in the Court of the District Judge, Patna, by the Opposite Party, valuing the suit at 21 lacs of rupees, in respect of certain *wakf* estate, in order to set aside a certain compromise decree which was arrived at and effected in the High Court in Reg. App. 434 of 11 whereby Petitioner No. 1 was reinstated as Matwalli and Petitioner No. 2 was reappointed as Naib Awal under the supervision of a committee of leading Mahomedans in Patna.

The suit was brought under sec. 92, C. P. C., by the Plaintiff, as members of the public, and although sanction was refused by the Advocate-General, leave to sue was obtained from the Legal Remembrancer of Behar and Orissa.

The suit was instituted in the Court of the District Judge (Mr. Roe) and written statements filed and issues framed in that Court and the suit was pending in that Court for further hearing up till 2-1-14 when the suit was transferred to the Court of the Additional District Judge (Mr. James) who was appointed by the following notification of Government.

"7942A—26-12-13.

Mr. J. W. James, I. C. S., is, on relinquishing charge of his special duty in connection with the preparation of the final Report on the survey and record-of-rights in the District of Patna, appointed to act temporarily as Additional District and Sessions Judge of Patna."

The Petitioners filed an objection that the Court (Mr. James) was not competent to hear this case. But the objection was overruled. He observed as follows:—

"No notification under sec. 92 is needed to give to an Additional Judge power to hear suits instituted under that section in the Court of the District Judge and transferred by him to the Additional Judge. Under sec. 8 of the Civil Courts Act the Additional Judge exercises the same powers as a District Judge in cases assigned to him by the District Judge. I may observe that if the fact that a suit under sec. 92 must be instituted in the Court of the District Judge is to bar its transfer to the Additional Judge, then no work could be given to an Additional Judge at all. I imagine that the effect of a notification under sec. 92 would merely be that suits under that section could be instituted in the Court of the Additional Judge. I find that the Additional District Judge has power to try cases of this nature transferred to him by the District Judge without any special notification."

MAHOMED MUSA *v.* ABDUL HASSAN KHAN.

The Defendants moved the High Court and obtained a Rule.

Mr. S. P. Sinha (with *Babus Umakali Mukerjee*, *Surendra Nath Ghoshal* and *Pankaj Kumar Ganguly*) for the Petitioners.—Sec. 92, C. P. C., *i.e.*, charity cases are to be determined after institution by the principal Court of Original Jurisdiction, *i.e.*, District Judge or some officer specially empowered by the Local Government. Sec. 8 of the Civil Courts Act, XII of 1887, contemplates transfer of certain classes of cases or assignment of functions but not particular cases. Sec. 24, C. P. C., could not possibly apply as it was not a transfer contemplated by the section but change of file on the direction of the District Judge, *vide Bidyamoyee* v. *Surya Kanta* (2) and *Abdul Karim* v. *Abdus Sobhan* (1).

Dr. Dwarka Nath Mitter for the Opposite Party.—Sec. 92 contemplates two specified classes of Courts, but purposes of institution only. Sec. 8 of the Civil Courts Act empowers the Judge to transfer the case to any proper Court he chooses. The District Judge and the Additional District Judge are officers with co-ordinate powers (*vide* sec. 21).

The JUDGMENT OF THE COURT was as follows:—

In this case the Local Government acting under sec. 8 of the Bengal and Assam Civil Courts Act, 1887, appointed Mr. James, Additional District Judge at Patna. On the 2nd February 1914, Mr. Roe, the District Judge, transferred to him a suit under sec. 92 of the Code of Civil Procedure instituted before himself, which had proceeded as far as the settlement of issues. It is not disputed that this transfer was made under sec. 24 of the Civil Procedure Code. On Mr. James taking up the case it was argued before him that he had no jurisdiction to deal with it: but this was overruled. A Rule, however, has been granted in this Court calling on the Opposite Party to show cause why the order transferring the case to the file of the Additional Judge should not be set aside as being made without jurisdiction. The objection to Mr. Roe's order is as follows:—The effect of Mr. James' appointment was that he became capable of discharging any of the functions of a District Judge which the District Judge might assign to him, and of exercising the powers of a District Judge in discharging them: but the functions so assigned must be general and no such functions were assigned by Mr. Roe's order of transfer under sec. 24 of the Code. This is a sound objection and a comparison of the language of the two enactments referred to, makes any other conclusion impossible. It is also consistent with the decision of this Court in *Abdul Karim* v. *Abdus Sobhan* (1). Had the Local Government empowered Mr. James to rceive suits under sec. 92, the case might have been different, for it is not disputed that he would then have been the "principal Civil Court" under sec. 92, C. P. C., though he would be a subordinate Court under sec. 24. Had the District Judge assigned to Mr. James the function of a District Judge in respect of sec. 92, then also all might have been well. But as it is, Mr. James had no jurisdiction to deal with cases under sec. 92 at the time the order was made, and Mr. Roe effected nothing by his order of transfer.

This Rule is, therefore, made absolute,

(1) I. L. R. 39 Cal. 146: s. c. 16 C. W. N. 44 (1911).

(2) I. L. R. 32 Cal. 876 (1905).

(1) I. L. R. 39 Cal. 146: s. c. 16 C. W. N. 44 (1911).

MAHOMED MUSA *v.* ABDUL HASSAN KHAN.

and the order of transfer is set aside. We make no order as to costs.

Rule made absolute.

[CRIMINAL REFERENCE.]

REFERENCE NO. 17 OF 1913.

MOOKERJEE, J.	EMPEROR
BEACHCROFT, J.	*v.*
1913,	TARAPADA NASKAR,
6, August.	Accused, Petitioner.

Criminal Procedure Code (Act V of 1898), sec. 307—Disagreement between Judge and jury—Reference to High Court—Sub-sec. 3—Opinion of the jury if equivalent to verdict—Verdict, grounds of, when desirable to ascertain.

The expession "opinion of the Sessions Judge and the jury" in sub-sec. 3 of sec. 307, Cr. P. C., is equivalent to "opinion of the Sessions Judge and verdict of the jury" and it is not necessary for a Sessions Judge before making a reference to the High Court to ascertain the opinion of the jurors apart from their verdict.

EMPEROR *v.* CHELLAN (1) *not followed.*

After the jury have returned their verdict and after the Judge has stated that he will not accept the verdict it may be desirable to ascertain the grounds of their verdict but there is no express provision in the Code for ascertaining the opinion of the jury.

This was a Reference under sec. 307, Cr. P. C., by the Sessions Judge of Hughly, dated the 25th of June 1913, disagreeing with the unanimus verdict of the Jury who found the accused not guilty of the charge framed against him under sec. 202 of the Indian Penal Code, the Judge being of opinion that the accused was guilty under sec. 304, I. P. C.

The facts will sufficiently appear from the judgment.

(1) I. L. R. 29 Mad. 91 (1905)

Babus Manmatha Mukerjee, Herambo Chandra Guha and *Nirmal Chandra Chunder* for the Accused.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference under sec. 307 of the Code of Criminal Procedure. The accused, Tarapada Naskar, was charged with an offence punishable under sec. 302, I. P. C., in that he committed murder by intentionally causing the death of one Johor Ali. He was tried along with his brother, Mannoo Naskar, who was charged with an offence punishable under secs. 392 and 114, I. P. C. The Jury returned a unanimous verdict of not guilty. The Sessions Judge, with some hesitation, accepted the verdict in respect of Mannoo Naskar and acqutited him. But as regards Tarapada Naskar the Sessions Judge has made this reference, as he has not been able to agree with the verdict of the jury and as in his opinion the reference is necessary for the ends of justice.

A preliminary objection has been taken on behalf of the accused, that the reference is not in order, inasmuch as the Sessions Judge did not ascertain the opinion of the jurors. In support of this contention reference has been made to the judgment of Mr. Justice Davies in the case of *Emperor* v. *Chellan* (1), and to the decision of this Court in the case of *Emperor* v. *Annada Charan Thakur* (2).

The first sub-section of sec. 307 lays down that if in a case tried before the Court of Sessions and a jury, the Judge disagrees with the verdict of the jurors or of a majority of them on all or any of the charges on which the accused has

(1) I. L. R. 29 Mad. 91 (1905)
(2) I. L. R. 36 Cal. 629 (1909).

EMPEROR v. TARAPADA NASKAR.

been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly recording the grounds of his opinion, and when the verdict is one of acquittal, stating the offence which he considers to have been committed. Sub-sec. (3) then provides that in dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto, it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and if it convicts him, may pass such sentence as might have been passed by the Court of Sessions.

It has been argued on behalf of the accused that in order that the High Court may properly discharge its duties under sub-sec. (3) of sec. 307, the opinion of the jurors must be ascertained, and that such opinion is distinct from the verdict of the jurors or of a majority of the jurors as mentioned in sub-sec. (1) of sec. 307. The reasons in favour of this argument are put forward most strongly in the opinion of Mr. Justice Davies to which reference has been made. "The duty of the High Court under sub-sec. (3) of sec. 307, Cr. P. C., is not only to consider the entire evidence but also to give weight to the opinions of the Sessions Judge and of the jury. The opinions of the jury cannot mean their verdict, for that is not a mere opinion nor is it styled as such, as the opinions of the assessors are. The verdict is a final judgment by the jury as to the guilt or otherwise of the persons charged before them, and it is binding on the Judge, while opinions are not so. Besides, it is obvious from the provisions of the Code that the opinions of the jury referred to in cl. (c) of sec. 307 are to be on the same par as those of the Judge, that is, opinions given after the verdict, for the jury are not enabled to pass opinions before their verdict. It is not until after the verdict is delivered and the Judge disapproves of it, that the jury's opinions are required for submission to this Court to be considered along with the Judge's opinions." With all respect we are not prepared to accept this view of sec. 307, and, in our opinion, the expression "opinion of the Sessions Judge and of the jury" is equivalent to "opinion of the Sessions Judge and verdict of the jury." No doubt, as pointed out by this Court in the case of *Emperor* v. *Annada Charan Thakur* (2), after the jury have returned their verdict, and after the Judge has stated that he will not accept the verdict, it may be desirable to ascertain the grounds of their verdict. But it must be remembered that there is no express provision in the Code for ascertaining the opinion of the jury. It is further worthy of note that in the case of *Emperor* v. *Annada Charan Thakur* (2), the learned Judge stated they were not prepared to hold that the omission to ascertain from the jurors the ground for their verdict, could vitiate the reference. We may add that if the contention of the accused were accepted, practical difficulties of a grave character might arise. The Judge would have, in that view, to ascertain the opinion of each individual juror in respect of each of the various points which might arise in a case, and the result might be

(2) I. L. R. 36 Cal. 629 (1909).

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

English Judicial Statistics—Civil.

The Civil Judicial Statistics for England and Wales for 1912 which have been published simultaneously with the Criminal show an all round decline in civil litigation except in the Divorce Probate and Admiralty Division of the High Court. Although the general decline in litigation during 1912 was very appreciable yet it would be difficult to say from the enormous volume of litigation which ordinarily prevails in England whether the litigious spirit is on the decline. The total number of proceedings begun in the various Courts in 1912 was no less than 1,368,455. Yet 1912 showed a decline of 53,236 over the figures of the previous year. Working out the figures for 1912, by reference to the population and taking it that two persons are always interested in every suit it may be said that nearly 8,000 persons in every 100,000 of the population were directly involved in litigation in 1912. Making every allowance it may be said that 1 in every 10 to 12 persons ordinarily has recourse to some sort of litigation in England. The bulk of this litigation takes place however in the County Courts where no less than 1,262,469 of the above proceedings were initiated. In the King's Bench Division of the High Court the proceedings instituted were 63,508 in 1912, which showed a decline, the figures for the previous year being 76,274. In the Chancery Division there was also a decline, the figures for 1912 being 5,566 and those for the previous year being 7,457. In the Probate and Divorce Division there was an increase from 1,447 to 1,904. It is regrettable from a social and moral point of view that this increase should be solely confined to the Divorce side of the Division.

The appeals from the various Courts during the year fell from 1,562 to 1,377. With reference to the decline in appeals it is worthy of note that in the Court of Appeal the decline was 87, in the Divisional Courts 71, in the Judicial Committee 28 and in the House of Lords only 1. The Judicial Committee however worked energetically and disposed of 132 appeals in 1912. By reference to the figures for the last 20 years it appears that the number of appeals have generally increased, almost all round—the rise in the Judicial Committee being from 88 to 100 which latter figure in some years is marked by a further increase of 25%. It is also no less remarkable that the Judicial Committee seem always disposed to bring to bear a fresh mind in these appeals and evidently pay little regard to the cult of settled fact. For instance, out of 132 appeals disposed of by their Lordships in 1912, in no fewer than 50 cases their Lordships reversed or varied the decisions of the Courts below. In the House of Lords the percentage of reversal was a little less, yet they were sufficiently substantial to testify to the desire of this august tribunal to reconsider the opinion of a particularly strong Court of Appeal on doubtful and debatable questions of law. In nearly ½ of the appeals heard in the House of Lords, the decisions of the Court of Appeal were reversed or varied—the exact figures being 19 out of 59. In the Court of Appeal while 263 decisions were reversed or varied, 327 were upheld which also go to show that the judgments of the Courts below appealed from receive the fullest consideration by the Appellate Courts. That this should be so is no matter of wonder when we consider that in most of the cases people would not take the trouble or incur the expenses of appealing unless they have a substantial grievance and it is undoubtedly gratifying to them that their grievances receive a patient and careful hearing and due consideration before the Appellate Courts.

English Judicial Statistics—Criminal.

The Criminal Statistics for England and Wales for 1912, recently published, are as usual very interesting reading and furnish much material for

thought. The total number of persons tried for indictable offences during the year were 67,530. Non-indictable offences in that year amounted to 663,139; of such offences those of a criminal character amounted only to 73,917; the rest were statutory offences arising out of breaches of Municipal and other similar regulations framed for securing public safety, or having reference to traffic, health, etc. Compared to the figures of 20 years back, *i.e.*, 1893, although the indictable offences show an increase yet relatively to the population. the figures for 1912 compare favourably. The indictable offences for 1913 were 57,357 and the non-indictable offences 6,00,249. Compared to the population the figures for the former in 1893 were 192·7 per 1,00,000 of population while those for 1912 are 184·8. Compared to the character of offences, crimes of violence show a decrease but sexual offences seem to be on the increase. These latter may, however, be explained to some extent by the change in the law which has made indictable some of the sexual offences which were formerly non-indictable. The non-indictable criminal offences for 1912 however show a decrease, the figures for 1893 being 113,587 and those for 1912 being 73,917. These offences show a steady decrease during the last 20 years.

It is also interesting to note that of 13,037 persons tried at the Assizes and Quarter Sessions in 1912, 2,077 persons were acquitted and of the persons convicted 7,465 had previous conviction. Courts of Summary Jurisdiction tried 717,383 persons, of whom 53,244 were charged with indictable and 663,139 with non-indictable offences; of these 76,361 were discharged and 83,527 were dealt with without conviction, while 555,495 were convicted; 477,071 were sentenced to pay a fine and about 82,000 of these went to prison in default of payment.

A BILL FURTHER TO AMEND THE INDIAN PENAL CODE AND THE CODE OF CRIMINAL PROCEDURE, 1898.

Whereas it is expedient further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898; it is hereby enacted as follows:—

(1) This Act may be called the Indian Criminal Law (amendment) Act, 191 .

THE INDIAN PENAL CODE.

(2) After sec. 228 of the Indian Penal Code the following sections shall be added, namely:—

"228A. Whoever by words, either spoken or written or by signs or by visible representation or otherwise, brings, or attempts to bring into contempt, or lowers or attempts to lower the authority—

(*a*) of any Court of Justice or

(*b*) of any person empowered by law to record or direct the recording of evidence on oath (when exercising such powers), shall be punished with simple imprisonment for a term which may extend to six months or with fine or with both.

Exception.—It is not an offence under the section to comment on the action of any Court of Justice or person referred to in cl. (*b*), provided that any such comments are in substance true, and made in good faith for the public good.

"228B. Whoever during the pendency of a judicial proceeding, by words either spoken or written, or by signs or by visible representation or otherwise makes or publishes—

(*a*) a false or misleading report of such proceedings or any stage thereof or

(*b*) any comments relating to such proceeding or regarding the presiding officer, the parties, witnesses, assessors, jurors or pleaders concerned in such proceeding, knowing or having reason to believe that such comments may cause or tend to cause prejudice in the public mind in regard to such proceeding or prejudice or tend to prejudice the trial thereof,

shall be punished with simple imprisonment for a term which may extend to six months or with fine or with both.

Explanation 1—A judicial proceeding for the purposes of this section includes any proceeding in the course of which evidence is or may be legally taken on oath.

Explanation 2.—A true, full and fair report of a judicial proceeding or any stage thereof does not constitute an offence under this section.

Explanation 3—A judicial proceeding which has become abortive, rendering a new judicial proceeding necessary is a pending judicial proceeding within the meaning of this section."

THE CODE OF CRIMINAL PROCEDURE.

(3) In section 196 of the Code of Criminal Procedure, 1898, after the words figures and letter "or sec. 153A" the words figures and letters "or sec. 228A or sec. 228B" shall be inserted and to the marginal note of the said section the words "and certain contempts of Court" shall be added.

(4) In Sch. II to the said Code after the entries relating to sec. 228 the entries contained in schedule hitherto annexed shall be inserted.

CURRENT INDIAN CASES.

(CIVIL.)

Provincial Insolvency Act (III of 1907), secs. 20, 22, 46—Claim-case arising out of attachment of property by Receiver.

MUL CHAND *v.* MURARI LAL, I. L. R. 36 All. 8.

A certain insolvency proceeding was transferred by the District Judge to the Additional Judge for disposal.

On information laid by one of the creditors the Receiver appointed by the Court under the Provincial Insolvency Act seized certain moveable property as property of the insolvents in order to dispose of the same for the benefit of the creditors. A third party claiming the property thus seized by the Receiver as his own presented to the Court what purported to be an objection under Or. 21, r. 58, C. P. C. This objection was disallowed by the Additional Judge against whose order an appeal was preferred to the High Court.

Held—That the claimant's position was that of a person aggrieved by an act of the Receiver and his remedy was by an application under sec. 22 of the Insolvency Act.

That even assuming for the sake of argument that the Court of the Additional Judge was a "District Court" under the Provincial Insolvency Act, an appeal would only lie from the order complained of by special leave of the District Court or of the High Court.

Indian Stamp Act (II of 1899), sec. 2, Sch. 1, Art. 5—Instrument—Memorandum of agreement.

MUTASADDI LAL *v.* HARKESH, I. L. R. 36 All. 11.

In a book purporting to be a register of sums payable

with respect to the letting out of wooden machines and rollers for pressing sugarcane and iron pans for boiling sugarcane juice there was an entry to the effect that—"H son of K and two others hired a sugarcane pressing machine in consideration of a rent of Rs. 15 from the Plaintiff, that they would pay the hire in Chait and in default would pay interest at 2 per cent. per mensem." Below this entry appeared the thumb-marks of the persons who hired the machine. There was a further statement that the hirers would return the pans hired at their own costs.

Held—That the document was an 'instrument,' as defined in sub-sec. 14 of sec. 2 of the Stamp Act and the contents of the documents fall within the terms of Art. 5 of Sch. I of the said Act being memoranda of agreements within the meaning of that article. Under cl. (*b*) of Art. 5 the document therefore required a stamp of eight annas.

Review.

THE LAW RELATING TO INJUNCTIONS IN BRITISH INDIA. *By J. G. Woodroffe, M. A., B. C. L., Bar-at-Law, one of His Majesty's Judges of the High Court of Judicature at Fort William in Bengal. Third Edition, by F. J. Mathew, Bar-at-Law. Published by Thacker, Spink & Co., Calcutta.*

This work originally formed the subject-matter of Tagore Law Lectures at the Calcutta University in 1907. The author had thus an occasion to explain the general principles of the English law on the subject and to point out in what respects the Courts in India are entitled to make departures. To the above fact much of its merits is due. It is very unlike the annotated editions of the codified law in India which fail to furnish a comprehensive view of the general principles of law on any subject. That this work is a general exposition of the law does not render it any less, and in our opinion makes it more useful than the commentaries on the codified law to which we are accustomed. The general principles of the law applicable to India are formulated in some cryptic sections of the Code of Civil Procedure and the Specific Relief Act. In their practical application no member of the Bar and the Bench can do without referring to the leading English decisions and text books on the subject. The learned author has judiciously given references in his annotations to the leading decisions and standard works on the subject. In illustrating the practical application of the principles of this equitable relief in the different spheres of substantive law, appropriate Indian decisions have also been cited throughout. In this edition the Indian case law up to 1912 has been incorporated. But the most material changes in the present edition have been necessitated by the amendment of the Civil Procedure Code in 1908. One speciality of this work is that the learned author has taken care to point out that the law with regard to the appointment of Receivers and issue of injunctions is governed by almost identical principles.

The subject index at the end of the work is at once full and informing. But the new editor has not been able to avoid typographical errors altogether. For instance under the heading of "Torts—Jurisdiction" reference is given to p. 261 which evidently is a misprint for p. 281. Another matter to which we would draw his attention is that under the heading of Copyright reference is given only to the Act of 1847. But the new English Act of 1911 was extended to India by the Governor-General by notification in October 1912 under powers given under the English Statute. The Indian Legislature has only this year passed a new Copyright Act on the lines of the English Act with but slight alterations with regard to the right of translation of works first published in India, regarding which a saving was made in the English Statute. We are sure that the consequential changes will be incorporated in a future edition. But as the principle on which injunctions are granted in cases affecting copyright have not undergone any changes the exposition of the law under this head will be applicable to the remedies provided in the new Act as well.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
LORD SUMNER.
LORD PARMOOR.
SIR JOHN EDGE.
MR. AMEER ALI.
1914.
2, March.

SURESH PRASAD SARVADHIKARY, Appellant,
v.
THE CALCUTTA TRAMWAYS COMPANY, LIMITED, Respondents.

Special leave, application for—Collision—Contributory negligence.

This was an application for special leave to appeal from the Judgment of the Calcutta High Court. The Petitioner instituted the suit on the Original Side of that Court for recovery of Rs. 4,300 as damages caused to him and his motor-car in a collision with a tram-car, alleged by him to have been brought about by the negligence of the driver and the conductor thereof.

The trial Judge decreed the claim for Rs. 2,709 with interest and costs. On appeal the suit was dismissed. It was held that the Plaintiff was guilty of contributory negligence. His application for a certificate to appeal to His Majesty in Council was also rejected.

Messrs. L. De Gruyther, K. C., (with him *Mr. Dunne*) for the Petitioner submitted that

the Appellate Court had erroneously found that the Appellant was guilty of contributory negligence, and that the case involved a substantial question of law relating to the rights of the public upon a public road where there was a tramway.

Their Lordships rejected the petition without hearing *Mr. A. Reed* who appeared for the Respondents.

Messrs. Watkin & Hunter for the Appellant.

Messrs. Burton, Yates and *Hurt* for the Respondents.

Leave refused.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COMMISSIONER OF AJMER-MERWARA.]

LORD DUNEDIN.
LORD MERSEY.
LORD MOULTON.
1914.
12, March.

THAKUR UMED SINGH and another, Appellants,
v.
RAI BAHADUR SETH SOBHAG MAL and others, Respondents.

Special leave—Guardian of minor party not joining in application for reference to arbitration—Award and decree, setting aside of—Appeal.

This was an application for special leave to Appeal from a Judgment of the Chief Commissioner of Ajmer-Merwara. The Respondents brought a suit on mortgage in the Court of the Commissioner of Ajmer. The parties entered into an agreement referring the matters in dispute to the arbitration of two persons and an umpire. Finally on the 10th February 1911 an award was made in favour of the Plaintiffs for a portion of the amount claimed. The Plaintiffs objected to the award on the ground of the misconduct of the arbitrators and the umpire, and on the ground that the application to the Court asking for a reference to arbitration was not signed by the guardian *ad litem* of a minor Defendant. The Court of first instance upheld the award and pronounced judgment in terms thereof on the 16th May 1911.

The Chief Commissioner in revision affirmed the said decree.

Subsequently the officiating Chief Commissioner granted a review to the Plaintiffs and set aside his predecessor's order on the ground that the reference to arbitration was made without jurisdiction in that the application to the Court was not signed by the guardian *ad litem* of the minor. The Appellants' application for leave to Appeal against the said order to His Majesty in Council was refused. Hence this petition. It was urged on behalf of the Petitioner that the order of the Chief Commissioner setting aside his predecessor's order and the decree passed in terms of the award was without jurisdiction.

Messrs. L. DeGruyther, K. C., and *B. Dube* appeared for the Petitioner.

Their Lordships granted special leave on the usual terms.

Messrs. Barrow, Rogers and *Nevill* for the Petitioner.

Leave granted.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., AND CHATTERJEE, J. LETTERS PATENT APPEAL No. 164 OF 1911. GORA CHAND CHATTERJEE (having died) substituted in his place, his sons ASHUTOSH CHATTERJEE AND ANOTHER, minors by their guardian and mother SURODHANI DEBYA, Appellants *v.* KESHUB CHANDRA KHAWAS AND OTHERS, Plaintiffs, Respondents. 16th March 1911.

Mesne profits—Co-sharer—Ouster—Enjoyment, excess of.

This appeal arose out of a suit brought by the Plaintiffs, who were co-sharers in certain tanks, against the Defendants, one of whom was a co-sharer of the Plaintiffs. The Plaintiffs established their right to be co sharers to the extent of $\frac{10}{11}$ ths. The Defendant No. 1, the Appellant, established his right to be a co sharer to the extent of the remaining $\frac{1}{11}$; joint possession was awarded by the lower Appellate Court in favour of the Plaintiffs. This decree modified the decree of the Munsif, who granted the Plaintiffs possession of the 16 annas of the tank, and also, as a consequence, mesne profits, while the lower Appellate Court varied the decree but adhered to the award of mesne profits as against the co sharers.

Held, when there is an ouster, mesne profits may be awarded against a co-sharer. The mere excess of enjoyment does not in itself amount to ouster. In the absence of the finding of an ouster, mesne profits cannot be given.

Babu Susil Madhub Mullick for *Babu Provash Chunder Mitra* for the Appellants.

Babu Joyoti Prosad Sarbadhikary for the Respondents.

A. T. M. *Appeal allowed.*

EMPEROR v. TARAPADA NASKAR.

divergent reasons assigned by five different persons upon each of the points for consideration. Such a collection of diverse opinions can hardly be expected to be of any real assistance to this Court. We hold accordingly that the reference before us is in order.

As regards the merits of the case, we feel no doubt whatever that the accused Tarapada did cause the injuries to Johor Ali, of which he ultimately died. This view is amply supported by the testimony of eye witnesses as also by two statements made by the deceased, one immediately after the occurence, and, the other, on the day following and a few hours before his death. The occurrence took place in broad daylight on the afternoon of the 13th April last. Witnesses, whom there is no reason to distrust, state that they saw the accused, Tarapada Naskar, stab the deceased Johor Ali with a knife. On his way to the hospital Johor Ali stated that he had been stabbed by Tarapada; and on the following day when his dying declaration was recorded, he repeated that statement. But it has been urged that the witnesses examined on the side of the prosecution have not disclosed the manner in which the occurrence happened, and that they have given an untrue account of the origin of the quarrel. It may be conceded that some of the statements made by witnesses examined on behalf of the prosecution are open to comment. Yet, in our opinion, there is a substratum of truth in that evidence; and as already stated we feel no doubt that the accused caused those injuries to Johor Ali which led to his death. At the same time, we are not prepared to hold that the accused should be convicted under sec. 302, I. P. C. Immediately after the occurrence the brother of the accused gave information to the Police and described what had happened. According to his statement, he saw one Alia Khan on the top of their cocoanut tree and Bakar Khan and Johor Ali, the deceased, standing under the tree. The result was that there was a quarrel and the present accused, as the evidence on the side of the prosecution shews, stabbed Johor Ali.

In view of this circumstance and also in view of the fact that the accused is only 17 years of age, we think that a comparatively light sentence may be passed.

The result is that we set aside the verdict of the jury as regards the accused, Tarapada Naskar, convict him under section 304, I. P. C, and sentence him to rigorous imprisonment for six years.

PRIVY COUNCIL.

[APPEAL FROM CEYLON.]

LORD DUNEDIN. LORD SHAW. LORD MOULTON. 1913, 16, December.	PAYANA REENA LAYANA SAMINATHAN CHETTY and anr., Appellants, *v.* PANA LANA PANA LANA PALANIAPPA CHETTY, Respondent.

Causes of action, different, though claim same—Agreement admitting liability and prescribing payment by promissory notes—Promissory notes, materially altered—Suit on promissory notes dismissed—Suit upon agreement if lies—"Accord and satisfaction by substituted agreement"—Claim on prior rights extinguished—Suit on such claim, if lies—Ceylon Civil Procedure Act, sec. 34 (Cf. C. P. C., Or. 2, r. 2)*—Pleadings, faulty—Claim in plaint based on wrong grounds—No objection by Defendant—Amendment.*

A whose claim to receive certain items of moneys from B was disputed by the latter agreed with B to refer the disputes to arbitrators who, after an informally conducted investigation, drew up what was termed a "receipt," which B signed, the arbitrators witnessed and A accepted and

acted upon. The document dealt seriatim *with seven sums thereby admitted to be due from B to A amounting in all to Rs. 28,224 odd and prescribed the mode in which it was to be paid, namely, by a cash payment of Rs. 224 odd (which was immediately paid) and by passing two promissory notes for Rs. 14,000 each "payable with interest" on two dates. The amount of interest was (probably by oversight) not specified but there was no doubt that the parties intended that it would be at a certain customary rate which worked out to between 6 and 7* per cent. per annum. *A however, subsequently, and without communication with B went to one of the arbitrators and (without bad faith either on his part or the arbitrator's) persuaded him to alter both promissory notes by inserting therein 9 per cent. as the rate of interest. A's action on the two promissory notes having been dismissed on the ground of material alteration, he sued B for two items of moneys amounting to Rs. 12,297 odd which he had claimed before the arbitrators and which were included in their award:*

Held—*That the "receipt" constituted the award of the arbitrators.*

That whether it did or did not amount to an award it was clearly an "accord and satisfaction by a substituted agreement," whereby the respective rights of the parties inter se *were abandoned in consideration of the acceptance by all of a new agreement.*

That the arrangement for the discharge of the unpaid balance of the amount found due by means of the promissory notes only expressed the mode of payment, which was essentially a matter of form only, the substance of the award being that the specified amount was actually due; the Plaintiff could, therefore, sue for the balance due upon the agreement when his action on the promissory notes failed.

That the form of the Plaintiff's action which was based on rights already extinguished by the agreement was faulty. But the present action should be treated as one based on the new agreement, the Defendant not having taken exception to Plaintiff's statement of the grounds of his claim, so as to give him an opportunity to amend them at an earlier stage.

That a claim on the promissory notes and a claim for the amount found due under the award were not the same cause of action, but were really inconsistent and mutually exclusive causes of action, and the Plaintiff was not required in his suit on the promissory notes to ask for relief on the cause of action arising out of the agreement, by sec. 34 of the Ceylon Civil Procedure Act.

That the Plaintiff's suit which was for a part only of the unpaid balance should be decreed. But he would be precluded by sec. 34 of the Ceylon Civil Procedure Act from bringing a fresh action for the remainder.

The object and meaning of sec. 34 of the Ceylon Civil Procedure Act (which is very similar to Or. 2, r. 2 of the Indian Code) *explained.*

This section is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the Plaintiff to include the whole of his claim in the action. The second portion makes it incumbent on him to ask for the whole of

his remedies. The final paragraph (Explanation in the Indian Code) *is not intended to be an illustration of the foregoing provisions, but a substantive enactment making what otherwise would be independent causes of action, one cause of action for the purposes of the section.*

This was an Appeal from the Supreme Court of the Island of Ceylon.

The material facts of the cases will fully appear from the judgment.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—The Respondent is a money-lender carrying on business in Colombo, and the first Appellant was for a time his Agent and Manager. He was at the same time carrying on business as a money-lender in pa tnership with the second Appellant.

For about 3½ years prior to June 1909 the Respondent was absent from Ceylon, and the first Appellant carried on his business during his absence. On his return serious disputes arose between them. The Respondent alleged that there was a large balance due to him from the first Appellant and also that the first Appellant had not credited the Respondent with certain profits made by discounting promissory notes at the Banks for firms in which the second Appellant was a partner. Ultimately all the parties to the present suit agreed that these disputes should be referred to two other money-lenders named Ramanathan Chetty and Mutu Ramen Chetty, who, after the completion of the investigation drew up, on the 30th August 1909, what has been termed "a receipt," which the Appellants signed, the Arbitrators witnessed and the Respondent accepted and acted upon. This document deals *seriatim* with seven sums thereby admitted to be due from the Appellants to the Respondent amounting in all to Rs. 28,224$\frac{5}{32}$, and it then proceeds as follows :—

"And this sum of 28,224$\frac{5}{32}$ Rs. we have this day settled with you in the following manner :—

"Rs. 224$\frac{5}{32}$ paid to you by us this day in cash, Rs. 14,000 by an on demand promissory note, payable with interest on 15th September, and Rs. 14,000, by another on demand promissory note given on the same date payable with interest on 30th November, all aggregating to Rs. 28,224$\frac{5}{32}$.

"And this ma ter having been thus arranged and settled in respect of all the accounts between us, this receipt shall be the witness that there is no other claim against us by you or by us against you."

Accordingly Rs. 224$\frac{5}{32}$ were thereupon paid by the Appellants to the Respondent, and two promissory notes, each for a sum of Rs. 14,000, were handed to him. Their Lordships entertain no doubt that, although informally conducted, the proceeding was in the nature of an arbitration, and the so-called "receipt" expresses the finding of the Arbitrators, and the mode in which it was to be performed. But the question whether or not it should so be regarded is immaterial for the decision of the present Appeal. The "receipt" given by the Appellants, and accepted by the Respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the "receipt." It is a clear example of what used to be well known in Common Law Pleading as "Accord and Satisfaction by a Substituted Agreement." No matter what were the respective rights

PAYANA REENA LAYANA SAMINATHAN CHETTY *v.* PANA LANA PALANIAPPA CHETTY.

of the parties *inter se* they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.

There appears to be no doubt that it was the intention of all the parties that the sums for which the promissory notes were given should bear what is known as Chetty interest, which is at a rate dependent on the current Bank rate, and would in the present case have been between 6 per cent. and 7 per. cent. But, probably by an oversight, no rate of interest was inserted in the promissory notes, and the Respondent, without communication with the Appellants, went to one of the Arbitrators and persuaded him to alter both promissory notes by inserting therein 9 per cent. as the rate of interest. Though this was an irregularity of a grave kind, their Lordships do not understand that it was done with bad faith either on the part of the Arbitrator or the Respondent. It appears to have been the result of a misunderstanding, and accordingly their Lordships treat it as a material alteration innocently made.

On the 18th October 1909, the Respondent commenced an action in the District Court of Colombo upon the two promissory notes so given to him. The Appellants raised as a defence that a material alteration had been made in them, and on this ground the Action was dismissed on February 8th, 1910.

On the 20th April 1910, the Respondent commenced the present Action for the two sums of Rs. 11,526$\frac{1}{32}$ and Rs. 771. These were two out of six items referred to in the receipt, all going towards making up the total of Rs. 28,224$\frac{5}{32}$ which was the basis of the new Agreement. The form of the plaint is such that it is clear that the Respondent was attempting to assert in the Action two of the claims which were included in the Award and settled by the new Agreement. This he was not entitled to do since they had been extinguished by the acceptance of the new Agreement.

At the trial of the Action, the District Judge found in favour of the Appellants, on the ground that the two promissory notes were given in absolute payment of the debt, and that, therefore, no remedy remained to the Respondent, excepting upon those notes. On Appeal, the Judges of the Supreme Court held that the notes were only accepted as a conditional discharge, so that they only amounted to payment if paid, and that, inasmuch as they had not been paid, the original debt of Rs. 28,000 remained. They accordingly allowed the Appeal. It is from this decision that the present Appeal is brought.

Their Lordships are of opinion, as has already been stated, that the form of the claim was faulty inasmuch as the sole existing liability was under the Agreement set out in the receipt. But they are also of opinion that the arrangement for the discharge of the amount found due by means of the promissory notes only expressed the mode of payment contemplated and arranged for at the time. This was essentially a matter of form only, the substance of the award being that the specified amount was actually due from the Appellants to the Respondent. Through an innocent act the promissory notes have become incapable of being

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enforced, and the Appellants have availed themselves of this and have refused to pay the notes so that payment in the form contemplated has failed. But this does not affect the substance of the award or the basis of the arrangement which was liability, and therefore it was open to the Respondent to bring an Action for the unpaid balance of the sum found due, *i.e.*, for the amount of the promissory notes. He has brought his Action for an amount less than this and based it on wrong grounds, but, on the other hand, the Appellants omitted to raise their true defence in their pleadings, when there would have been an opportunity for the Respondent to correct the grounds of his claim.

The learned Judge at the trial held that this Action was barred by sec. 34 of the Ceylon Civil Procedure Act, and Counsel for the Appellants relied strongly upon this section in the argument before us. On account of the importance of the point it is desirable to cite the section in full:—

"Every action shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.

"If a Plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted."

"For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."*

Their Lordships are of opinion that the learned Judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the Plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragragh, in

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* Cf. r. 2, Or. 2 of the Civil Procedure Code (Act V of 1908).

2 (1) Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where the Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so oomitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwerds sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

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their Lordships' opinion, is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section.

Viewed thus, it is evident that a claim on the Bills and a claim for the amount found due under the Award and for which payment was provided by the Agreement are not the same cause of action but are in truth inconsistent and mutually exclusive causes of action. So long as the Bills were outstanding there was no right of action otherwise than upon the Bills. It is therefore impossible, in their Lordships' opinion, to hold that the claim for the amount due was the same cause of action as the claim upon the Bills and ought to have been included in the prior action.

Their Lordships therefore think that justice will be done by treating the sum sued for as being part of the amount found due by the Arbitrators, the payment of which was provided for by the Agreement and in respect of which the promissory notes were given. They hold that, as such, it is recoverable by the Respondent, and that the Appeal should be dismissed. But this amendment will entail the consequence that inasmuch as the Respondent has sued for a part only of the total sum due he cannot bring a fresh Action for the remainder.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed but without costs.

B. D. *Appeal dismissed without costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 465 OF 1910.

JENKINS, C. J.	BISHNU CHARAN ROY
RAY, J.	CHAUDHURI and others,
1913,	Plaintiffs, Appellants,
Heard, 1 and	*v.*
2, May.	BEPIN CHANDRA ROY
Judgment,	CHAUDHURI and others,
2, May.	Defendants, Respondents.

Contribution amongst joint tort-feasors—Decree against Plaintiffs and Defendants for mesne profits —Tort not wilful—Plea that Plaintiffs sole wrong-doers to be specially pleaded and made a special issue.

Held—*That on the facts of the case, the Plaintiffs and Defendants against whom as zemindars of estate A, a decree for possession and mesne profits had been passed in favour of zemindars of estate N, were not wilful tortfeasors—even if the strict law of* MERRYWEATHER *v.* NIXAM (1) *were applicable in India—and* primâ facie *the Plaintiffs who paid the whole of the decretal amount in a proceeding under sec. 310A, C. P. C., were entitled to contribution as against the Defendants.*

In such a suit for contribution, a plea that the Plaintiffs were the only wrong-doers in the sense that they alone were in possession of the land in respect of which mesne profits were awarded is of such a special nature and requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue.

DERING *v.* WINCHELSEA (2) *referred to.*

This was an Appeal preferred on the 14th of November 1910 against the decree of Babu Satya Charan Ganguli, Subordinate Judge of Zillah Faridpore, dated the 27th of June 1910.

(1) 8. T. R. 186 (1799).
(2) 1 Cox. 318 (1787).

BISHNU CHARAN ROY CHAUDHURI *v.* BEPIN CHANDRA ROY CHAUDHURI.

The facts of the case will appear from the judgment.

Mr. S. P. Sinha and *Babus Dwarka Nath Chuckerbutty*, *Tara Kishore Chaudhuri*, *Braja Lal Chuckrabarty* and *Satish Chandra Bhattacharjee* for the Appellants.

Babus Bidhu Bhusan Ganguly, *Hirendra Nath Ganguly*, *Kshirode Narain Bhuyan* and *Brajendra Nath Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This Appeal arises out of a suit for contribution. The findings of the Subordinate Judge are all in favour of the Plaintiffs with the one exception that he considered that he was unable to pass a decree in the Plaintiffs' favour by reason of the difficulty in determining the shares in which the several Defendants should contribute. The result has been that the suit has been dismissed. From this decree the present appeal has been preferred.

The case stated broadly is this : The Plaintiffs and the Defendants in the present suit may be described in general terms as the zemindars of Amgram. There was an adjoining estate which belonged to the zemindars of Narail. There was a contest between these two sets of zemindars, as to the ownership of a considerable area of marshy land, each claiming it to be within their zemindari. This led to proceedings under sec. 145 of the Criminal Procedure Code, in which it was determined that possession as to a part was with the zemindars of Narail, and as to the rest with the zemindars of Amgram. The zemindars of Narail were dissatisfied with this result, and they brought a Suit No. 29 of 1887 whereby they claimed possession and *wasilat.* There was a decree passed in their favour, for possession of 800 bighas in round numbers. An appeal was preferred by some of the zemindars of Amgram, with the result that the area awarded to the Plaintiffs was materially diminished, and as a result the amount of mesne profits was largely decreased, still a considerable sum was due by way of mesne profits, and this the zemindars of Narail took steps to realise in execution of the decree with the result that property belonging to the present Plaintiffs was attached and sold. This led to an application under sec. 310A, and the sale was set aside. In the end the decree in favour of the zemindars of Narail was satisfied. The present Plaintiffs, being some of the zemindars of Amgram, claim that they have paid off the whole of the decretal amount and are thus entitled to contribution from those of their co-sharer zemindars of Amgram who were Defendants to Suit No. 29 of 1887. The decree for mesne profits in no way discriminates between the Defendants, it treats them all as on the same footing, and that no doubt accounts for the fact that by the plaint in this suit the Plaintiffs sought a contribution from the Defendants equally. Had they been able to substantiate this claim, it would have diminished the complexity of this litigation ; but it has been stated before us by Counsel for the Plaintiffs that in the circumstances he does not think he would be justified in seeking for contribution except in accordance with the shares of the Defendants in the zemindari of Amgram. This view is accepted by the Respondents, if there is any liability at all, and it thus becomes unnecessary for us to consider whether the Plaintiffs could have claimed an equal contribution, so that for the purposes of

this judgment I will assume that if the Plaintiffs are entitled to recover anything from the Defendants it will be upon the basis of a contribution by the Defendants proportionate to their shares in the zemindari of Amgram.

The findings of fact by the trial Judge have not been assailed before us, with one exception to which I will later allude. It has, however, been suggested that the Defendants to Suit No. 29 of 1887 were wrong-doers, and that therefore no right to contribution exists. That, I think, is an argument which we need not consider seriously, for even if the strict law of *Merryweather* v. *Nixam* (1) were applicable in India—a point on which I would desire to reserve my opinion—it certainly would not be applicable in the circumstances of this case, because it cannot be said on the facts on the record that the Defendants to Suit No. 29 of 1887 were wilful tortfeasors. But the principal defence urged before us is that the Plaintiffs ought not to be given relief in this case, because they really were the only worng-doers, in the sense that they alone were in possession of the land in respect of which mesne profits were awarded to the zemindars of Narail. It is on this point that the Respondents quarrel with the finding of the Court below. The principle of contribution as applicable in a case like the present is well established, and the leading case is *Dering* v. *Winchelsea* (2). There, as here, it was argued that the author of the loss could not have the benefit of a contribution. But the Lord Chief Baron, while repelling the applicability of the argument to the circumstances of that case, went on to say that "cases, indeed, might be put, in which the proposition would be true," and in illustration of this he said "if a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the Plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution." That illustration is useful as an indication of what might furnish an answer to a Plaintiff seeking contribution, when it is urged that he was disentitled by reason of his responsibility for the mischief that had occurred. But in this case, notwithstanding the argument that has been addressed to us, I am unable to say that this is made out. *Primâ facie* a person in the position of the Plaintiffs in this suit has a right to contribution and the particular plea now under consideration is of such a special nature and requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue. That has not been done, and though there are expressions in the judgment of the learned Subordinate Judge which look as though the point had been discussed, it was in connection with a contention distinct from this plea. Moreover, it is to be noticed that the learned Judge's view of the facts was against the contention now advanced on behalf of the Defendants.

The position then is this: So far as the evidence goes, the learned Subordinate Judge who had every opportunity of estimating the value of the testimony given before him considered that it did not prove that the Plaintiffs alone were in possession of the land in dispute in the former litigation. The evidence has also been brought to our notice, and I too am unable to regard that evidence as suffi-

(1) 8 T. R. 186 (1799).
(2) 1 Cox. 318 (1787).

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cient to establish the special plea that has been advanced. And I may further remark that it is a plea that may involve a very complex enquiry. Thus, even if it did appear that the Plaintiffs were in possession of the greater part of this disputed land, it still might have to be considered whether this was not by reason of some understanding under which the Defendants were in possession of an equivalent portion of land outside the disputed area as forming part of the zemindari of Amgram.

I think I have shown enough to make it evident that we ought not to and we cannot properly, on the materials at present before us, give effect to this plea. Moreover, it has to be noticed that this plea is barely consistent with the decree passed in Suit No. 29 of 1887 which treated all the Defendants against whom it was passed as equally responsible for the *wasilat.* The theory of that decree, as I understand it, was this: The litigation was treated as one in effect between the zemindars of Narail on the one side and zemindars of Amgram on the other, and it was the zemindars of Amgram who were treated as responsible as being zemindars of Amgram. The reasonable meaning of such decree would be as decided by the Privy Council in *Jotindra Mohun Lahiri* v. *Guru Prosunno Lahiri* (3), that the estate was to be made liable, and it is this that justifies the view of proportionate liability taken by both sides in this case. If, therefore, there be a liability, it must be a liability in proportion to the interests of the Defendants in the zemindari of Amgram. We hold therefore that the Plaintiffs are entitled to succeed in this suit, and that the Defendants are liable to the extent of their several shares. The measure of that liability in the case of each Defendant will be a proportionate part of the decretal amount in Suit No. 29 of 1887, together with interest on that sum from the time of payment up to the institution of this suit. The amount of that decree is a matter in dispute between the parties. It is one on which they certainly should have no difficulty in settling, and for that purpose the learned Vakils on both sides have agreed they will meet and will then give us the requisite figure.

There still remains the question of proportionate shares of the several Defendants. That no doubt is a matter of some little difficulty unless the Defendants will co-operate. The Defendants must know what their shares are, and the decree of the Court cannot be defeated because they may think fit to create a difficulty in the way of ascertaining those shares.

We do not propose to send the case down, as we intend to pass a decree in this Court for the amount payable by each Defendant to the extent of his share, and we only have to see how that can most conveniently and expeditiously be ascertained.

(After discussion)

The parties are agreed that the Plaintiffs will file their list of the Defendants' shares in Court and they will also furnish the Defendants with copies of that list within seven days, and the Defendants on their part will also furnish within a month their list, or counter list if they do not agree with the Plaintiffs' list.

The case will be mentioned to us again after a month when we will finally dispose of it.

[Order, dated 30th June 1913.

(3) 8 C. W. N. 625 (1904).

BISHNU CHARAN ROY CHAUDHURI *v.* BEPIN CHANDRA ROY CHAUDHURI.

The parties are agreed as to the proportionate shares in which the Defendants-Respondents are liable to pay the decretal amount, and have submitted a statement showing the said shares. They also agree that the principal amount to be paid by the Defendants is Rs. 21958-15-6 p. deposited on the 21st of December 1907 minus the sum of Rs. 5,744-2-9 p. which has subsequently been refunded to the Plaintiffs under order, dated the 22nd of February 1909.

It is accordingly decreed that the Defendants do pay the following sums, in proportion to their respective shares shown in the statement of shares:—The principal sum of Rs. 16,214-12-9 p., together with interest thereon at the rate of twelve per cent. per annum from the date of payment up to the date of suit, as well as interest on the sum of Rs. 5,744-2-9 refunded to the Plaintiffs, at the rate aforesaid from the date of deposit of that amount up to the date of refund. The decretal amount will carry interest at the rate of six per cent. per annum from this date until realisation.

The Defendants will pay costs throughout in proportion to their respective shares.

There will be no decree against the three *pro formâ* Respondents (Nos. 104, 105 and 106), the suit having been compromised with two of them and the third being given up by the Plaintiffs in the Court below]

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 20 OF 1910.

MOOKERJEE, J.
HOLMWOOD, J.
1912,
30, July.

SURYA NARAIN JHA, Appellant,
v.
BANWARI JHA and ors., Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 522—Decree made in confirmation of an award of arbitrators, appeal if lies on the ground of invalidity of award—Art. 158 of Sch. II of the Limitation Act (XV of 1877).

There is no appeal against a decree made under sec. 522, C. P C., in confirmation of an award of arbitrators even when that decree is assailed on the ground that there was no award valid in law.

GHULAM KHAN *v.* MUHAMMAD HASSAN (3) *followed.*

The decision of the Judicial Committee in HARNARAIN SINGH *v.* BHAGWANT KUAR (4) *cannot be treated as in any way in conflict with the later decision of the Judicial Committee in the case of* GHULAM KHAN *v.* MUHAMMAD HASSAN (3), *inasmuch as in the former case no question as to the competency of the appeal was raised either before the Judicial Committee or in the High Court.*

Where no application to set aside the award was made to the lower Court within the period of limitation prescribed by Art. 158 of the Limitation Act by the guardian ad litem *of the Appellant who was a minor at the time:*

Held—*That the Appellant could not be allowed to invite the High Court to interfere with the decree in the exercise of its revisional jurisdiction even on the ground that the reference to arbitration was made with*

(3) I. L. R. 29 Cal. 167 : s. c. 6 C. W. N 226 (1901)

(4) I. L. R. 13 All. 300 (1891).

SURYA NARAIN JHA *v.* BANWARI JHA.

the concurrence of a person who had no authority to act on behalf of the guardian of the Appellant and that the award had therefore no existence in the eye of law.

This was an Appeal preferred on the 7th of January 1910 against the decree of A. McGavin, Esq., Subordinate Judge of Zillah Deoghur, dated the 28th of July 1909.

The material facts will appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Ramesh Chandra Sen* for the Appellant.

Babus Mahendra Nath Roy, Ambika Pada Chowdhury and *Peary Mohan Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This Appeal is directed against a decree made under sec. 522 of the Code of Civil Procedure of 1882, in confirmation of an award of arbitrators. A preliminary objection has been taken to the competency of the appeal, because under that section, an appeal does not lie from such decree except in so far as the decree is in excess of or not in accordance with the award. As the decree is not assailed on behalf of the Appellants on the ground that it is in excess of or not in accordance with the award, the appeal is *primâ facie* incompetent.

It has been argued, however, on behalf of the Appellant, upon the authority of the decisions in *Indur Subbarami Reddy* v. *Kanda Dai* (1) and *Muhammad Abid* v. *Muhammad Ashgar* (2), that inasmuch as the decree is assailed on the ground that there was no award valid in law, the appeal is competent. But this contention cannot possibly prevail, in view of the plain language of sec. 522, and of the exposition of the law by the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan* (3). Our attention, however, has been invited to another decision of the Judicial Committee in *Harnarain Singh* v. *Bhagwant Kuar* (4), where an appeal, under somewhat similar circumstances, was allowed to be heard without any question as to its competency. In that case, the award had been filed after the expiry of the time prescribed by the Court, and it was held by the Judicial Committee that there was no legal award which could be made the foundation of a decree. It is clear, however, from the judgment of the Judicial Committee that no question as to the competency of the appeal was raised either before their Lordships or in the High Court. Consequently that decision cannot be treated as in any way in conflict with the later decision of the Judicial Committee in the case of *Ghulam Khan* v. *Muhammad Hassan* (3).

It is further worthy of note that even if the Appellant were allowed to invite this Court to interfere in the exercise of its revisional jurisdiction, he would still find himself in inextricable difficulty, as no application was made on his behalf to the Court below to set aside the award. The matter was referred to the arbitrators on the 14th March 1907. The award was filed on the 8th July 1909. The Court thereupon adjourned the case till the 18th July and directed the parties to file objections, if any, on or before that date. This was in strict conformity with Art. 158 of the Second Schedule of the Limitation Act. On the 17th July,

(1) I. L. R. 26 Mad. 47 (1902).
(2) I. L. R. 8 All. 64 (1885).
(3) I. L. R. 29 Cal. 167 : s. c. 6 C. W. N. 226 (1901).
(4) I. L. R. 13 All. 300 (1891).

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it was discovered that the date to which the case had been adjourned was a Sunday; the Court thereupon adjourned the case to the 28th July. We cannot interpret this order in the sense that the time within which objection could be filed was also thereby extended to the 28th July. In fact, it was not competent to the Court to extend the period of ten days prescribed by Art. 158, because under sec. 5 of the Limitation Act, the Court has no authority to receive an application to set aside the award after the expiry of the time prescribed by that article. The Appellant suggests, however, that he was misled by the order of the 17th July 1909, and alleges that he could not appear before the Judge on the date fixed, as the Court was held on that date in a place different from the locality wherein the Court was ordinarily held. It is not necessary for us to determine, whether this latter allegation is or is not well-founded on fact. The position is unassailable that no exception was taken within the time prescribed by Art. 158 and it was not competent to the Court to extend the time prescribed by that article. It thus became obligatory on the Court to confirm the award. But it has been ingeniously argued that an application to set aside the award was unnecessary, because the award had, in the eye of law, no existence, as the reference to arbitration was made with the concurrence of a person who had no authority to act on behalf of the guardian of the Appellant, an infant at that time. This contention is clearly fallacious. Sec. 522 of the Code of 1882 provides that if the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in the manner aforesaid, that is, under secs. 520 and 521, and, if no application has been made to set aside the award or if the Court has refused such application, the Court shall proceed to give judgment according to the award. The expression 'if no application has been made to set aside the award' is clearly comprehensive enough to cover a case of the present description and refers to a contingency other than the remission of an award. The award here, if not successfully challenged, would be *primâ facie* binding upon the Appellant: if there was good reason to assail the award, it was competent to his guardian *ad litem* to apply to the Court to set it aside within the time prescribed by Art. 158. This was not done: and the Court had thus no other course open than to record an order of confirmation.

It has finally been represented to us that the Appellant, at the time of the proceeding in the Court below, was an infant, and that although he has since then attained majority, he is now insane. This may be a matter for regret, but plainly cannot affect our decision. We do not however express any opinion upon another aspect of the matter suggested in the course of argument, namely, whether it is possible for the Plaintiff to obtain relief in a separate declaratory suit, on the ground of negligence of his guardian *ad litem*. We only hold that the present appeal is incompetent, and that even if we had been invited to interfere in the exercise of our revisional jurisdiction, we could not afford any relief to the Petitioner in the events which have happened.

The result is that this Appeal is dismissed with costs: We assess the hearing-fee at five gold mohurs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2421 OF 1911.

FLETCHER, J. N. R. CHATTERJEA, J. 1913, Heard, 27 and 28, November. Judgment, 28, November.

RAKHAL CHANDRA DAS, Plaintiff, Appellant, *v.* UMAPADO MISRI and others, Defendants, Respondents.

Putni Regulation (VIII of 1819), secs. 5, 6—Transferee of portion of putni, *if may claim recognition by zemindar under Bengal Tenancy Act (VIII of 1885), secs. 12, 17—Sec. 195* (c).

A partial transferee of a putni *taluk is not entitled to be recognised by the zemindar. It is a form of transfer which under the terms of secs. 5 and 6 of Reg. VIII of 1819 the zemindar is not bound to recognise, and under sec. 195* (c) *of the Bengal Tenancy Act the transferee cannot claim recognition by reason of secs. 12 and 17 of the latter Act.*

This was an Appeal preferred on the 7th of February 1911 against a decree passed by J. Cornes, Esq., District Judge of Midnapur, dated the 17th of May 1911, modifying on appeal the decree passed by Babu Trailokya Nath Shome, Subordinate Judge of Midnapur, dated the 30th of July 1910.

The material facts of the case are thus set out in the judgment of the District Judge.

Formerly there was a *putni-pottah* of 12 mouzahs in the name of Defendant No. 3; of these 12 mouzahs, the Defendant No. 3 sold his rights in 4 of them to Defendant No. 4. Afterwards, he sold his rights in 4 more of them to the Plaintiff, and on the same day, the Defendant No. 4 sold her rights in 2 of her mouzahs to the Plaintiff; thus the Plaintiff acquired *putni* rights in 6 mouzahs out of the 12.

Shortly after these sales, the Defendants Nos. 1 and 2 bought the proprietary interest in the *putni mehal* with the exception of 2 mouzahs, which had been sold away. For these new properties, the Defendants Nos. 1 and 2 then instituted rent Suit No. 216 of 1909 against the Defendant No. 3 alone and obtained an *ex parte* decree and in execution of it advertised for sale one of the Plaintiff's mouzahs in the *putni*.

The Plaintiff sued for and obtained in the first Court the following declarations: (1) that the Defendants Nos. 1 and 2 were bound to recognise him as tenant of the *putni* tenure jointly with Defendant No. 3.

2. That the Plaintiff was not bound by the decree passed in Suit No. 216 of 1909, and

3. That the Defendants Nos. 1 and 2 should be restrained by an injunction from proceeding against the properties of the Plaintiff in execution of the decree passed in Suit No. 216 of 1909.

Against this decree, the Defendants Nos. 1 and 2 who alone contested the suit appealed to the District Judge who held that the Defendants Nos. 1 and 2 were not bound to recognise Defendant No. 3 as a tenant of the *putni* tenure jointly with Defendant No. 3, and set aside that portion of the Munsif's decree. With regard to the decree in Suit No. 216 of 1909, he held that it was a fraudulent decree and he allowed the first Court's decree on this point to stand. He concluded his judgment as follows:—

"It might be said that the result of these orders is tantamount to making Defendants Nos. 1 and 2 recognise the Plaintiff as a *putnidar* without his taking the necessary action under secs. 5 and 6 of the Putni Regulation, as they would be bound to implead him in a future suit, but this is not so. The Plaintiff cannot plead now ignorance of his duties under the Regulation, and if he does not take steps

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speedily to get his name registered with his landlords on a proper basis, the Court will presume that he is neglecting his duty deliberately, and if a similar case should come up in future, where a suit is being brought against the registered tenant, it will no longer be a genuine grievance with the Plaintiff that he has not been made a party.

"Under these circumstances, it is ordered that each party will bear its own costs in this and the lower Court."

The Plaintiff appealed to the High Court.

Babu Tarak Chandra Chuckerbutty for the Appellant.

Babus Harendra Nath Mukerjee for *Babu Jyotish Chandra Hazra* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is an Appeal preferred against a judgment and decree of the learned District Judge of Midnapur passed in an appeal presented to him from an order of the Subordinate Judge. The learned District Judge varied the decree of the Subordinate Judge by declaring that the Defendants are not bound to recognise the Plaintiff as a tenant. The point lies in a very narrow compass. The Plaintiff is a partial transferee of certain properties comprised in a *putni* and the point that has been pressed before us is that being only such a partial transferee, the provisions of Reg. VIII of 1819 do not apply to him and that he is entitled to be recognised by the landlords under secs. 12 and 17 of the Bengal Tenancy Act. In my opinion, there is no foundation for such a suggestion and it is contrary to what has been decided in the decisions of this Court on the Regulation. The 5th section of the Regulation (VIII of 1819) recognises the right of the *putnidar* to transfer his *putni* but subject to certain conditions, the conditions being, first of all, the payment of a fee to the zemindar and, secondly, the giving of security for half year's rent. Then, the 6th section of the Regulation provides that the zemindar may refuse to sanction the transfer till the fee and the security be tendered. Then comes a proviso in these terms:—"The rules of this and of the preceding section shall not be held to apply to transfers of any fractional portion of a *putni* taluk nor to any alienation other than of the entire interest." Those are the enacting words contained in the proviso. Then there is a semicolon and the proviso continues thus:—"For no apportionment of the zemindar's reserved rent can be allowed to stand good unless made under his special sanction. The reasons seem to me to be perfectly good and clear but they do not cut down the enacting words of the proviso even if you come to a case which does not fall within the reasons. In my opinion, this case does fall within the reasons because if the Plaintiff can compel the landlords to recognise him then there will be an apportionment of the reserved rent. It seems to me that it is a form of transfer which, under the terms of the Regulation, the zemindar is not bound to recognise. If that be so, then, of course, the Bengal Tenancy Act has nothing to do with this case at all. Sec. 195 (*e*) provides that nothing in the Bengal Tenancy Act shall affect any enactment relating to *putni* tenures in so far as it relates to those tenures. If, on the true construction of secs. 5 and 6 of Reg. VIII of 1819, a perpetual transfer of a *putni* taluk is not permitted as against the

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zemindar without his special sanction, then under sec. 195 (e) of the Bengal Tenancy Act, the sections contained in that Act do not enable the tenant to claim recognition by reason of secs. 12 and 17 of the Act. In my opinion, the learned Judge came to a correct conclusion in varying the decree of the first Court in the way he did. The present appeal must therefore fail and be dismissed with costs.

The observations of the learned District Judge contained in the penultimate clause in his judgment seem to me to be unnecessary and uncalled for, and, in my opinion, the learned Judge was not in a position to express any opinion as to what the failure of the Plaintiff to observe a course of conduct which he thought the Plaintiff ought to adopt would bring upon him if a similar case should occur in future. Those observations in the judgment should therefore be considered as unnecessary and uncalled for.

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

APP. No. 23 OF 1913.

JENKINS, C. J. OSMOND BEEBY
WOODROFFE, J. v.
1914, KSHITISH CHANDRA
30, January. ACHARYA CHAUDHURI.

Administrator pendente lite, *commission by way of remuneration that may be properly charged—Assets in his hands, meaning of—Negotiable securities endorsed over to banks for loans obtained by deceased, assets to what extent—Such securities, if pledges in the hands of bank and bank if holders for value thereof to the extent of loan—Lien of bank for loan on negotiable securities—Indian Contract Act (IX of 1872), secs. 172, 176—Account of administrator* pendente lite *passed, if amounts to settled account and if any bar to recovery of monies retained by him to which he is not entitled—Fiduciary position of such administrator—Estoppel—Laches—Acquiescence—Partition suit between Hindu sons—Mother's share, if ascertained before decree—Limitation, error of procedure, rectification within time, delay in completion of order and recording the re-presentment of plaint—Limitation of suits against persons in fiduciary position.*

Where Government securities are endorsed in blank or endorsed in favour of a bank and given to the bank as security for loans obtained, the bank would be not merely a pledgee but a holder for value of the negotiable instruments to the extent of the sum for which it had a lien. The delivery of securities so endorsed passed to the bank a legal and not a mere equitable title.

SCOTT v. FRANKLIN (1) *referred to.*

Where such Government securities were, after the debtor's death, sold by the bank through a firm of brokers nominated by the administrator pendente lite *to the debtor's estate:*

Held—*That the bank did not sell as the agent of the administrator* pendente lite *and that so much of the sale-proceeds as the bank applied to the discharge of debts due to it were not assets that came into the hands of the administrator* pendente lite *and the latter was not justified in charging commission on the whole of the sale-proceeds of the Government securities but only on the balance that came into his hands after satisfaction of the lien of the bank.*

Where the accounts of the administrator pendente lite *were passed by Court, including the charge of commission on the whole of the sale-proceeds mentioned above, and the heirs had full knowledge of it through their agents and solicitor and the solicitor also expressed an opinion that com-*

(1) 15 East, 428 (1812).

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mission so charged was properly charged, no estoppel arose to debar the heirs from suing the administrator for refund of the commission to which he was not legally entitled.

That this was not a case of opening a settled account but one of enforcing a claim against a fiduciary agent on the ground that he had retained more of the estate than he was entitled to under the order of Court authorising his remuneration, and the alleged acquiescence on the part of the Plaintiff would be no defence to the suit.

The suit being also within the statutory period of limitation, the defence of laches could not prevail.

Where there was no evidence that the Plaintiff knew that the facts as represented in the accounts were incorrect or that they did not rely on that representation, the inference was that they did so rely on the representation.

REDGRAVE *v.* HURD (2) *referred to.*

When one of four brothers governed by the Bengal school of Hindu law sued for partition and their mother was made party and an administrator pendente lite *was appointed to represent the interests of a deceased brother before partition was actually effected, such administrator was entitled to charge commission on ¼th share of the whole estate and not on the ⅕th share as mother's share was a mere charge for maintenance and could not be declared before partition actually took place.*

Where the administrator pendente lite *charged commission on the whole estate when it came into his hands he could not charge any commission on the sale-proceeds of any portion of it.*

Where on leave being asked for in the plaint under cl. 12 of the Charter the Registrar on the Original Side of the High Court under a misapprehension of the change in procedure with regard to the filing of plaints gave such leave but on discovery of the fact that the Registrar had no authority to grant such leave, the plaint was withdrawn on the 15th August 1907 and was immediately after presented before a Judge sitting on the Original Side who gave the leave and endorsed on the plaint "presented 15th August 1907," but there was delay in the office in completing the order and stamps were supplied upon requisition from the office on the 14th December 1907 and it was recorded in the office and also re-endorsed on the plaint that the plaint was re-registered and filed on the 18th December 1907; on objection being taken by the Defendant that the suit was barred by limitation:

Held by CHAUDHURI, J.—*That the 15th of August 1907 as recorded by the Judge on the plaint was the date of its presentation and the suit was not barred by limitation.*

This was an Appeal against the judgment of Chaudhuri, J., sitting on the Original Side of the High Court at Calcutta. The suit was brought by Plaintiffs-Respondents against the Defendant-Appellant, who had been appointed Administrator *pendente lite* to the estate of one Dakshina Mohan Roy deceased, praying that his accounts may be duly investigated in their presence and that Mr. Beeby may be ordered to pay and refund all overcharges made by him, the particulars of which are set out in para. 18 of the plaint and prayer 23 (b) of the prayer which are set out below. Mr. Osmond Beeby was appointed Administrator *pendente lite* on the 25th of July 1901 in certain testamentary suits in which Dakshina's properties and interests were claimed by some of his brothers under

(2) L. R. 20 Ch. D. 1 (1881).

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an alleged Will, the genuineness of which was contested by his widow Sindhubala. The term regarding his remuneration was that he was to be allowed a commission of 2 per cent. on all assets that came into his hands. Upon an application by Sindhubala an order was made by Court on the 21st of May 1903 by which Mr. Osmond Beeby was discharged from further acting as administrator *pendente lite* and he was ordered to file his accounts. Mr. Beeby had filed his accounts of July 1901 to 1902 in the Testamentary Court on the 16th December 1902; his accounts for July 1902 to December 1902 were filed on the 9th of September 1903; for January to June 1903 and July to December 1903 were filed in two sets on the 10th December 1903. Mr. Beeby was discharged on the 8th December 1903. Then Sindhubala was granted Letters of Administration to the estate of Dakshina on the 8th January 1906, the claims of the brothers under the alleged Will of the deceased having failed. Both prior and subsequent to this Sindhubala executed a deed of relinquishment of all her interests in favour of the reversionary heir, Kshitish Chandra Acharya Chaudhuri, the Plaintiff abovenamed. The accounts filed by Mr. Beeby were passed by the Testamentary Court on the 9th of January 1904. On the 6th December 1906, the Plaintiffs filed the present suit.

Para. 18 and prayer 23 (b) of the plaint are as follows:—

18. That after the said decree of the 8th day of January 1906 the accounts so filed by the Defendant were looked into on behalf of the infant Plaintiff and the Plaintiffs have discovered that the Defendant has improperly charged various items of commission amounting to a very large sum of money which the Defendant is bound to refund with interest and the Plaintiffs in particular show as follows:—

Amount of commission improperly charged	*Grounds of objection.*
(*a*) On the 27th of August 1901 the Defendant charged Rs. 12,818-13-7 being 2 per cent. on Rs. 6,40,942-8-10 representing the market value of the Government Promissory Notes endorsed to and in pledge with several banks in Calcutta at the time of the Defendant's appointment.	(*a*). The assets of Rs. 6,40,942-8-10 never came into the hands of the Defendant and the actual assets which came into the hands of the Defendant were small balances after the satisfaction of the claims of various banks, and the Plaintiffs submit that the Defendant was entitled to commission only on such balances.
(*b*). On the 27th March 1902 the Defendant charged Rs. 2,284 in excess on the valuation of the deceased's share in the joint family property.	(*b*). The deceased was only entitled to ⅕th share in the joint property, his mother being then alive and by the decree in the partition suit the deceased's share was declared to be a fifth one. The Defendant charged commission on a fourth share instead of a fifth, and thus charged in excess the sum of Rupees two thousand two hundred and eighty-four.
(*c*) On the 27th of March 1902 the Defendant charged Rs. 3,524-14 being 2 per cent. on Rs. 1,76,240 representing the value of the property in Joynagore allotted to the share of the deceased in the partition suit, and on the 1st of August the Defendant charged a further sum of Rs. 2,622-10-0 being 2 per cent. on Rs. 1,31,133 representing the value of the rest of the properties allotted to the share of the deceased in	(*c*). The Defendant in the said affidavit of valuation valued the share of the deceased in the property the subject-matter of the said Ghosal partition suit at Rs. 1,50,000 and he was only entitled to charge commission at 2 per cent. on the said sum of Rs. 1,50,000 amounting to the sum of Rs 3,000 and the Defendant consequently overcharged the sum of Rs. 3,147-8-0

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the said partition suit, making together the sum of Rs. 6,147-8-0.	
"(*d*). On the 22nd of September 1903 the Defendant charged Rs. 880 for commission without specifying the property on which the same was charged and it appears that he received sale-proceeds of certain land included in the said Ghosal property on the 19th September 1903 amounting to the sum of Rs. 26,490 two per cent. on which would amount to Rs. 528-14.	(*d*). The Defendant not having shown as to why this sum of Rs 880 was charged by him ought to refund the same and that at all events if it should appear that the said sum of Rs 528-14 is included in the said sum of Rs. 880 then he should refund the latter sum, he having already charged commission on the total value of the deceased's share in the Ghosal property.
(*e*). On the 1st day of February 1904 the Defendant charged commission amounting to the sum of Rs. 2,284-12-0 at 2 per cent. on gross collections in the deceased's share in the joint property amounting to the sum of Rs. 1 08 904 8-0 in the course of the Bengali years 1308 and 1309, such collections being made by the Receiver in the joint family partition suit.	(*e*). The Defendant never collected the said sum of Rs. 1,08,904-8-0 but only received from time to time small sums amounting in all to the sum of Rs. 33 315 from the said Receiver as the nett profit in the deceased's share and he thus overcharged the sum of Rs. 2,178

The Plaintiffs therefore pray as follows:—

(*b*) That the said accounts may be duly investigated in the presence of the Plaintiffs and the Defendant be ordered to pay and refund all overcharges and wrong debits made by him with interest at such rate and from such time as this Honorable Court may think fit, in particular the Defendant may be directed to refund the said sums of Rs. 12,818-13-7, Rs. 2,284, Rs 3,147-8, Rs. 880 and Rs 2,178 with interest thereon at 6 per cent. per annum from the dates when they were respectively debited until realization.

The other material facts and contentions of the parties will appear from CHAUDHURI, J.'s judgment given below.

In the plaint they asked for leave under cl. 12 of the Charter, inasmuch as the commission charged was in respect of properties situate outside the jurisdiction of this Court and also because Mr. Beeby was not then residing within the jurisdiction of this Court, he having left for England. Such leave was granted by the Registrar of this Court. A new procedure had come into operation, and the Registrar, in the belief that he had power given to him by this Court to grant such leave had granted it in this case. There were several suits filed about that time in this way in which the Registrar had in a similar manner granted leave under cl. 12 of the Charter. Certain parties to these suits contended that the Registrar was not so empowered, and therefore the suits ought not to be held as having been properly instituted The matter was considered by this Court which came to the conclusion that the Registrar had not been empowered in that behalf and that the leave granted by him was inoperative, but to avoid questions of limitation being raised it was ordered in each case that the plaint should be re-presented at once, and upon that being done it was to be taken as having been duly filed. I am referring to this, as the first point taken by the Defendant is one of limitation based upon the return of this plaint upon an order of withdrawal, dated the 15th August 1907, which is to be found on page 34 of the Paper book. The plaint appears to have been re-registered and filed according to the endorsement upon it on the 18th December 1907, and it is contended that that date ought to be taken as the date of the re-presentation of the plaint. If that be so, it is contended that the suit is statute-barred. It appears, however, that the plaint was re-presented immediately after the order of withdrawal was made on the 15th August 1907 and the plaint itself contains an endorsement signed by Mr. Justice Stephen who was then sitting on the Original Side in these terms "presented this 15th day of August 1907. Leave granted under Cl. 12. H L Stephen." There was some delay in the office in drawing up the order of withdrawal, and stamps were supplied upon requisition from the office on the 14th of December and then the Assistant Registrar entered the plaint as registered and filed on the 18th December 1907. There is a

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minute by the Registrar of this Court which is annexed to the plaint, which gives all the particulars. I am unable to agree that the plaint must be taken as having been filed on the 18th December 1907 and hold that it was admitted on the 15th August 1907. In addition to this point it is pressed that inasmuch as the overcharges are shewn in the accounts in respect of (1) the Government Promissory Notes on the 27th August 1901, (2) the valuation of the joint family properties and of what are called the Joynogore properties on the 27th March 1902, (3) of the rest of the properties allotted to the share of Dakshina on the 1st August 1902, (4) an item of Rs. 880 for commission on the 1st February 1904, (5) in respect of rent collections of the estate, the period of limitation should be 3 years from each of these dates, and therefore the suit must be considered as statute barred. It is also contended that the Defendant was in no sense a trustee, that he was certainly not an express trustee, and therefore when he charged these sums it must be taken that it was money had and received and therefore the period of limitation was three years from the respective dates of receipt Now it seems to me that "an Administrator pendente lite" is certainly in the position of trustee. In *Seagram* v. *Tuck* (3), it was held by Mr. Justice Kay that in regard to any money due from a Receiver and not brought into account either through mistake or through fraud, he would be a trustee for the person entitled to that money and that would be one answer to the Statute of Limitation. Reference may also be made to the case of *Mahomed Wahib* v. *Mahomed Ameer* (4), and also *In Re Dunn Singleton: Brinklow* (5), and also to the case of *Akhoy Kumar Bose* v *Keder Nath Bannerjee* (6). I am of opinion that the claim in this suit is not statute barred.

The main contention, however, in this case is about the overcharges. They are clearly set forth in para. 18 of the plaint and the grounds of objection are also therein fully stated. There is no question of a general investigation of accounts in this case. Decision of this Court has been practically asked for in respect of the items mentioned in that paragraph of the plaint.

The first relates to certain Government Promissory Notes which had been pledged by Dakshina Mohan in his lifetime with three different banks in Calcutta The total nominal value of the Government Promissory Notes exceeded six lakhs of Rupees and Dakshina Mohan had drawn against them very nearly the full value. The details are to be found in Schedule B annexed to plaint, page 11 of the Paper book. On page 19 the amount which was received by the Defendant the administrator after the sale of these Government Securities and payment of the debts due by the deceased to the Banks, is shewn, namely, Rs. 29,215-4-5 only. Mr. Beeby has charged commission on the gross value of the Government Securities at the rate of 2 per cent, and it is contended that all he could charge against was the sum of Rs. 29,215-4-5. The sales are credited in his books on the 21st August 1901. There is no doubt that Mr. Beeby asked the different Banks to sell the Government Securities through a well-known firm of brokers in Calcutta, the firm being named by him His letters are Exbts. 1a, 1b, 1c, and Exbt. 2. The Banks sold upon receipt of his instructions and as I have stated the proceeds after deduction of the debts due to them respectively were sent to him about the 21st August 1901. It is contended on behalf of Mr. Beeby that it must be taken that upon his appointment he came into possession of these Government Securities although they were with the Bank, and that they were assets in his hands. The transaction, however, was a pledge, and there can be no question that the Banks were entitled to possession of these Securities and had possession as pledgees. The rights of a pledgee are contained in sec. 173 of the Contract Act. The form which the transaction usually takes is an endorsement by the pledgor of the Government Securities in favour of the Bank. But whether in this case they were endorsed in favour of the Banks or not has not been shown. Sec. 176 of the Contract Act provides that if the pledgor makes default the pledgee has the right to sell the articles pledged but with notice to the pledgor. The same principle is affirmed in the case of *Neikram Dobay* v. *Bank of Benagl* (7). In this case the securities were sold at the instance of the representative of the deceased.

Mr Beeby contends first that security was taken from him by this Court when he was appointed

(3) 18 Ch. D. 296 (1881).
(4) I. L. R. 32 Cal. 527, 530-33 (1905).
(5) [1904] 1 Ch. 648 at p. 652.
(6) Unreported, 7th of January 1909.
(7) L. R. 19 I. A. 60 (1891).

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Administrator on a valuation of the estate which included the value of these Government Securities as part of the assets. Even if that be so, I do not think that such valuation by the Court made the securities assets in his hands. He next says that inasmuch as he employed his brokers to sell, that therefore it must be taken that he had authority to deal with these Government Securities, and in fact under his authority the Banks dealt with these securities, and from that the Court ought to hold that they were assets which came into his hands. Now the pledgee had possession of these securities under a legal right. Mr. Beeby could not get possession of them without paying the debt due What he had, was a right to redeem. If he did not choose to redeem, the pledgee could with notice sell. The effect of his letters to the Banks was to waive notice of sale, that he did not desire to redeem the securities, that he wished the securities should be sold at once and that a particular firm of brokers was to be employed. By employing them the Banks certainly did not part with the possession of these documents. The effect of the employment of the nominated firm was merely that the Banks accepted such rates as were brought to them by the brokers. I, therefore, hold that these Government Securities were not assets which came into the hands of Mr. Beeby. Supposing Mr. Beeby employed money in his hands belonging to the estate to redeem the Government Securities, could he again charge upon the value of the Government Securities so redeemed? It appears to me certainly not, because he would then be converting one portion of the assets into another form and he could not charge twice over. Take it in another way, namely, that he borrowed the necessary amount and redeemed those securities. Can it be said that the sums borrowed by the Administrator for purposes of administration are assets of the deceased in his hands? Employment of sums borrowed in redeeming pledged Government Securities cannot, in my view, be held to reduce the redeemed Government Securities to assets of the deceased upon which commission is payable

A great many cases have been cited in connection with this question. But before I deal with them, I think some light may be derived from the provisions in the Civil Procedure Code about the execution of decrees against "assets" in the hands of the legal representative of a deceased. Would the securities pledged by the deceased be available for a general creditor in execution, or only the balance left over after satisfaction of the debt due to the pledgee? I now intend to deal with some of the cases which were cited. *In the goods of Simpson* (8), the contention was in respect of the rights of the Administrator-General under sec. 27 of Act VIII of 1855. The properties upon which the Administrator-General had charged were cash, Government Securities and the value of the leasehold properties. Their Lordships in the Madras High Court held that the leasehold properties could not be considered as assets collected and distributed. They held that so far as the Government Securities were concerned as the Administrator-General had taken manual possession of them, it was a collection within the meaning of the statute, although some doubt was expressed by one of the Judges who considered that Government Securities were not assets until realization. *In the Goods of Courjon* (9), the question of the commission chargeable by the Administrator-General under Act 2 of 1872 was discussed, with reference to the collection and distribution of assets by him. Sale, J., held that under the Act "collection" implied the doing of some act in connection with the assets of the deceased. A special section of the Administrator-General's Act was construed, which does not much help in dealing with the question before me. In *Omrita Nath Mitter* v. *Administrator-General of Bengal* (10), dealing with the question of admission of assets by an executor, the term "assets" is defined as "the property of a deceased person chargeable with and applicable to the payment of his debts."

I find in the case of *N. S. Watkins* v. *Sarat Chunder Ghose Mullick* (11), Sir Francis Maclean, C. J., held on appeal on the 8th January 1908 that in respect of mortgaged property the Administrator-General was only entitled to a commission on the value of the equity of redemption In my opinion Rs. 29,215-4-5 only is to be considered as assets which came into the Defendant's hands. In *Glaholm* v *Rowntree* (12), a life policy had been pledged by the testator with a person whom he subsequently appointed one of his executors.

(8) I. L. R. 1 Mad. H. Ct 171 at p. 173 (1863).
(9) I. L. R 25 Cal. 65 (1897).
(10) I. L. R. 25 Cal. 54 (1897).
(11) Unreported
(12) 6 Ad. and Ell. 710 (1837).

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The pledgee applied to the Life Insurance Company for payment of the policy. The Company refused to pay without a receipt from both the two executors, upon which the pledgee executor and the other executor gave a receipt the pledgee stating in it that he did not admit that any such joint receipt was necessary but in order to avoid trouble he had joined with the other executor in giving the receipt. Upon payment by the Company of the amount, some of the creditors of the deceased claimed that the sum so paid should be considered as assets in the hands of the executors for their benefit. It was held that it could not be considered as assets in their hands but that the surplus after payment of the debt due to the pledgee Executor was to be considered as "assets" in the hands of the Executors. This case has been quoted with approbation by Lord Justice Vaughan Williams in *Cooke* v. *Stevens* (13). In my opinion the sum of Rs. 29,215-4-5 only can be considered as assets which came into the hands of the Defendant and upon that sum alone he could charge commission, not on the nett value of the pledged Government Securities.

The next question is as to the share of the deceased in the joint family properties. Dakshina was one of four sons of Mohini Mohan Roy who also left his widow him surviving. She being the mother of these sons a suit was instituted in the lifetime of Dakshina by one of his brothers for partition of the joint estate in which the mother was necessarily made a party. Upon the appointment of Mr. Beeby he was put in the place of Dakshina. The Plaintiffs contend that Mr. Beeby was entitled to charge only on one-fifth of the value of the estate, not on one-fourth inasmuch as the mother was entitled to one-fifth upon partition. The preliminary decree in the partition suit was made on the 19th January 1904 and the final decree on the 10th November, 1904, that is to say, after Mr. Beeby's discharge. Dakshina's share in his father's estate was undoubtedly one-fourth, the mother being entitled to an equal share with the sons only upon partition She has no share until partition. This Court held in *Sarolah Dassi* v. *Bhoobun Mohun* (14), that a wife's interest in her husband's estate given to her by her marriage ceases upon the death of her husband leaving lineal heirs in the male line; that such heirs take the whole estate; and that the share which a mother takes on partition among her sons she does not take from her husband either by inheritance or by way of survivorship in continuation of any pre-existing interest; but she takes it from her sons in lieu of or by way of provision for that maintenance for which they and their estates are already bound, that upon her death such share goes back to her sons. *Sheodya Tewaree* v. *Judoo Nath Tewaree* (15), was discussed in *Sarolah Dassi's* case (14), and the learned Judges approved of the decision that when a mother takes a share on partition her title arises from the partition alone and that she had no pre-existing vested right except a right of maintenance It was a Mitakshara case but the Bengal Law is more positive in restricting the mother's right than the Benares Law. Mr. Beeby was in the same position as Dakshina, entitled to one-fourth of the property until partition, and as such partition took place after his discharge he is entitled to his commission on one-fourth.

The next question is as regards the Joynagore properties. The contention is that Mr. Beeby having stated in his application for Letters of Administration that their value was Rs. 1,50,000 he was not entitled to charge upon the actual value of the estate ascertained later. Mr. Beeby valued the properties at the price paid by the deceased. I cannot hold that he is estopped from claiming commission on the proper value of the properties when ascertained. I hold that he was entitled to charge as he has done.

In respect of the second portion of the charge in para. 18, I find that Mr. Beeby did not charge his commission until the property was allotted to the share of the deceased. He appointed his own manager upon such allotment. I therefore hold that he was entitled to charge in respect of those properties

The next item relates to a sum of Rs. 880 alleged to have been charged for commission without specifying the property on which the same was charged. Mr. Beeby has made up an account and it was made over to the Defendants during the trial No objection has been taken to it. It appears to be merely an item in the account and I take it that there is no objection to it, nor

(13) L. R. [1898] 1 Ch. 162, see p. 175.
(14) I. L. R. 15 Cal. 293 at p. 314 (1888).
(14) I. L. R. 15 Cal. 293 at p. 314 (1888).
(15) 9 W. R. 61 (1868).

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in respect of the item mentioned in the second portion of sub-para. (*b*), para. 18.

The last item is a charge on the gross collection in respect of the deceased's share in the joint family property. The contention is that the joint estate was in the hands of the Receiver appointed in the partition suit and Mr. Beeby is only entitled to charge on what the Receiver ultimately remitted to the Administrator *pendente lite*, Mr. K. S. Bonnerjee who replaced Mr. Beeby. Mr. Bonnerjee then paid Mr. Beeby commission on the gross collection and not merely on what he received. Mr. Beeby firstly contends that if any one is accountable for this payment it is Mr. K. S. Bonnerjee and that if the Court thinks that such commission was improperly charged, Mr. Bonnerjee is liable to bring it back, not he. I am of opinion that the Administrator is entitled to charge on the gross collection which was made by the Receiver. The Receiver was appointed in a partition suit in which there was no dispute as regards the share of Dakshina. He was admittedly entitled to one fourth of the whole estate subject to the mother's right. The possession of the Receiver is the possession of the parties according to their respective title although he may not be the agent of any particular party. When the Receiver collects in such a suit he collects as the agent of the co-sharers and moneys collected by him are their money. In the case I have once referred to, *N. S. Watkins* v. *Sarat Chunder Ghose Mullick* (11), it was held that if the collection was made by the Receiver of the estate it was not a collection of assets by the Administrator General within the meaning of the Administrator-Generals' Act. This portion of the case is reported in *Watkins* v. *Sarat Chunder Ghosh* (16). But I think Mr. Beeby's case is distinguishable. His remuneration does not depend upon collection and distribution but upon what is to be considered as assets coming into his hands, and I hold that the assets which were realized by the Receiver were held by him on account of Mr. Beeby and he is entitled to claim commission upon such assets

The only question which now remains is as to the right of the Plaintiffs to a refund of the amounts which I have held was overcharged by Mr. Beeby, namely, in respect of the Government Promissory Notes. Now there are three points taken in this connection (i) That the accounts having once been passed in the Testamentary Jurisdiction there was no further right of suit. The Appellate Court has held in this very case *Khitish Chunder* v. *Osmond Beeby* (17), that there is a right of suit although the accounts may have been so passed. (ii) That these accounts were open to the inspection of the parties and that Nripendra Bhusan Roy, the brother of Sindhubala, who held her Power of Attorney, used to come to the office of Mr. Beeby frequently, that he always looked into his accounts, and that he never took any objection to them, and that therefore it should be taken as an account stated. Mr. Beeby, however, said in his evidence that Nripendra attended his office so far as he knew before April 1902. I am not prepared to hold that such inspection as may have been held by Nripendra precludes Sindhubala from questioning the accounts. (iii) That the attorney for Sindhubala was present in Court at the time Mr. Beeby's accounts as Administrator came up to be passed when no objection was taken. It is also stated that Radhica, one of the objectors in the first Testamentary Suit, actually wrote to Mr Beeby objecting to these items but that he subsequently withdrew them, that the attorneys for other two brothers did not object to the commission charged by Mr. Beeby and that Babu Bhupendra Nath Bose, the attorney for Sindhubala, personally told Mr. Beeby that he had no objection and that another member of his firm who appeared for Sindhubala on the day that the matter was set down for consideration did not also object. I am not prepared to hold that the accounts passed in the Testamentary Suit in manner above stated precludes the Plaintiff's right to an account, or that such accounts can be looked upon as settled accounts between the parties which cannot be re-opened under any circumstances. Mr. Justice Harington trying this question when the case came up before him on settlement of issues, only said that the accounts could not be re-opened unless there was fraud, mistake or omission. He further said that as there was no question of fraud or mistake the Plaintiffs were not entitled to maintain this suit. The case was then taken to the Appeal Court which has remanded it for trial on its merits. The payments made by Mr.

(11) Unreported

(16) I. L. R. 31 Cal. 672 (1904).

(17) 16 C. W. N. 516 (1912).

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Beeby to himself may at least be treated as made under a mistake and therefore the beneficiaries would be entitled to have a general account taken. The Appeal Court has sent the case back for trial holding that the plaint discloses a cause of action and that the Plaintiffs were entitled to maintain the suit. It is contended by Mr. Garth on behalf of Mr. Beeby that if the parties were fully cognizant of the items at the time the accounts were passed, they cannot re-open the question. In support of his proposition, *Maund* v. *Allies* (18) was cited. That was a case between partners who came to a settlement fully cognizant of what the items were. The facts were wholly different. *Fowler* v. *Wyatt* (19) was also cited but that was a case between an architect and builder. There was a deed of release but it was sought to re-open the accounts on the ground that the rates were usurious It was held that the accounts could not be re-opened because when they were taken and the release was executed, the parties knew what they were about. *Gething* v *Keighley* (20) was also cited. In that case the accounts were settled a long time before suit. It was a matter between two partners. Even in that case their Lordships held there was a right to surcharge or falsify if not to re-open the whole account. The law is also clearly discussed in the case of *Bhowani Prosad Shahu* v. *Jugernath Shahu* (21). All that is sought here is to test the validity of certain charges in respect of specified items. It is not sought to open up the accounts generally. It is then contended on behalf of the Defendant that the payments so taken by Mr. Beeby were if anything under a mistake of the law and that therefore there is no remedy. In support of this proposition, *Brisbane* v. *Dacres* (22) was cited. The passage relied upon is to be found on pages 152 to 153. It was held in that case that in every case a mistake of law was not an answer In the case of *Rogers* v. *Ingham* (23), also cited, two legatees respectively took Counsel's opinion which agreed, and the executors upon such opinion made a payment. One of the legatees subsequently took another Counsel's opinion which differed from that of the former and he then sought to recover the amount thus paid

It was held that in the circumstances of that case it could not be done. Reference has been made to the case of *Daniell* v. *Sinclair* (24), in which the following passage occurs:—"Undoubtedly there are cases in the Courts of common law in which it has been held that money paid under a mistake of law cannot be recovered and it has been further held that under certain circumstances the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set off. But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn." In *Ex-parte Simmonds, In re Carnac* (25), it was held that the ordinary rule as between litigant parties that money paid under a mistake of law cannot be recovered does not apply to payment made under such mistake to a Trustee in Bankruptcy. The Court held that it had power to order re-payment of money which may have been kept by a Receiver appointed by a Court of Equity although it may have been due to a mistake of law when such mistake was discovered. In *In re Brown, Dixon* v. *Brown* (26), the same principle is affirmed and also in the case of *Hurronath Ray* v. *Krishna Coomar Bukshi* (27). I am of opinion that I can make a decree in this case for the overcharge in sub-cl (*a*) of paragraph 18 of the plaint in respect of the Government Securities in favour of the Plaintiff, Kshitish Chander Roy. The decree will be for the difference of the commission between Rs. 640,942-8-10 and Rs. 29,215-4-5 at 2 per cent. The Plaintiff will also be entitled to his costs. Decretal amount to carry interest at 6 per cent. from date of decree.

Mr. Norton (with *Mr. Mullick*) for the Appellant.—Sindhubala's attorney gave consent to the passing of account. On that we contend that Plaintiff was estopped from questioning these accounts by her laches and acquiescence. The lady had copies of account taken. Her brother objected to the charge but withdrew that

(18) 5 Jurist. 860 (1840).
(19) 24 Beavan 232 (1857).
(20) L. R. 9 Ch. D. 547 (1878).
(21) 18 C. W. N. 809 at pp. 814, 815 (1909).
(22) 5 Taunton 143 (1813).
(23) 3 Ch. D. 351 (1876).
(24) L. R. 6 App. Cas. 181 at p. 190 (1881).
(25) L. R. 16 Q. B. D. 308 (1885).
(26) L. R. 32 Ch. D. 597 at p. 602 (1886).
(27) 13 I. A. 123 at p. 129 (1886)

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objection. There is no evidence on the side of Plaintiff. It is a mere allegation on her part: she has not submitted to cross-examination. The suit was brought within a few days of limitation. I do not contest that the suit is not barred by limitation.

The securities are assets and Mr. Beeby has collected them These Government promissory notes vested in Mr. Beeby by virtue of his appointment. See sec. 4 of the Probate and Administration Act. [Also secs. 100, 103, 104, 62, 98].

Even if the bank was pawnee and pledgee it did not act in this sale as such but only as agent of the administrator *pendente lite* under instructions from him.

The whole sale-proceeds are credited to Mr. Beeby.

[JENKINS, C. J —That account by itself does not show that it was not a pledge.]

Mr. Norton.—I admit the papers were lying there as security against overdrafts.

[JENKINS, C. J.—Then it is a pledge.]

Mr. Norton.—There may be power in their favour executed by me but that wont make it pledge.

Even if the banks were pledgees under sec. 172 of the Contract Act, under sec. 176, Contract Act, the property and title remain in the pledgor until the conditions mentioned in sec. 176 arise.

[JENKINS, C. J.—Has sec. 171 any application ?]

Mr. Norton.—I admit they would have right to retain these securities if they were made over to them with that purpose. The banks terminated that right to retain by following my instructions to sell and handing over to me the balance.

Unlike mortgage transactions the title in things pledged is in the pledgor. The estate is outstanding and is in, *Carter* v. *Wake* (28).

[JENKINS, C. J.—You say the banks had only a right of retention in respect of goods baled by Dakshina.]

Mr. Norton continuing.—What are assets ?

See Stroud's Judicial Dictionary. *In the Goods of Courjon* (9). These securities in bank are chargeable with payment of debts and legacies. *Cook* v. *Gregson* (29). Kindersley, V. C.

As to estoppel.

(1) Advisors of Plaintiff took from time to time copies of these accounts.

(2) Advisors consented to passing of account.

See Woodroffe's Evidence Act, 4th Ed., p. 649.

As to commission chargeable. See *Cockerell* v. *Barber* (30), *Mathews* v. *Bagshow* (31), *Vaisey* v. *Reynolds* (32).

As to re-opening of accounts settled, see *Maund* v. *Allies* (18), *Fowler* v. *Wyatt* (19). Money not legally payable paid under mistake of law, not necessarily recoverable. *Brisbane* v. *Dacres* (22).

Mr. B. Chackravarti (with him *Mr. B. K. Lahiri*) for the Respondents.—My first submission is that the whole of the Government Securities in the several Banks were in no sense of the term assets in Mr. Beeby's hands. As to what are such assets, see *Glaholm* v. *Rowntree* (12), *Cooke* v. *Stevens* (13), and Williams on Exe-

(9) I. L. R. 25 Cal. 65 (1897).
(12) 6 Ad. & Ell. 710 1837).
(13) L. R. [1898] 1 Ch. 162 (175).
(18) 5 Jur. 860 (1840).
(19) 24 Beav. 232 (1857).
(22) 5 Taunt. 143 (1813).
(28) 4 Ch D 606 (1877).
(29) 3 Drury. 547 (1856).
(30) 2 Russ. 585 at p. 591 (1826).
(31) 14 Russ. 123.
(32) 5 Russ. 12 (1828).

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cutors, 10th Edn., Vol. II., pp. 1279, 1283. Therefore, Mr. Beeby was not entitled to charge commission on such portion of their value as did not come into his hands. The real position of the Banks in respect of these Government Securities was that they were holders of the Government Securities and they had also a lien on them to the extent of their advances to Dakshina. See Chalmer's Bills of Exchange, 7th Edn., p. 93. Byles on Bills, 17th Edn., p. 193. *Brandao* v. *Barnett* (33). Even if the Banks were mere pledgees or pawnees Mr. Beeby's request to the Banks to sell made it unnecessary for the Banks to give him notice before sale and the requirements of sec. 176 of the Contract Act were satisfied. Pledgor cannot recover the securities pledged without payment of the amount secured. *Netkram Dobay's* case (7). The Banks were entitled to sell and repay themselves at any time they chose and what the Banks were entitled to deduct did not form assets in Mr. Beeby's hands. Such assets were limited to the balance left over after the satisfaction of the claims of the Banks and Mr. Beeby collected such balance only. As to the title in things pledged, such title and property in a bill of exchange which is pledged passes to the pledgee and in this respect it forms an exception to the ordinary cases of pledge where title remains in the pledgor. The law constitutes the pledgee a holder for value to the extent of the lien with a title independent of the pledgor.

Byles on Bills, 17th Edn., p. 193. So far as estoppel is concerned, no such question arises. The point here is whether the Defendant was entitled to charge certain commission under the order which appointed him. That is a proposition of law and is not a "thing" within the meaning of sec. 115 of the Evidence Act. See Woodroffe's Evidence Act, 4th Edn., p. 666. The mere fact of keeping an account for any length of time without remark and objection is no evidence of acquiescence. See Woodroffe's Evidence Act, 5th Edn., p. 149. Taylor on Evidence, sec. 110. Assuming that my client's attorney in testamentary proceedings considered that in his opinion Mr. Beeby was entitled to charge commission, it was an admission on the part of the legal adviser on a point of law which is not binding on the client. Woodroffe's Evidence Act, 4th Edn., p. 128. The attorney's consent to the passing of account on the testamentary side of this Court cannot affect my right. As a matter of fact no such objection to the debit of commission could have been raised in the proceedings on the passing of accounts which are merely formal. See *Sattya Sankar* v. *Golapmonee* (34). There can be no estoppel against an infant. The cases cited by my friend have no application and are distinguishable.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is an Appeal from a judgment of Chaudhuri, J, in a suit brought against Mr. Osmond Beeby, a former Adminisitrator *pendente lite* of the estate of Dakshina Mohan Roy, for a refund of remuneration alleged to have been retained by him in excess of what was his due.

The order appointing the Defendant to be Administrator *pendente lite* provided for his remuneration by the allowance

(7) L. R. 19 I. A. 60 (1891).
(33) 3 C. B. 519, 531 (1846).
(34) 5 C. W. N. 225 (1900).

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of "a commission of two per cent. on the assets that will come into his hands."

Dakshina Mohan Roy at the time of his death was indebted to the Bank of Bengal, the National Bank of India, and the Comptoir National D' Escompte De Paris. Against this indebtedness each bank held Government securities, the total value of which was Rs. 6,40,942-8-10. The indebtedness to the several banks was discharged out of the sale-proceeds of the Government securities with the result that a balance of Rs. 29,215-4-5 only came to the hands of the Administrator *pendente lite*. He has, however, retained a comission of 2 per cent. on the Rs. 6,40,942-8-10. To this exception is taken by the Plaintiffs in this suit.

What we therefore have to decide is, whether this sum, representing the full value of the Government securities, can be regarded as assets of the deceased that came into the hands of the Administrator *pendente lite*. Chaudhuri, J., held that there was a pledge to each of the banks and that the banks were entitled to possession of these securities and had possession of them as pledgees. There is no ground of appeal directed against this finding, and I think we ought to accept it as correct.

There is no evidence as to how these securities were endorsed, but this at least is certain, that there is no suggestion that they were endorsed by Mr. Beeby.

At the same time we know they were sold and transferred by the banks, so that it is conceded they must either have been endorsed in blank or endorsed to the several banks. In either case each bank, as to the securities held by it, would be a holder for value at any rate to the extent of the sum for which it had a lien. To borrow the phraseology of English law, by the delivery of the securities so endorsed there passed a legal and not a mere equitable interest. [See per Lord Ellenborough in *Scott* v. *Franklin* (1)]. How then can it be said that these securities to the extent of the amount for which each bank had a lien, were assets of the deceased which came to the hands of the Administrator *pendente lite*?

For Mr. Beeby it is argued that though his claim could not have been sustained had the securities been mortgaged, still as the banks were only pledgees the same difficulty does not arise; for that under those sections of the Contract Act which relate to pledges the property in the securities did not pass to the banks. In the circumstances it is contended, the sales of the securities must be deemed to have been made by the several banks as agents for Mr. Beeby. But can it be fairly said that the banks sold as the agents of Mr. Beeby?

True it is that the brokers by whom the sales were effected were the firm nominated by Mr. Beeby, and under the provisions of the Contract Act the banks were not entitled to sell at the time when the sales were effected. But I cannot think that the banks in selling as they did were acting as the agents of the Administrator *pendente lite*.

Moreover, the banks were not only pledgees, they were also holders for value of these negotiable instruments with the consequent rights that belong to that position; and in the circumstances I am unable to hold that so much of the sale-proceeds as the several banks applied to the discharge of the debts due to them, were within the description of assets that

(1) 15 East. 428 (1812).

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came into the hands of the Administrator *pendente lite*.

But then it is said that the present Plaintiffs are estopped. These Plaintiffs are a *purdanashin* lady and a minor. The lady succeeded to a widow's limited interest at the deceased's death, and the minor, by surrender of all previous limited interests to him as the next male reversioner on the 16th August 1905, then became and now is, the full owner of the deceased's estate. What is charged against the Plaintiffs is that the accounts of the Administrator *pendente lite* were passed, and that the Plaintiff, Sreemutty Sindhubala Debi, with full knowledge of their contents, including the charge of this commission, through her agent and attorney raised no objection though she had full notice. And in this connection reliance is placed on a conversation alleged to have passed between Mr. Beeby and the attorney in the Bar Library when the attorney expressed an opinion that Mr. Beeby was justified in making this charge. But I fail to see how any estoppel arose. When the procedure followed on the passing of accounts is borne in mind, it would be dangerous to hold that this alone would suffice for the purpose of forming the basis of an estoppel, nor can the Plaintiffs be bound by this casual conversation. But apart from that, how can it be said that the conditions prescribed by sec. 115 of the Evidence Act have been established? Even if it be assumed that the Plaintiffs represented that the charge was rightly made, still it had to be observed that the accounts represented the 6 lakhs as having been received by Mr. Beeby And had that been the fact, then he would have been entitled to the commission shown in the accounts as retained by him.

Nor can I see *what act was induced* by the Plaintiffs; his appropriation of the amount of the commission was before the passing of the accounts, as also was his departure for England.

But if the Plaintiffs are not estopped, are they debarred by *laches* or *acquiescence* from enforcing their claim? I think not. This is not a case of opening a settled account so much as enforcing a claim against a *fiduciary agent* on the ground that it has been discovered that he has retained more of the estate than he was entitled to under the order authorising his remuneration.

The defence of laches cannot prevail when, as here, a statutory period of limitation is prescribed. Nor can acquiescence be imputed to the Plaintiffs, for though Mr. Beeby's accounts as passed showed the retention of the amounts now sought to be recovered, still these accounts represented the 6 lakhs odd, on which the commission was calculated, as received by him.

There is no evidence to show that the Plaintiffs actually knew the facts as represented in the accounts to be incorrect, or that they did not rely on that representation, and the inference therefore is that they did so rely. [*Redgrave* v. *Hurd* (2)].

In saying this, I do not forget the aleged conversation with Mr. Bhupendra Nath Bose in the Bar Library.

The broad facts are these, if my view of the extent of Mr. Beeby's right to commission is correct; an Administratior *pendente lite* has retained as his remuneration more than he was entitled to claim: his accounts, contrary to the fact, represented receipts by him entitling him to the commission retained by him;

(2) L. R 20 Ch. D. 1 (1881)

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and a suit is now brought against him to recover that amount within the time allowed by law.

I hold no answer has been shewn, and I therefore would not disturb Mr. Justice Chaudhuri's decision on this part of the case.

Then three points have been raised by way of cross-objection. First, it is said that the Adminis'rator has charged commission on the basis of the deceased being entitled to a ¼th share in the family property, whereas his share was only ⅕th. I am not prepared to dissent from the view taken by Chaudhuri, J. The share was originally ¼th, and I think it may fairly be said that this share came into Mr. Beeby's hands, though it was liable to be reduced to ⅕th and was in fact so reduced.

The next objec ion is tha: Mr. Beeby received commission on the sale-proceeds of a part of the Ghosal property, though he had previously received commission on the entire'y of that property. Chaudhuri, J., has not dealt with this point under the impression that it was not seriously urged. But Mr. Chakravarti assures us that this was not so. If commission was taken on the whole of the property, I do not think commission could be again taken on the sale-proceeds of a part of the property. As this is what happened, the objection must succeed.

The third objection raises the question whether commission is to be charged on the gross or only on the net collections.

The gross collections were made on behalf of those entitled, of whom Mr. Beeby as Adminis'rator *pendente lite* was one. I therefore think we ought not to disturb Mr. Justice Chaudhuri's decision on this point.

The result then is that, in my opinion, the decree of the learned Judge should be varied by increasing the sum of Rs. 12,234-8-9 thereby decreed to Rs. 12,763 6-9 by the addition thereto of the sum of Rs. 528-14-1, the commission on the proceeds of sale of a part of the Ghosal property.

WOODROFFE J.—I agree.

Decree varied.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 48 OF 1912.

HOLMWOOD J., SHARFUDDIN, J. 1914, 4, March.

SHEIKH AMJAD and anr., Defendants, Appellants, *v.* LACHMI KANTA JHA, Plaintiff, Respondent.

Evidence Act (I of 1872), sec. 74—Criminal Procedure Code (Act V of 1898), sec. 107—Notice under sec. 107, Cr. P. C., if a public document—Proof necessary for admission of such document in evidence.

A notice under sec. 107, Cr. P. C., is a public document within the meaning of sec. 74 of the Evidence Act, but it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence.

This was an Appeal preferred on the 15th of June 1912 against a decree of A. Mellor, Esq., District Judge of Darbhanga, dated the 20th of September 1911, reversing a decree of Moulvie Najabat Husain, Munsif of Madhubani, dated the 20th of February 1911.

The facts necessary for this report will appear from the material portion of the judgment of the District Judge which is set out below:—

"This was a suit on a mortgaged bond executed by Defendants in favour of the

SHEIKH AMJAD v. LACHMI KANTA JHA.

Plaintiffs, Umakant Jha and one Udit Jha, for a consideration of Rs. 250. Umakant and Udit each advanced half of this amount, and it was arranged that the latter should keep the bond in his possession and that any payment by the mortgagor to the former must, therefore, be acknowledged by a formal receipt and acquittance instead of the usual endorsement on the back of the bond. Plaintiffs alleged that nothing had been paid by the mortgagors, the Defendants, first party, on account of principal or interest, and, therefore, sued to recover the amount due on the bond, or in the alternative, their half share. Udit Jha and the members of his family were joined as Defendants as they had refused to join in the suit. Defendants, first party, alleged that they had paid up the whole amount due in the bond, and in support of the statement produced the original bond with acknowledgments of payment purporting to be written by Udit Jha and Umakant Jha, each for his own share of what was due. The learned Munsif has believed the evidence for the Defendants, first party, and holding that the debt had been paid has dismissed the suit. Defendant, second party, has not appeared throughout the proceedings. Plaintiffs contended that after the execution of the mortgage bond there had been a quarrel between them and Udit Jha, while on the other hand, the Defendants, first party, alleged that the Plaintiff and Defendant, second party, were in collusion with each other. The Munsif has believed the version given by the Defendants, first party. The Plaintiffs are of course the Appellants and the Defendants, first party, the Respondents.

"In support of their story of a quarrel between themselves and Udit Jha, the Appellants produced before the lower Court a notice issued on Ajaib Jha, one of the Plaintiffs, in a case under the Code of Criminal Procedure, but the learned Munsif refused to admit it as evidence. I think that this evidence has been wrongly excluded. If a paper bearing the signature of a Magistrate and the seal of his Court is not an act of a public officer under sec. 74 of Evidence Act, it is difficult to say what is. The notice is clearly a public document and it bears out the allegation that in the year 1905 there was a quarrel between Ajaib Jha and Udit Jha about a piece of land which resulted in criminal proceedings. The result of the criminal proceedings does not matter, as all that Appellants wish to prove is the existence of bad feeling between them and Udit Jha at the time when the mortgage debt is said to have been discharged, *viz.*, the 23rd of Chait 1313, (*i.e.*, the 2nd of April 1906)."

Babus Manmatha Nath Mukerjee (for *Babu Umakali Mukerjee*) and *Suresh Chandra Mukerjee* for the Appellants.

Babu Lakshmi Narain Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The only point which arises in this case is the question upon which the two lower Courts were in disagreement, whether the notice under sec. 107, Cr. P. C., is a public document within the meaning of sec. 74 of the Evidence Act, and if it is, whether it can come in without proof of the identity of the parties who are named therein. We may answer the second question first by saying that clearly it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about

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which it is produced as evidence. But in this case the Plaintiff himself in the witness-box said that he had received this notice from the Court and that he had appeared in Court and he had fought this case against the Defendants, fourth party, and that the order had been passed in his favour. It is, therefore, clear that this was a notice issued in a criminal case between the Plaintiff and the Defendant No. 4 in the year 1905, and if it is admissable it would therefore be evidence that there was a quarrel between Ajaib Jha and Udit Jha about a piece of land in the year 1905.

As regards it being a public document we think that there can be no doubt that it is the record of the act of a tribunal; in one sense it is the act of the tribunal itself. It is the only authority by which the accused person can be brought before the tribunal, and it is in its essence the strong arm of the tribunal stretched out to bring the accused person into its presence. It is clearly therefore the act of the tribunal. It is also in the case of a notice under sec. 107 the record of another act of the tribunal inasmuch as it sets out the ground upon which the tribunal is acting and calls from the party summoned to show cause, so that in any case it appears to us to be a public document; and that being so and it being shown that the parties mentioned therein were the Plaintiff and Defendant No. 4 in this case the learned Judge in the Court below was right in using it as evidence.

As this is the only point raised in this Second Appeal, the Appeal must be dismissed with costs.

Appeal dismissed.

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[CRIMINAL REVISIONAL JURISDICTION.]
REV. No. 1660 OF 1913.

IMAM, J. CHAPMAN, J. 1913, Heard, 17, November, Judgment, 26, November.	ARAJ SARKAR and ors., Accused, Petitioners, *v.* EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 439—Revision of sentence on consideration of fresh facts—Indian Penal Code (Act XLV of 1860), sec. 147—Rioting over disputed possession of chur—Finding of Settlement Officer pronounced after issue of Rule considered by High Court in revising sentence.

In a case of rioting arising out of a dispute relating to the possession of a chur *between the zemindar and the talukdar in which both the lower Courts found in favour of the complainant on the question of possession, but the Assistant Settlement Officer after the judgment of the Sessions Judge in appeal was pronounced and after a Rule was issued by the High Court, found in connection with the preparation of record-of-rights that the culturable area in the* chur *was in the possession of the zemindar whose men the Petitioners were, the High Court for the purpose of revising the sentence considered the judgment of the Assistant Settlement Officer and reduced the sentence.*

This Rule was issued against an order of Babu Nagendra Chandra Sen, Deputy Magistrate of Tangail, dated the 21st of July 1913, convicting the Petitioners under sec. 147, I. P. C., and sentencing them to 18 months' rigorous imprisonment and binding them down under sec. 106, Cr. P. C., an appeal from which order was dismissed by Mr. M. C. Ghosh, Sessions Judge of Mymensingh, on the 15th of September 1913.

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The dispute out of which this case arose related to a *chur* known as Chur Bahuli in the river Brahmaputra locally called Jumna. The Petitioners were the men of the zemindar who claimed title to and possession over the land comprised in the *chur*. The party of the complainant belonged to the side of the talukdars who also claimed possession over the land. There were several criminal cases between the parties. In the meantime survey and settlement proceedings were taken in respect of the *chur*. On account of the dispute between the parties an order under sec. 144, Cr. P. C., was issued by the Magistrate, on the 14th October 1912, directing the zemindar's party as well as the talukdar's party not to go on the *chur*. The Petitioners' case was that in spite of the order under sec. 144, Cr. P. C., the talukdars' party attempted to go on the land and take possession. An application was made to the Magistrate setting out the charge of disobedience against the talukdars' party and praying that the land and standing crops might be attached till the decision of the dispute between the parties. On the 1st November 1912, the Magistrate passed an order of attachment and on the 3rd November 1912 a Sub-Inspector of Police went to the disputed *chur* to attach the crops under the orders of the Magistrate. The Petitioners representing the party of the zemindar accompanied the Sub Inspector of Police and when they were engaged in pointing out the plots on which the crops stood the party of the talukdars appeared. A dispute arose between the parties and a sort of fight took place. The Petitioners were placed on their trial on a charge of rioting and some of them were also charged under sec. 323, I. P. C. On the 21st July 1913, the Deputy Magistrate delivered judgment convicting the Petitioners under sec. 147, I. P. C., and sentencing them each to rigorous imprisonment for 11 months and also ordered them to execute bonds under sec. 109, Cr. P. C. The Petitioners appealed to the Sessions Judge. The appeal was heard by the Additional Sessions Judge who upheld the conviction and sentence by his judgment, dated the 15th September 1913. The Magistrate and the Sessions Judge found that the talukdars were in possession.

The Petitioners thereupon moved the High Court which issued a Rule on the 24th October 1913 calling upon the District Magistrate to show cause why the sentences passed on the Petitioners should not be revised. On the 18th November 1913, the Assistant Settlement Officer pronounced his decision in which he found that the zemindar was in possession of all culturable area of the *chur*. The Assistant Settlement Officer found as follows:

"The objectors are generally known as the talukdars' party, and the Defendants are known as the zemindar's party. This *chur* has been the subject-matter of a series of litigations between the parties which culminated in the conviction and imprisonment of fifteen of the zemindar's men under sec. 147, I. P. C., in the Court of the Deputy Magistrate of Tangail on the 21st July 1913. From copies of the case records it appears that since 1910 it has all along been held by the Criminal Courts that the *chur* was in possession of the talukdars' party. The Criminal Courts have dealt with the *chur* as a whole and did not enter into an examination of the rights of the parties. It therefore becomes necessary for me in preparing a record-of-rights to go more fully into the

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question of rights . . . . . I am firmly of opinion that the cultivated portion of the *chur* was in the possession of the zemindar's men. As there has been no change in the possession up till now I think these lands should remain recorded in the names of the zemindar's tenants. . . . There are some waste or unoccupied lands in both portions. These should consequently be recorded under the respective owners of each portion separately."

Before the final hearing of the Rule Counsel for the Petitioners asked the leave of the Court to put in fresh evidence, *viz.*, the judgment of the Assistant Settlement Officer referred to above. A certified copy of the order was filed before their Lordships who after considering it passed final orders on the Rule.

Mr. K. N. Chaudhuri and *Babu Naresh Chandra Sen-Gupta* for the Petitioners.—Since the issue of the Rule the Assistant Settlement Officer has pronounced his decision in which he finds that all the culturable land in the *chur* is in the possession of the zemindar. I want to place a copy of the judgment before this Court. For revising the sentence this Court can consider fresh facts. See *Rex* v. *Francis* (1), *Rex* v. *Ettridge* (2), *Rex* v. *Bradshaw* (3). Also *Rex* v. *George Bruce* noticed in 18 C. W. N. 10 n. decided by the Lord Chief Justice sitting in the Court of Criminal appeal.

The JUDGMENT OF THE COURT was as follows :—

The Petitioners were convicted by the Deputy Magistrate of Tangail for an offence under sec. 147, I. P. C., and sentenced to 18 months' rigorous imprisonment each and bound down under sec. 106, Cr. P. C., for a period of two years to keep the peace. On appeal the learned Sessions Judge upheld the convictions and sentences. Against these convictions and sentences the Petitioners moved this Court and obtained this Rule on the District Magistrate to show cause why the sentences passed on the Petitioners should not be revised.

The occurrence in this case took place on a *chur* called *Bahulis chur* in the river Brahmaputra locally called Jumna. The Petitioners are the men of the zemindar who claims title to and possession over the land comprised in the *chur*. The party of the complainant stand on the side of the talukdars who also claim possession over the land. On account of the dispute between the parties an order under sec. 144, Cr. P. C, was issued by the Magistrate directing the zemindar's party as well as the talukdars' party not to go on the land. The injunction so issued was received by the zemindar's party with approval and they refrained from going on the land. The talukdars' party, however, were dissatisfied with the order, and the Petitioners' case is that in spite of the injunction they attempted to go on the land and take possession. On behalf of the zemindar an application was made to the Magistrate setting out the charge of disobedience against the talukdars' party and praying that the standing crops might be attached till the decision of the dispute between the parties. Accordingly an attachment order was made and a Sub-Inspector of Police deputed to effect the attachment. The Petitioners repeenting the party of the zemindar accompanied the Sub-Inspector

(1) 1 Cr. App R. 259.
(2) 1 Cr. App. R. 62, 66.
(3) 6 Cr. App. R. 222 (1911).

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

The Patna University Committee's scheme of legal education.

The report of the Patna University Committee is very interesting reading. We are, however, not concerned with the scheme of general education formulated by the Committee for the proposed University. But we are glad to be able to express our complete accord with the scheme for legal education recommended for the University. The Committee is perfectly right in saying "that the scientific study of law in itself affords a good intellectual training, sufficing, when properly pursued, to occupy the whole of a man's time and to give him the same degree of culture as other honour subjects." It is proposed under the scheme that after a student has passed the intermediate examination, he will be allowed to take up the law course for graduation at the University. This is the system which obtains at Oxford and Cambridge and we see no reason why the same should not be adopted here. Of course, we would have objected if the study of law had been limited in the manner suggested by the Sub-Committee, *viz.*, that it should be open to those only who would pass the intermediate examination having taken either Sanskrit or Arabic as one of their subjects. We are at one with the Committee that no such restriction should be imposed. It is also reasonable that under-graduate students going up for the law degree of the University will be required to take up English as a compulsory additional subject and that they should be trained chiefly in the theory, history and principles of law rather than its technique. Although we admit that the course prescribed by the Calcutta University for the B. L. examination gives the students a thorough good grounding both in theory and principles of law as also in its practical application, still it cannot be ignored that at our *alma mater* comparatively little importance is attached to the study of the historical development of law as also of constitutional law. The Patna University Committee is to be congratulated for having recommended these subjects for the special study of the law students. We must also confess that there is a great deal of force in the objections urged by the Committee against the adoption of the Calcutta system of making law a subject-matter of post-graduate study. Should law be adopted as a subject for graduation in the proposed Patna University, the pleadership examination should be abolished. We are of opinion that the system recommended by the Patna University Committee should be adopted by all the Universities in India. We do not however approve of the suggestion that those who graduate in law should be divided into two classes, those showing proficiency being given the L. L. B., degree and those securing a mere pass being given the B. A. degree. It would be better if those who obtained honours in the subject were styled B. A. with honours and others as pass B. A.'s. The higher degree of L. L. B. might be reserved for a supplementary examination in the practice of law.

We have always been of opinion that the mere passing of examination in law should not furnish a passport to practise in the law Courts. We therefore welcome the suggestion that law graduates must serve out two years' apprenticeship with some practising lawyers of no lower grade than a Barrister or Vakeel or a graduate pleader authorized by the High Court to take apprentices. The certificate to practise should be given by the High Court only to such apprentices after having passed such examination in the practice of law as may be prescribed by the High Court in this behalf. It is after they have thus qualified for practice that they should be given the degree of L. L. B. by the University on payment of some fee to the University. Both the pass and the honours B. A.'s should be allowed

to qualify themselves for practice in this manner. For it must be remembered that it is often the man with the stronger common sense, and not necessarily the better scholar, who makes the more successful lawyer. The training we suggest will put a wholesome restriction on the present practice of allowing every graduate in law to practise in our law Courts. Those who intend to practise law must take to it seriously and must be trained under lawyers of approved standing, merit and character. A judicious restriction of this kind would be wholesome alike for the legal profession and the public. We have long urged for this reform and we shall be glad to see the Patna University take the lead of the other Indian Universities in this respect.

DOES THE PROBATE AND ADMINISTRATION ACT

RECOGNISE THE DISTINCTION BETWEEN

LEGAL AND EQUITABLE ESTATE.

The decision in *Mohunt Jiblal* v. *Mohunt Jagomohun Gir* [[(1898) 16 C. W. N. 798] raised a very important question. It is, whether a trustee under sec. 37 of the Probate and Administration Act must have an estate in order to bring that section into operation, and if so, whether such estate is "legal estate" as contemplated by English law?

In this case an application was made for grant of letters of administration to the estate of a *math* after the decease of its Mohunt. An objection was raised to the effect that the deceased Mohunt had only a life-estate which determined on his death, that he occupied the position of a trustee, and that sec. 37 of the Probate and Administration Act did not apply. It was an undisputed fact that the deceased Mohunt had no ownership. Their Lordships (Prinsep and Steven, JJ.) held, that sec. 37 applies only to property in which the deceased person had ownership, so as to constitute it a portion of his estate, although he held it in trust." Thus according to their Lordships' view, to justify the application of that section, there must be, first, ownership constituting an estate or as their Lordships say, "ownership so as to constitute it (the property) a portion of his (deceased's) estate;" and, secondly, the deceased person must have been a trustee clothed with such ownership. We can find no difference in meaning between the expressions "ownership constituting an estate" and "ownership so as to constitute it a portion of his estate."

But then what is ownership? In what sense has the term been used by their Lordships—whether in the sense of absolute ownership, or in that of limited ownership? That by the word "ownership" their Lordships intend to mean absolute ownership, seems to admit of no doubt. For it is difficult to see how one can leave at his death "property and credits" unless his ownership is such that it extends beyond his lifetime—that it is descendible or heritable. The ownership of a life tenant is a limited one, and it is, accordingly, confined to his lifetime only; but that of a tenant in fee or of a Bengal zemindar, is absolute and as such it extends beyond his lifetime, so that, at his death, he leaves an estate, or "property and credits" which make an estate (1). Sec. 77 of the Probate and Administration Act from which the words "property and credits" have been taken and with reference to which the word estate has been interpreted lends support to this view. It is thus clear that to bring a case within the operation of sec. 37, the trustee must not only be clothed with absolute ownership, but he must also hold an estate, for such ownership constitutes an estate. In other words, a trustee must have an estate. That is evidently the meaning of their Lordships' decision.

Now, if we are so far correct, the next question is, what is the nature of this estate? Does it not partake of the nature of a legal estate as distinguished from equitable estate, and is not such an estate capable of being the subject of testamentary gift? It appears that sec. 37 itself unmistakably points to some of its most prominent incidents and sufficiently indicates the nature of the trustee's estate. The words "and leaves no general representative" show that it is devisable and the trustee may appoint executor or executors as his general representatives, so that where they are willing and take out probate, the "property and credits" necessarily vest in them. This being so, we arrive at the conclusion that it is a separate and distinct estate. That the beneficiary has also an estate or interest in the same property is an undeniable fact. What the nature of that estate or interest is we need not enquire. For, whatever may be its nature or incident, there is no denying of the fact that we have got here two separate and distinct estates or interests in regard to the same property but residing in two different individuals. Thus we are driven to the conclusion that the double system of English jurisprudence on which is based the doctrine of legal and equitable estate, is being introduced in this country, however it may be modified in its nomenclature or application. Give the trustee an estate and we have two separate estates the one vested in the trustee and the other in the *cestui que trust*, or the beneficiary. We may not call the estates legal and equitable—that is not of much importance. But

(1) Their Lordships said the word "estate," as used in Act V of 1881, "invariably denotes the property and credits left by a deceased person."

so long as there are two estates with respect to the same property residing in two different persons, it is impossible to avoid the system of double ownership of English law, and as a necessary consequence the distinction between a legal and an equitable estate.

It is to be further seen that sec. 37 corresponds to the following passage in Tristram and Coote's Probate Practice :—"If a person has died leaving personal property of which he was sole or surviving trustee, administration may be granted to that property * * * * (1)." Although that section may be held to agree substantially with this passage, there is much difference between them, at least, so far as the wording goes; and this is apparent from the fact that the words "sole or surviving trustee" which stand alone in the latter, are followed by the words "or in which he had no beneficial interest on his own account" in the former. These words are new and must have been added by the Indian Legislature to serve some useful purpose. But it is not easy to see what that purpose is. It seems, however, reasonable to suppose that they are intended not as merely explanatory of the word trustee but to stand as an alternative to it, and to denote a person other than a trustee technically so-called. In other words, they are intended to enlarge the meaning of trustee and not merely to explain or restrict it. It is a well-known fact that until lately, a *mohunt* or a *shebait* was regarded as a trustee and was held capable of executing testamentary documents. From this it may be safely inferred that when sec. 37 was enacted, such persons had a recognised status, and it was evidently the intention of the Legislature not to exclude them, for which purpose these words were inserted.

It is clear their Lordships' attention was not drawn to these words.

In the result it seems to follow, that the word trustee is used in sec. 37 of the Probate and Administration Act in its English technical sense. If the view laid down above is correct, how does it stand the test of judicial decisions? The Privy Council is clearly opposed to this view. In *Tagore v. Tagore* [9 B. L. R. 377], their Lordships said—"The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts and an equitable ownership which is paramount in Courts of Equity does not exist in and ought not to be introduced into Hindu Law." But sec. 37 of the Probate and Administration Act as interpreted by their Lordships of the Calcutta High Court, seems to have introduced it. Where is the remedy? Perhaps there is no remedy unless the Legislature interferes.

MAJUMDAR.

(1) 157, 12th Ed.

CURRENT INDIAN CASES.

(CIVIL.)

Hindu Law—Father's debt.

KAPILDEO *v.* THAKUR PROSAD, I. L. R. 36 All. 17.

The father of the Appellants had bid for certain immoveable property at an auction sale and had paid into Court the preliminary deposit required by law. In order to complete the transaction he executed a mortgagee deed hypothecating both the property he proposed to acquire at the auction sale and other family property in his hands.

Held—That the father of the Appellants had entered into an agreement by which he bound himself under penalty to deposit in Court a certain sum of money by a certain date. In borrowing money in order to enable him to meet this engagement he was clearly discharging an "antecedent debt" and his sons cannot repudiate liability for a mortgage debt thus incurred.

Civil Procedure Code, Or. XL, r. 1—Appointment of Receiver.

DAN PRASAD *v.* GOPI KISHAN, I. L. R. 36 All. 19.

In the course of a suit for partition the Defendants applied for a temporary injunction regarding the custody of the property in suit and the Court directed that until the determination of the suit the Plaintiffs shall have the control and management of a portion of the property in suit and the Defendants of another portion.

Held—That the order was not *ultra vires* but are covered by Or. XL, r. 1.

A Court has a right to proceed under Or. XL, r. 1, where it appears to it to be just and convenient to do so and the order is not improper or illegal merely because it was made *suo moto*.

Succession Certificate Act (VII of 1889), sec. 4—Assignment of certificate.

RANG LAL *v.* AUNU LAL, I. L. R. 36 All. 21.

A mortgage was executed in favour of the head of a Hindu family. His widow after his death obtained a certificate and assigned the mortgage to the Plaintiffs as also gave them the certificate she had received.

Held—That sec. 4 of the Act was no bar to the Plaintiffs obtaining a decree on the mortgage because they had not obtained a certificate under that Act.

General rules for Civil Courts—Execution of decree—Attachment of ancestral land.

FATMATUL KUBRA *v.* ACHCHI BEGAM, I. L. R. 36 All. 33.

Where it appeared that the landed property sought to be attached was a grove or garden part of which was occupied by a house and was in the possession of the family of the judgment-debtor for over fifty years, was portion of a mehal and was assessed to revenue.

Held—That the property was ancestral land within the definition given in the general rules for the Civil Courts and could only be sold by the Collector after transfer of the execution of the decree to his Court under sec. 68, C. P. C.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[Appeal from Quebec.]

Lord Dunedin.
Lord Atkinson.
Lord Shaw.
1914,
3, February.

The Cedars Rapids Manufacturing and Power Company, Appellants,
v.
Sir Alexandre Lacoste and others, Respondents.

Principles upon which compensation for land should be awarded.

In this appeal in the course of their Lordships' judgment delivered by Lord Dunedin, the principles upon which compensation for land should be awarded, were laid down as follows :—

"The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in the case of *Locus* v. *Chesterfield Gas and Water Board* (L. R., 1909, 1 K. B., 16), where Lord Justices Vaughan Williams and Moulton dealt with the whole subject exhaustively and accurately.

"For the present purpose it may be sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

"Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Lord Justice Moulton in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility."

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

Civil Appellate Jurisdiction Before Jenkins, C. J., and Chatterjee, J Letters Patent Appeal No. 94 of 1912. NONI GOPAL BOSU, Appellant *v.* SURES CHUNDER GHOSH, Respondent. 18th March 1914.

Civil Procedure Code (Act XIV of 1882), sec. 317—Auction-purchaser benamdar—Manager of minor purchaser—Fraud.

The appeal arose out of a suit brought for the recovery of possession of 25 bighas of land after declaration of Plaintiff's *jamai* right. The jama was the property of Plaintiff's father D by right of his auction-purchase in the name of K. D died in 1299, leaving Plaintiff, his minor son, his sole heir. Defendant No. 1 being the husband of the only child of D's brother, used to live in the family of his father-in-law, and being held in confidence and in affection was appointed by D as his chief officer. He continued in this capacity till after D's death and down to 1302 and the aforesaid jama meanwhile being eventually brought to sale again for its own arrears, purchased it in his own name with Plaintiff's money in 1894 and looked after the property as before on Plaintiff's account till 1312. Some 9 or 10 years later, *i.e.*, in 1903 and 1914, Defendant No. 1 got collusive rent decrees against Defendants Nos. 2 and 3 and from that time the tenant Defendants Nos. 2 and 3 withheld all payment of rents from Plaintiff. The Plaintiff accordingly prayed for a declaration of his *jamai* right in the disputed lands (by auction-purchase in the name of Defendant No. 1) and for recovery of possession of the same through this tenants, Defendants Nos. 2 and 3. The tenant Defendants did not contest the suit.

Defendant No. 1 admitted that the infant was the real purchaser, but maintained that he was able to deprive the infant of the property because of sec. 317 of the Code of Civil Procedure. The Courts below decreed the suit. On appeal to the High Court the judgment was reversed by a single Judge.

Held, that as the conduct of Defendant No. 1, the manager, was found to be fraudulent, sec. 317 of the Code of Civil Procedure did not furnish any answer to the Plaintiff's claim.

Babu Sarat Chunder Roy Chowdhury for the Appellant.

Babus Basant Coomar Bose and *Jadu Nath Kanjilal* for the Respondent.

A. T. M. *Appeal allowed.*

ARAJ SARKAR *v.* EMPEROR.

of Police and when they were engaged in pointing out the plots on which the crops stood the party of the talukdars appeared. Between the two parties there was some sort of a fight resulting in some slight injury to one of the complainant's party and some injuries to two men on the side of the Petitioners. At the trial the question was considered as to whether the party of the talukdars were in possession or the party of the zemindar. The Magistrate and the Sessions Judge came to the conclusion that the talukdars were in possession. For the purpose of our revising the sentences passed on the Petitioners the learned Counsel appearing on their behalf has placed before us a decision of the Settlement Court which was made after the decision of the appeal before the Sessions Judge. From the Settlement Officer's decision we gather that the zemindar was in possession of all culturable area of the *chur.* Regard being had to the finding of the Settlement Officer on the question of possession we are constrained to say that the Petitioners though they were not right in engaging in a fight with the talukdars yet had some justification on their side. The learned Judge has not come to any finding as to what had been done by the accused and to what extent they had been lawless. It is clear to our mind that the fight was not a premeditated one and were it not for the appearance of the talukdars' party at the time when the Sub-Inspector had gone to attach the crops there would have been no trouble at all. The learned Judge himself in his judgment remarks that "the actual fight was not very serious. A few men on both sides received slight hurt." Then the learned Judge goes on to say "the sentence is undoubtedly very severe." We think that the sentence in any case was too severe and particularly so in view of the decision of the Settlement Court whereby the possession of the land in dispute has been held in favour of the zemindar. We think that for this breach of the peace a small term of imprisonment with fine would have amply vindicated the law. We reduce the period of imprisonment in the case of each of these Petitioners from 18 months to three weeks' rigorous imprisonment with a fine of Rs. 75 each. In default of payment of fine each Petitioner will suffer rigorous imprisonment for a period of one month.

If the Petitioners have already suffered imprisonment for the period of three weeks, they will be discharged from their bail on payment of fines.

The order binding down the Petitioners under sec. 106 is set aside.

The Rule is made absolute.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW. LORD MOULTON. MR. AMEER ALI. 1913, Heard, 7, 11, 12 & 13, November. 1914, Judgment, 6, February.	LALA BIRJ LAL, Appellant, *v.* MUSAMMAT INDA KUNWAR and others, Respondents.

Hindu Law—Widow, alienation by—Legal necessity, proof of—Onus—Recital in conveyance if evidence—Proof aliunde, *necessity of.*

The onus of supporting a sale from a Hindu widow is on the purchaser.

Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as

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evidence by themselves of the fact. To substantiate the allegation there must be some evidence aliunde.

The facts of the case sufficiently appear from their Lordships' judgment.

Sir Erle Richards, *K. C.*, and *Mr. Bhugwandin Dube* for the Appellant submitted that the Subordinate Judge was right in finding that the Plaintiffs are not descendants of Kundan Lal's daughter. Further, the evidence established the fact that Musammat Rukmin died more than 12 years before the suit. Most of the witnesses who deposed that she was alive within 12 years derived their information from Het Ram, Plaintiff. He did not come forward to give evidence and his absence ought to discount the Plaintiffs' evidence. *Musammat Lal Kunwar* v. *Chiranji Lal* (1). The onus of proving that the suit in ejectment was within time lay upon the Plaintiffs and they had at any rate failed to prove that she died within 12 years. Further, the recitals in the sale-deed shewed that the sale was made for paying antecedent debts. The Subordinate Judge was right in holding that the sale was made by the lady for legal necessity.

Mr. L. DeGruyther, *K. C.*, and *Mr. J. M. Parikh*, for the Respondents, supported the findings of fact arrived at by the High Court. In any case with reference to the 8 biswas sold by Musammat Bhauna the onus of shewing that she did so for legal necessity rested on the Appellant. He had adduced no evidence in support of it except the recitals in the conveyance. The recitals in the sale-deed and the details of consideration therein given were no evidence of legal necessity. Reference was made to Mayne's Hindu Law, pp. 862 & 349; *Maheshar Baksh Singh* v. *Ratan Singh* (2), *Deputy Commissioner of Kheri* v. *Khanjan Singh* (3).

Sir Erle Richards replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The suits which have given rise to this consolidated appeal from three decrees of the High Court of Allahabad relate to a property called Mouzah Khilchipur lying in the District of Rae Bareilly in the United Provinces of India.

The mouzah is now in the possession of the Defendant-Appellant under a usufructuary mortgage executed in 1871 in favour of his ancestor Madhoram by two Hindu ladies, Rukmin and Nimma and one Dhal Chand. Other titles were created subsequently in favour of Madhoram or his son Darbari Lal to some of which reference will be made in the course of this judgment. But the Plaintiffs' claim to possession depends principally on their right to redeem the mortgage of 1871.

Mouzah Khilchipur belonged originally to one Kundan Lal; he died many years ago leaving two sons Mihin Lal and Sham Lal who, it is not disputed, were joint in food and estate. Mihin Lal died in 1853, and Sham Lal in 1859, leaving his widow Nimma and a nephew named Lila Dhar, Mihin Lal's son. On Sham Lal's death the whole property devolved on Lila Dhar. Lila Dhar died in 1861 when Rukmin, his widow, became the owner taking a widow's estate under Hindu Law. But although Rukmin as the widow of the last full owner was

(1) L. R. 37 I. A. 1: s. c. 14 C. W. N. 285 (1909).

(2) L. R. 23 I. A. 57 (1896).

(3) L. R. 34 I. A. 72: s. c. 11 C. W. N. 474 (1907).

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entitled to the entire property, it would appear, that Sham Lal's widow claimed, or was acknowledged, to possess an equal interest with Rukmin. In 1862 the two widows jointly sold a half or 10 biswas share of the village to Dhal Chand who is said to have been Rukmin's manager. In 1871, the three, Dhal Chand, Rukmin, and Nimma executed the usufructuary mortgage referred to above for a period of 12 years in respect of the entire mouzah represented as 20 biswas in favour of Madhoram, the conditions being that at the end of the term the debt would become satisfied and the mortgagors would recover the property without payment of the "principal mortgage money" or interest. Dhal Chand died, it is said, in 1873, and in 1874 his widow, Bhauna, sold the equity of redemption in respect of eight biswas out of the 10 biswas he had acquired from Rukmin and Nimma to the son of Madhoram, Durbari Lall, and his widow, Chando, one of the Defendants in the present suits. The equity of redemption in respect of the remaining two biswas was sold in execution of decree against Bhauna, and passed ultimately into the hands of the Appellant.

It is unnecessary for the determination of this Appeal to refer to the subsequent transactions by which Madhoram's son acquired the equity of redemption in respect of the 10 biswas that had remained in the hands of Rukmin and Nimma after the sale of the moiety to Dhal Chand.

The Brahman Plaintiffs claim to be the reversioners of both Lila Dhar and Dhal Chand. They allege that Bhauna, Dhal Chand's widow, died in 1905, Nimma in 1906, and Rukmin a few years ago, and that upon their respective deaths whatever rights they had purported to create in favour of Madhoram came to an end, and they are entitled to possession of the entire property. They have transferred a moiety of the mouzah with all the appurtenant rights to Inda Koer, who brings one suit in respect of the share purchased by her, whilst the Brahman Plaintiffs have sued separately for the other share claimed by them.

With regard to the 10 biswas Dhal Chand had purchased from Rukmin and Nimma, they allege that the sale of the equity of redemption in respect of eight biswas by Bhauna was without legal necessity and that the execution sale of the two biswas was in respect of a personal decree against her, and that, consequently, neither transaction is binding against them.

The contesting Defendants, the representatives of Madhoram, denied that the Brahman Plaintiffs were the reversioners of either Lila Dhar or Dhal Chand; that their claim was barred by the Statute of Limitations, as Rukmin, the widow of the last full owner, died more than 12 years before suit, and that even if the Brahman Plaintiffs were the reversioners of Lila Dhar or Dhal Chand, the transactions impugned by them were for legal necessity and consequently binding against them. The two suits were tried together, and although in consequence of the decree of the Subordinate Judge there were three separate Appeals to the High Court, they were heard together; and subsequently on an application for leave to Appeal to His Majesty in Council, all three Appeals were consolidated. This case has thus come before their Lordships as a single consolidated Appeal. Their Lordships propose, therefore, in order to avoid confusion, to deal with the two suits as one consolidated action from

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the outset. The Trial Judge was of opinion that the evidence produced to establish the relationship of the Brahman Plaintiffs to Lila Dhar was wholly untrustworthy. He, therefore, did not consider it necessary to enter upon an enquiry as to the time of Rukmin's death.

He held, however, that the Brahman Plaintiffs (save Lachman) were the reversioners of Dhal Chand, being his brother's sons; that the sale of the equity of redemption by Bhauna in respect of eight biswas was for legal necessity, but that there was no proof that the sale by auction of the two biswas in execution of the decree against her was "in satisfaction of a debt contracted by her for legal necessity." He accordingly made a decree in Inda Koer's suit for the redemption of the mortgage of 1871 in respect of two biswas, and dismissed the rest of her claim as well as the claim of the Brahman Plaintiffs in their suit.

From these decrees there were, as already observed, three Appeals to the High Court; one by the Defendants in respect of the two biswas, and the two others by the two sets of Plaintiffs, namely, Inda and the Brahmans respectively.

As regards the relationship of the Brahman Plaintiffs to Lila Dhar, the learned Judges of the High Court have come to a diametrically opposite conclusion to the Trial Judge. They hold that it is satisfactorily established they are the descendants of one Bhauna, *alias* Mulo, a daughter of Kundan Lal, and therefore related as *Bandhus* to Lila Dhar, Rukmin's husband. They have further held that the sale by Rukmin and Nimma in 1862 to Dhal Chand, the mortgage of 1871 by these three to Madhoram, and the sale of the equity of redemption by Bhauna, Dhal Chand's widow, in respect of eight biswas, were without legal necessity. They have also held that Rukmin was alive within 12 years from date of suit. They accordingly reversed the decree of the Trial Judge by which he had dismissed the Plaintiffs' claim in respect of eighteen biswas, and affirming his order in respect of the two biswas made a decree in favour of the Plaintiffs in both suits.

In the present Appeal the Defendant Brij Lal, the grandson of Madhoram, challenges all the conclusions of the High Court. The case as presented at their Lordships' Bar is divisible into two parts, one relating to the reversionary right to Dhal Chand's estate, the other to Lila Dhar's. It is not disputed now that the Brahman Plaintiffs, including Lachman, are the sons of Dhal Chand's brothers, and are, therefore, entitled to his estate on the death in 1905 of his widow Bhauna. The only question for determination on this part of the case is whether the sale by Bhauna of the equity of redemption in respect of the eight biswas was for legal necessity. The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the Appellant has adduced no evidence to prove legal necessity as would bind the husband's estate. He has relied simply on the recitals in the Schedule attached to the sale-deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*.

In these circumstances their Lordships are of opinion that the conclusion of the

High Court with regard to the sale by Bhauna of the equity of redemption in respect of the eight biswas is well-founded.

Respecting the other two biswas which belonged to Dhal Chand, there is a concurrent finding of fact by the two Courts that the decretal debt in execution of which it was sold was not for legal necessity. In the result, therefore, as regards the share purchased by Dhal Chand from Rukmin and Nimma in 1862, and which he jointly with them mortgaged in 1871 to Madhoram, the Brahman Plaintiffs as reversioners of Dhal Chand, are entitled to the same.

The position respecting the other 10 biswas seems to their Lordships quite different. The right of the Plaintiffs to that share rests on the allegations that they are the grandsons of one Bhauna *alias* Mulo, who was a daughter of Kundan Lal and the sister of Sham Lal and Mihin Lal. There is no documentary evidence in support of the statement that the wife of Hulas Rai, the grandfather of the Plaintiffs, was a daughter of Kundan Lal. It was natural to expect that in 1862, when Rukmin and Nimma sold a moiety of the property of Dhal Chand, the uncle of the Plaintiffs, on which occasion the relationship of Lila Dhar, Rukmin's husband, was stated with some particularity, a reference should be made to the vendee's connection with the family. Other documents of a similar nature are equally silent. As observed already, the Plaintiffs' allegation rests entirely on oral testimony. Having regard to the divergence of opinion between the two Courts in India with respect to the credibility of the Plaintiffs' witnesses, their Lordships have closely examined the evidence, and they cannot help considering it to be of a very dubious character. The witnesses had to prove only one link in the chain of relationship; the discrepancies, therefore, in their statements on material points, which have been somewhat lightly passed over by the High Court, seriously affect, in their Lordships' opinion, the value of their testimony. Their Lordships agree with the Trial Judge in considering the evidence as to Mulo being a sister of Sham Lal and Mihin Lal as worthless. In this view of the case, it is hardly necessary to determine whether Rukmin was alive or not within twelve years from date of suit. Admittedly she left her home many years ago. The Plaintiffs allege she went on a pilgrimage, and was last heard of eight or nine years before the action. The Defendant, on the other hand, says she had to leave her home a considerable time before owing to having been outcasted for unchastity. Most of the witnesses who speak to her being recently alive state they obtained their information from Het Ram, one of the Plaintiffs, who has not thought fit to enter the witness-box. On the other hand, there are some corroborative circumstances which incline their Lordships to believe that Rukmin left the village in consequence of her lapse, and died many years ago in a distant relative's home.

On the whole, it appears to their Lordships that the Plaintiffs have failed to establish their right to recover possession of the remaining 10 biswas, as reversioners to Rukmin's husband. The Decree of the High Court in the suit of Inda Koer omits, however, from consideration the covenant in the deed of mortgage which provides that at the time of redemption the mortgagors

"Shall be liable for the amount of arrears and the amount of *takavi* advances and the amount ad-

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vanced on account of seed which may be due to the mortgagee by the tenants of the village according to the entries in the *patwaris'* papers."

Their Lordships are of opinion that the decrees of the Courts in India should be discharged, that the claim of the Brahman Plaintiffs in their suit should be dismissed, and in the suit of Inda Koer who has acquired the 10 biswas which alone the Brahman Plaintiffs had a right to sell, there should be a declaration that she is entitled to recover possession of the same from the Defendant-Appellant, with mesne profits as provided by law, less any sum that may be found due to the mortgagee Defendant upon the taking of proper accounts on the basis of the above-recited covenant within a time to be specified by the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Considering the result, they think the ends of justice will be served by making the parties bear their respective costs in the Appeals to the High Court and to this Board.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Appellant.

Solicitors: *Messrs. Edward Dalgado* for the Respondents.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1798 OF 1909.

STEPHEN, J.
MULLICK, J.
1913,
Heard,
4, February.
Judgment,
6, February.

KALI CHARAN SAHA and others, Defendants, Appellants,
v.
DABIRUDDIN AHMED, Plaintiff, Respondent.

Adverse possession by tenant—Suit for declaration of title to jalkar *and injunction against Defendants—Plaintiff's title based on* durputni *lease—Defendant's possession as tenants for 12 years previous to lease—Knowledge if necessary to constitute possession adverse.*

Where the Plaintiff sued for a declaration of his title to a certain jalkar *and for an injunction prohibiting the Defendants from catching fish in that* jalkar *and it was admitted that the Plaintiff was entitled to an eight annas share of the* jalkar *and the Plaintiff claimed the other eight annas share under a* durputni *lease granted to them by one R, the* putnidar *of the said eight annas share, who, it was found, had no possession at the time of granting the lease to the Plaintiffs and no knowledge as to who was in actual possession, and the Defendants proved possession as tenants for 12 years previous to the granting of the lease by R to the Plaintiffs:*

Held—*That the Defendants by their possession gained a title as against all the world and this held good as against the person who was in fact their landlord, though he did not know, and the Defendants' possession was a good answer to the Plaintiffs' claim which was equivalent to a claim for* khas *possession.*

ISHAN CHANDRA *v.* RAM RANJAN (1), ICHHARAM SINGH *v.* NILMONEY BAHIDA (2), GOPAL KRISHNA *v.* LAKHIRAM (3) *followed.*

This was an Appeal preferred on the 23rd of August 1909 against a decree of Babu Jogendra Nath Bose, Subordinate Judge of Rajashahye, dated the 22nd of June 1909, modifying a decree of Babu Satish Chandra Biswas, Munsif of Boalia, dated the 31st of March 1908.

The Plaintiff sued for a declaration of

(1) 2 C. L. J. 125 (1905).
(2) I. L. R. 35 Cal. 470: s. c. 12 C. W. N 636 (1908).
(3) 16 C. W. N. 634 (1912).

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his title to the sixteen annas share of a certain *jalkar* known as Durga Daha Damush and for an injunction prohibiting the Defendants from catching fish in the Damush or *jalkar*. This *jalkar* formed part of certain *putni* mehals which originally belonged to two brothers, Kashinath Shaha and Harinath Shaha. In 1257, B. S., there was a partition between the two brothers of these *putni* mehals. The mehals which fell to the share of Harinath Shaha were let out in *durputni* to one Bama Sundari Debi and Parama Sundari Debi in 1263, B. S. This *durputni* was sold subsequently in 1285 for arrears and was purchased by Harinath Shaha himself who then granted a *durputni* lease to Plaintiff's father in 1286, B. S. The mehals which fell to the share of Kashinath Shaha were let out in *durputni* to Bama Sundari Debya alone in 1263, B. S., but this *durputni* under Kashinath passed subsequenly to one Nafar Mandal and then to his sons Srinath Mandal and others and finally to the Defendants.

The Plaintiff's case was that the whole of the disputed *jalkar* fell to the share of Harinath under the partition of 1257, B. S., and his father got the entire sixteen annas of the Damush in suit under the *durputni* lease granted to him by Harinath in 1286, B. S., and his father and after his death he had been all along in possession of this entire Damush up till 1312, B. S., when the Defendants for the first time interfered with their possession. The Plaintiff further alleged that Radhikanath Shaha, son of the aforesaid Kashinath Shaha, having raised an objection that an undivided eight annas share of the Damush appertained to his own *taruf*, the Plaintiff took a *durputni* lease of the 8 annas share of the Damush from the said Radhikanath in 1299, B. S.

The Defendants admitted the Plaintiff's title to eight annas share of the *jalkar* but disputed their title to the remaining eight annas inasmuch as under the partition of 1257 eight annas undivided share of the Damush fell to the share of each of the two brothers, Harinath and Kashinath, who continued to be in *ijmali* possession of the *jalkar* in equal shares and so also their lessees, Plaintiff's father and Defendants' predecessors.

Both the Courts below found that in the partition of 1292, B. S., the *jalkar* in suit was left *ijmali*, each of the brothers Harinath and Kashinath getting an undivided eight annas share. The Munsif dismissed the suit and held—"The *durputni* lease granted by Radhika in 1299, B. S., was a collusive document. . . . I find from the evidence on the Defendants' side, both oral and documentary, that the Defendants' predecessor Srinath Mandal and Bama Sundari Debya were in possession of Kashinath's eight annas share before 1299, B. S. Plaintiff's father took the lease in 1286, B. S., and died in 1294, B. S., and admittedly Plaintiff did never possess before Magh 1286, B. S. So that Plaintiff's father died without acquiring any title to the eight annas share of Kashinath Shaha even if it is admitted for the sake of argument that Plaintiff's father did possess the entire Damush from Magh, 1286, B. S. to 1294, B. S. From 1296, B. S., I find that the Defendants' predecessors are in possession of the Damush jointly with the Plaintiff."

The Subordinate Judge in appeal found that neither the *durputni* lease granted by Harinath to the Plaintiff's father nor that granted by Kashinath to the Defendants' predecessors covered the *jalkar* in ques-

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tion; that the *durputni* lease granted by Radhika to the Plaintiffs in 1299 was not invalid, although "when Radhika granted the lease he had no possession and no knowledge as to who were in actual possession; whether Radhika was aware of his title or not the Plaintiffs will get title if Radhika had it." The Subordinate Judge in allowing the appeal and decreeing the suit did not displace the finding of the Munsif as to the Defendants' possession previous to the granting of his lease by Radhika but held—"Even if that be so, still it will not bar the maliks' right as the Defendants held as tenants."

Against this decesion the Defendants preferred a Second Appeal to the High Court.

Mr. Caspersz and *Babus Mahendra Nath Roy* and *Sarat Chandra Khan* for the Appellants.

Mr. U. P. Ray and *Babu Nagendra Nath Bhuttacharya* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff in this case sued for a declaration of his title to a certain *jalkar*, known as Durgadaha Damush, and for an injunction prohibiting the Defendants from catching fish in the Damush or *jalkar*. It is admitted that the Plaintiff is entitled to an eight annas share of the *jalkar*. The question is whether they or the Defendants are entitled to the other eight annas share. In the Court below a question was raised as to the construction of a *durputni* which was the foundation of the title of both parties. But it is now admitted that the *durputni* does not cover the *jalkar* in question. The result is that the Plaintiff is admittedly entitled to eight annas of the *jalkar* and he puts forward a lease of 1299, B. S., by one Radhikanath in respect of the other eight annas. On the findings of the Court below this lease is valid in respect of the eight annas in question unless the Defendants can set up any prior claim. They cannot set up any such claim on the *durputni* under which they claimed in the lower Courts. They have, however, proved, according to the findings of the first Court which are not displaced by those of the second, possession for 12 years previous to the granting of the lease in 1892. The lower Appellate Court has held that that possession will not avail them since they cannot set it up as being adverse to their landlord. In this, the lower Appellate Court is wrong; for, the effect of the principles of the decisions in the cases of *Ishan Chandra* v. *Ram Ranjan* (1), *Ichharam Singh* v. *Nilmoney Bahida* (2) and *Gopal Krishna* v. *Lakhiram* (3), as applied to this case, is that the Defendants by their possession have gained a title as against all the world, and this holds good as against the person who was in fact his landlord though he did not know, as it might have been against any one else. The Plaintiff seeks now to disturb this right to be tenants, for he is setting up a claim which is equivalent to a claim for *khas* possession. In this claim, the Defendants' possession is a good answer; and we hold that they have established their right to be treated as tenants.

Under these circumstances, the Appeal is allowed and the judgment and decree of the lower Appellate Court are set aside. The Appellant is entitled to his costs throughout.

Appeal allowed.

(1) 2 C. L. J. 125 (1905).

(2) I. L. R. 35 Cal. 470: s. c. 12 C. W. N. 636 (1908).

(3) 16 C. W. N. 634 (1912).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3338 OF 1910.

MOOKERJEE, J. BEACHCROFT, J. 1913, 5, March.	MAGOO BRAHMA, Plaintiff, Appellant, *v.* BALKRISHNA DAS and others, Defendants, Respondents.

Indian Registration Act (III of 1877), sec. 50—Transfer of Property Act (IV of 1882) —Registered document relating to land, effect of, as against unregistered document—Notice of title created by prior unregistered document, effect of, on holder of registered document—Burden of proof as to such notice—Possession of person other than vendor, if sufficient notice to put purchaser on enquiry—Effect of purchase with such notice.

Sec. 50 of the Indian Registration Act has no application when the person who claims title under the subsequent registered document has notice of the title created by the prior unregistered document.

The burden lies upon the person who alleges such knowledge or notice to aver it in his pleadings and to establish it.

If a person purchases and takes a conveyance of an estate which he knows to be in the occupation of a person other than the vendor he is bound by all the equities which the person in such possession may have in the land.

This was an Appeal preferred on the 21st of November 1910 against a decree of T. S. Macpherson, Esq., District Judge of Zillah Cuttack, dated the 25th of July 1910, affirming a decree of Babu J. C. Dutt, Deputy Collector of Kendraparah, dated the 25th of January 1910.

The facts of the case will sufficiently appear from the judgment.

Babus Ram Chandra Majumdar and *Nagendra Nath Sen* for the Appellant.

Babus Provash Chandra Mitra and *Susil Madhub Mullick* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Plaintiff in a suit for rent. The land in respect of which rent is claimed originally belonged to Sankar Sarangi. The Plaintiff alleges that he acquired title thereto by a registered conveyance executed in his favour by the son of Sankar Sarangi on the 6th June 1903. The Defendants were admittedly at the time tenants in occupation of the land and would *primâ facie* be liable to pay rent. But they contest the claim of the Plaintiff on the allegation that on the 4th July 1889 they obtained a usufructuary mortgage of this land by an unregistered instrument and since then have been in possession as usufructuary mortgagees. On these facts it has been argued on behalf of the Plaintiff-Appellant that he has a preferential title to the land under sec. 50 of the Indian Registration Act, which provides that registered documents relating to land take effect against unregistered documents whether such unregistered documents be of the same nature as the registered documents or not. In answer to this contention it has been argued on behalf of the Defendant that sec. 50 of the Indian Registration Act has no application where the person who claims title under the subsequent registered document has notice of the title created by the prior unregistered document. This proposition is well settled and is supported by the decision in *Narain Chandra* v. *Dataram* (1), *Shivram* v. *Genu* (2), *Ram*

(1) I. L. R. 8 Cal. 597 (1882).
(2) I. L. R. 6 Bom. 515 (1882).

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Autar v. *Dhanauri* (3) and *Krishnamma* v. *Suranna* (4). As observed in *Chinnappa* v. *Manikavasagam* (5), the burden lies upon the person who alleges such knowledge or notice to aver it in his pleadings and to establish it. Consequently the question arises whether the Defendant has proved that when the Plaintiff took his conveyance he had notice of the usufructuary mortgage under which the Defendants claim.

On behalf of the Defendants it is contended that it was incumbent upon the Plaintiff at the time he took his conveyance, to inquire into the question of possession of the property and if he had made such enquiry from the Defendants he would have found that the latter were in possession not merely as tenants but as usufructuary mortgagees. This raises the question whether it was incumbent upon the Plaintiff to make any enquiry as to the possession of the property. Now it cannot be disputed, as laid down in the case of *Allen* v. *Seckham* (6), that when a person purchases property where a visible state of things exists which could not legally exist unless the property were subject to some burden, he is taken to have notice of the extent and nature of that burden. On this principle it has been ruled that if a person is in possession it is sufficient to put a purchaser on enquiry as to the nature and extent of his interest. The leading decisions in support of this proposition are the judgments of Sir Richard Couch in the cases of *Mancharji* v. *Kongoseoo* (7) and *Hakeem Meah* v. *Bejoy Putnee* (8): see also *Barnhart* v. *Greenshields* (9), *Jogal Kishore* v. *Kartik* (10), *Bhika Bai* v. *Udit* (11), *Kondiba* v. *Nana* (12), *Radhamadhab* v. *Kalpataru* (13). In the case before us, the Defendants and not the vendors of the Plaintiff were admittedly in occupation of the land at the time of the execution of the conveyance in his favour: it was consequently incumbent upon him to enquire under what title the Defendants claimed to be in occupation. This he did not do, and in justification of his conduct it has been urged that he was entitled to assume that the Defendants were in occupation as tenants, in other words, to assume that as they had entered into possession of the land as tenants, they had not subsequently acquired any other title. In our opinion, this position cannot possibly be supported: the contention in fact is opposed to the decision in *Kondiba* v. *Nana* (12), which was followed in *Vyankappa* v. *Yamnasami* (14); this latter case was accepted as good law in *Ram Charan* v. *Jayram* (15). It is indisputable that if a person purchases and takes a conveyance of an estate which he knows to be in the occupation of a person other than the vendor, he is bound by all the equities which the person in such occupation may have in the land, for possession is *primâ facie* seisin and the purchaser has therefore actual notice of a fact by which the property is affected and he is bound to ascertain the truth. [*Holmes* v. *Powell* (16), *Carroll* v. *Keayes* (17), *Reilly* v. *Gamett*

(3) I. L. R. 8 All. 540 (1886).
(4) I. L. R. 16 Mad. 148 (1892).
(5) I. L. R. 25 Mad. 1 (1901).
(6) 11 Ch. D. 790 at p. 795 (1879).
(7) 6 Bom. H. C. R. 59 (1869).
(8) 22 W. R. 8 (1878).
(9) 9 Moo. P. C. 18 (1853).
(10) I. L. R. 26 Cal. 116 (sic.).
(11) I. L. R. 25 All. 366 (1903).
(12) I. L. R. 27 Bom. 408 (1903).
(13) 17 C. L. J. 209, 214 (1913).
(14) I. L. R. 35 Bom. 269 (1911).
(15) 17 C. W. N. 10 (1912).
(16) 8 DeG. M. & G. 572 (1856).
(17) 8 Ir. R. Eq. 97.

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(18)]. The extreme length to which this doctrine has been carried is illustrated by the decision of Eldon, L. C., in *Daniels* v. *Davison* (19), where it was ruled that the purchaser has constructive notice not merely of the title of the tenant in occupation, but also of a contract into which he had entered for the purchase of the estate. [*Hanbury* v. *Litchfield* (20), *Jones* v. *Smith* (21)]. The principles applicable to cases of this description were explained in *Hunt* v. *Luck* (22), where Vaughan Williams, L. J., states the law in these terms: "If a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make enquiries of the person in possession, of the tenant who is in possession, and find out from him what his rights are and if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee, will be subject to the title or right of the tenant in possession." This doctrine was applied by this Court in the cases of *Radhamadhab* v. *Kalpataru* (13) and *Baburam* v. *Madhab* (23). Tested in the light of these principles, the claim of the Plaintiff is manifestly unfounded and has been rightly negatived: he must be deemed to have purchased the property with notice of, and consequently subject to, the usufructuary mortgage of the Defendants and is not entitled to claim rent for them as his tenants, till he has redeemed the usufructuary mortgage.

The result is that the decree of the District Judge is affirmed and this Appeal dismissed with costs.

Appeal dismissed.

(18) 17 C. L. J. 209, 214 (1913).
(18) 7 Ir. R. Eq. 1.
(19) 16 Ves. 249: 17 Ves. 433: 10 R. R. 171 (1809).
(20) 2 My. and K. 629, 638 (1833).
(21) 1 Hare 43, 62 (1841).
(22) [1902] 1 Ch. 428.
(23) 19 I. C. 9 (1913).

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 442 OF 1913.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 13, 14, May and 13, August. 1914, Judgment, 2, February.	CHANDRA NARAYAN SINGH, Plaintiff, Petitioner, *v.* ASHUTOSH DEY, Defendant, Opposite Party.

Court Fees Act (VII of 1870), sec. 7, cl. v, *sub-cls.* (a), (b), (c), (d)—*Ghatwalli tenure, suit to recover—Ghatwalli estate whether part of revenue-paying estate.*

Held—*That the Plaintiff's suit to recover the Ghatwalli estate of Rohini is governed by sub-cl.* (d) *of cl.* v *of sec. 7 of the Court Fees Act and, for purposes of Court-fee, the estate should be valued according to its market value.*

The Ghatwalli estates are not revenue-paying estates within sub cls. (a) *and* (b) *of cl.* v *of sec. 7 of the Court Fees Act, as appears* inter alia *from the fact that the amount payable to Government by the tenure holder is divided between the Government and the zemindar of Birbhum. They are parts of the estate of the zemindar.*

This was a Rule granted on the 18th of April 1913 against an order of Mr. J. M. Christian, Subordinate Judge of Deoghur, dated the 25th of March 1913.

The facts of the case were as follows:—

One Chandra Narain Singh instituted a suit for declaration of his title to and for recovery of possession of five Ghatwali estates known as the Rohini Estate. He paid Court-fees on ten times the sum

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payable by the Ghatwal into the Collectorate, and valued the suit for the purpose of jurisdiction at a much larger sum, *viz.*, Rs. 3,50,000. The Subordinate Judge directed the Plaintiff to pay Court-fees on fifteen times the net profits of the property. The Plaintiff moved the High Court and obtained a Rule.

Babu Naresh Chandra Sinha for the Petitioner.

Babus Dwarka Nath Chuckerbutty and *Kshetra Mohan Sen* for the Opposite Party.

Babu Ram Charan Mitra for the Government.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to determine the principle on which Court-fees are to be levied on the plaint in the suit instituted by the Petitioner for recovery of possession of a Ghatwali Estate known as Rohini. The Plaintiff contends that the case falls within sec. 7, cl. *v*, sub-cl. (*a*), while the Defendant argues that the case is governed by sec. 7, cl. *v*, sub cl. (*b*), of the Court Fees Act, 1870. The Subordinate Judge has accepted the contention of the Defendant as well-founded, and has called upon the Plaintiff to pay Court-fees accordingly. As the question raised is of considerable importance and affects the Government ultimately, we have heard the learned Government pleader in addition to the learned Vakils for the parties themselves. To determine the provision within which the case before us falls, it is necessary to examine carefully the terms of the sub-clauses of cl. *v* of sec. 7 of the Court Fees Act.

Cl. *v* of sec. 7 provides that in suits for ...e possession of land the amount of fee payable on the plaint shall be computed according to the value of the subject-matter. Sub-cl. (*a*) lays down that where the subject-matter is land, which forms an entire estate or a definite share of an estate, paying annual revenue to Government or which forms part of such an estate and is recorded in the Collector's Register as separately assessed with such revenue, and such revenue is permanently settled, the value of the subject-matter shall be deemed to be ten times the revenue payable. Sub cl. (*b*) treats of a case similar in all respects with that comprised in sub-cl. (*a*), with this difference that the revenue payable in respect of the estate is not permanently settled. Sub-cl. (*c*) lays down that where the land pays no such revenue or has been partially exempted from such payment or if charged with any fixed payment in lieu of such revenue and net profits have arisen from the land during the year next before the date of presentation of the plaint, the value of the subject-matter shall be deemed to be fifteen times such net profit : but where no such net profits have arisen therefrom, the value of the subject-matter shall be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood. Sub-cl. (*d*) provides that where the land forms part of an estate paying revenue to Government but is not a definite share of such estate and is not separately assessed as mentioned in sub-cl. (*a*) the value of the subject-matter shall be deemed to be the market value of the land. To these sub-clauses is added an explanation that the word estate "means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence

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of such engagement, shall have been separately assessed with revenue. Before we determine which of these sub-clauses governs the case before us, we may state that according to the Plaintiff the Ghatwali estate in suit pays a Government revenue of Rs. 3,148-12-8: and the Plaintiff paid on the plaint, a Court-fee stamp of Rs. 995 or ten times the revenue payable, while he fixed the market value of the subject-matter at Rs. 3,50,000 for purposes of jurisdiction. The history of the Ghatwali estate has been explained to us but need not be set out in detail here for our present purposes, and will be found narrated in the judgment of this Court in the case of *Kastura Kumari* v. *Monohar Das* (1). There is no controversy that the land does not form an entire estate nor a definite share of an estate paying annual revenue to Government within the meaning of sub-cl. (*a*). To enable us to dermine whether the land forms part of such an estate and is recorded in the Collector's Register as separately assessed with such revenue, we called upon the parties to produce before us a certified copy of the Register in so far as it is relevant to the matter under enquiry. We found that the property in suit which consist of five Ghatwali mehals is included in an aggregate of fifty-two Ghatwali mehals for which a sum of Rs 16,183 is annually payable as sadar jama. No apportionment of this sum has been made with reference to the several tenures. It further appears from the Register that a sum of Rs. 22,494 is collected by Government from the fifty-two Ghatwali mehals, out of which the Government retains a sum of Rs. 16,183 on account of sadar jama and pays the balance to the zemindar within whose estate the Ghatwali land was originally comprised. The collections from the five Ghatwali mehals in suit amount to Rs. 3148-12-8. It is consequently plain that this latter sum is in no sense revenue payable in respect of these five Ghatwali mehals: the whole of this sum is not payable as revenue to Government. As already explained, the larger sum of which this amount is a component element, is collected by Government and is retained in part as revenue and made over in part to the proprietor of the estate from which the Ghatwali tenures have been carved out. We must hold accordingly that even if the disputed land is deemed part of a revenue-paying estate, it is not recorded in the Collector's Register as separately assessed with revenue, within the meaning of sub-cl. (*a*). It has been ingeniously argued, however, on behalf of the Plaintiff, that he should not be called upon to pay a larger amount as Court-fee than what he would have had to pay if he had been the owner of all the fifty-two Ghatwali mehals and sued to recover possession thereof. This contention is manifestly fallacious for two reasons, namely, first, that the Plaintiff cannot avail himself of sub-cl. (*a*) unless he brings his case strictly within its terms, and for that purpose the determining factor is the land in suit and not a larger property in which it may be included: and, secondly, that even if the Plaintiff had sued for recovery of all the fifty-two Ghatwali mehals, the question would require careful examination, whether those mehals constitute an estate paying annual revenue to Government. The contention of the Plaintiff consequently fails.

As regards sub-cl. (*b*), it is plainly inapplicable for the reasons assigned for the

(1) [1864] W. R. 89.

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exclusion of sub-cl. (*a*). As regards sub-cl. (*c*), it is clear that before the Defendant can successfully rely upon it he must establish that the land in suit pays no revenue permanently or temporarily settled thereon, or has been partially exempted from such payment or is charged with a fixed payment in lieu of such revenue. This the Defendant has failed to establish. On the other hand, the Subordinate Judge has found on the authority of the cases of *Rajah Leelanund Singh* v. *Bengal Government* (2), *Monorunjan* v. *Rajah Leelanund* (3), the same case on review—*Leelanund* v. *Monorunjan* (4), and on appeal to the Privy Council—*Leelanund* v. *Monorunjan* (5), *Leelanund Singh* v. *Monorunjan* (6), that the Ghatwali land forms part of the estate of the zemindar of Birbhum. This position indeed is supported by the fact that a definite amount is collected through the agency of the Government and is divided between the Government and the zemindar of Birbhum. Consequently the contention of the Defendant that sub-cl. (*c*) is applicable cannot be supported.

From what has been already stated, it is plain that sub-cl. (*d*) is applicable. The land in suit forms part of an estate paying revenue to Government, but does not constitute a definite share of such estate nor is it separately assessed with revenue. Consequently the value of the subject-matter must be deemed to be the market value of the land. In para. 15 of the plaint, the market value is stated to be Rs. 3,50,000 and the fee payable is Rs. 2,675. As the Plaintiff has paid Rs. 995 only, he must be called upon to pay the deficit, namely, Rs. 1,680 within a time to be fixed by the Court below.

The result is that the Rule is made absolute, the order of the Court below set aside and the case remitted to it, so that the direction given in this judgment may be carried out. As the contentions of both the parties have failed, there will be no order for costs.

Rule made absolute.

(2) 6 M. I. A. 101 (123) (1855).
(3) 3 W. R. 84 (1865).
(4) 5 W. R. 101 (1866).
(5) 13 B. L. R. 124 (1873).
(6) I. L. R. 3 Cal. 251 (1877).

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 1363 OF 1913.

COXE, J.
CHATTERJEE, J.
1914,
Heard,
23, January
and
10, February.
Judgment,
17, February.

SARDHARI SAH OF DEOGHUR, Decree-holder, Petitioner,
v.
HUKUM CHAND SAH and ors., Judgment-debtors, Opposite Party.

Sonthal Pergunahs Act (XXXVII of 1855), sec. 1, cl. (2)—Sonthal Pergunahs Justice Regulation (V of 1893), sec. 27—Sonthal Pergunahs Civil Courts Rules, No. 29—Suit valued over Rs. 1,000, proceedings in, if subject to High Court's superintendence—Execution proceeding, order in, if may be revised—Proper case for interference—Same officer subject to Lieutenant-Governor in some proceedings, to High Court in others—Charter Act (24, 25 Vict., c. 104), sec. 15—Civil Procedure Code (Act V of 1908), sec. 115.

All suits over Rs. 1,000 in value, being, under the Sonthal Pergunahs Act of 1855, triable according to the general law and in the same manner as if that Act had not been passed, Judicial Officers in the Sonthal Pergunahs are subject to the general powers of superintendence of the High Court, in so far as proceedings in suits over Rs. 1,000 in value are concerned.

Execution proceedings being proceedings in suit are, when they arise out of suits

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over Rs. 1,000 in value, similarly subject o revision by the High Court.

DUNGARAM *v.* RAJ KISHORE (1) *referred to.*

Where a tenure in the Sonthal Pergunahs, having been put up for sale in execution of a mortgage decree passed in a suit over Rs. 1,000 in value, the landlord, under r. 29 of the Rules for the guidance of Civil Courts in the Sonthal Pergunahs, objected to the description of the property as mourasi mokurari *alleging it to be a tenancy-at-will, and the matter being brought before the High Court in a Rule, order was passed by consent discharging the landlord from the record and directing the property to be sold subject to the objection of the landlord that the tenancy was not a* mourasi mokurari, *but the landlord nevertheless by a fresh application obtained an order from the Deputy Commissioner, without whose sanction the tenure could not (under r. 29 aforesaid) be sold, for further enquiry into his claim, and the Deputy Commissioner having called for a report from the Sub Divisional Officer who was also the Subordinate Judge, the latter officer as Subordinate Judge adjourned the sale proceeding pending enquiry by himself as Sub-Divisional Officer:*

Held—*That the order of the Subordinate Judge staying the sale was fit to be set aside by the High Court in the exercise of its general powers of superintendence.*

As no case had been decided, sec. 115 of the Civil Procedure Code did not apply.

This was a Rule granted on the 17th of November 1913 against the proceedings of J. M. Christian, Esq., Subordinate Judge of Deoghur, and his order, dated the 29th of September 1913.

(1) I. L. R. 18 Cal. 183 (1890).

The material facts will appear from the judgment.

Mr. S. F. Sinha and *Babus Bepin Behary Ghssh* and *Mohini Mohan Chatterjee* for the Petitioner.

Mr. C. R. Das and *Babu Surendra Nath Ghoshal* for the Opposite Party.

Mr. Sultan Ahmed, Deputy Legal Remembrancer, for the Government.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner in this case obtained a decree for sale on a mortgage and the property was advertised for sale on the 18th April 1912. The Opposite Party, Surajmal Marwari, claims to be the landlord of the judgment-debtor and he objected to the description of the property as being the *mokurari mourasi* property of the judgment-debtor, inasmuch as he contends that the judgment-debtor is a mere tenant-at-will. Various references were made to the landlords and the executive authorities and ultimately the Petitioner came up to this Court and obtained a Rule on the Opposite Party to show cause why the property should not be sold. The order ultimately passed on that Rule ran as follows:—

"After some discussion the decree-holder, Petitioner, has agreed that the objector zeminder shall be discharged from the record and that the property shall be put up for sale as described in the mortgage decree.

"Let the Opposite Party, Surajmal Marwari, be discharged from the record and the property sold as described in the mortgage decree.

"The Opposite Party is entitled to his costs throughout. We assess the hearing-fee of this Court at three gold mohurs.

"The property will of course be sold

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subject to the objection of the landlord, Surajmal Marwari, that it is not *mourasi mokurari* and that it is a tenancy-at-will."

The case then went back to the Subordinate Judge. Thereupon Surajmal applied to the executive authorities for a further enquiry. The Deputy Commissioner called for a report from the Sub-Divisional Officer who happens to be also the Subordinate Judge. That officer accordingly, as Subordinate Judge, has adjourned the sale proceedings while he makes an enquiry as Sub-Divisional Officer. The Petitioner accordingly came again to this Court and obtained this Rule on the Opposite Party to show cause why the mortgaged property should not be sold without further delay.

So far as the Opposite Party is concerned the Rule presents no difficulty. The former order was passed with his consent and he cannot be heard to say that the Subordinate Judge must again decide his objection before proceeding with the sale. His contention that he did not agree to the order and that it is not binding on him is childish.

But as I had grave doubts whether the matter was within our powers and as the Deputy Commissioner in submitting the records reported that application had been made to Government to be represented at the hearing of the Rule, notice was given to the Government and we have heard the Deputy Legal Remembrancer against the Rule.

On consideration, I do not think that we are debarred by anything in the local Acts and Regulations of the Sonthal Pergunahs for revising the Subordinate Judge's proceedings. The learned Deputy Legal Remembrancer has relied on Rule 29 of the Rules for the guidance of Civil Courts in the Sonthal Pergunahs issued on the 18th August 1905, which reproduced in a modified form earlier rules on the subject. This Rule prescribes that the sale of tenant's rights shall be subject to consent of the Deputy Commissioner, the landlord also being given an opportunity to object. These rules are issued with reference to the provisions of sec. 1, cl. (2) of the Sonthal Pergunahs Act, 1855, and sec. 27 of the Sonthal Pergunahs Justice Regulation, 1893, for the guidance of the officers appointed under sec. 2 of the said Act to administer civil justice." Sec. 27 of the Regulation need not detain us as it merely enacts that directions issued under the Act must be consistent with the Regulation. Under the Act officers are made subject to the directions of the Lieutenant-Governor and the administration of civil justice among other things is vested in those officers. It may therefore seem to follow that officers administering civil justice are subject to the directions of the Lieutenant-Governor. Then however comes a proviso that all suits over Rs. 1,000 in value shall be tried and determined according to the general law in the same manner as if the Act had not been passed. Officers therefore trying such suits are independent of the Lieutenant-Governor's direction and have to try them as if the Act, from which alone the directions derive their validity, had not been passed. Can it therefore be said that this state of things lasts only up to decree and has no application to proceedings in execution, which are proceedings in suits. I think it clear that this was not the intention of the Legislature. Turning to the Sonthal Pergunahs Justice Regulation, 1893, I find the Civil Courts divided into (1) Courts established under the Courts Act and (2) Courts of officers appointed by the Lieutenant-

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Governor under sec. 2 of the Act. This surely justifies the inference that the Legislature not only did not regard Subordinate Judges as subject to directions under the Act of 1855 but did not even regard them as officers appointed by the Lieutenant-Governor under that Act. That being so, I think it is impossible to hold that such Courts are subject to the directions of the Lieutenant-Governor under the Act of 1855. This seems to be in accordance with the decision in *Dungaram* v. *Raj Kishore* (1).

Of course we cannot interfere with an order of the Deputy Commissioner directing an enquiry or with an enquiry by the Sub-Divisional Officer. But the Subordinate Judge is subject to our jurisdiction and an order by him adjourning a sale may be examined by us.

Reference has also been made to sec. 27 of the Sonthal Pergunahs Settlement Regulation. It is contended that this section binds all Courts whether trying suits over Rs. 1,000 or not. I see no reason to doubt that this is so but the section has no application to the present case. Assuming that it applies to execution sales at all, an assumption with which the words "every other contract or agreement" seem somewhat inconsistent, the section only applies to transfers by raiyats and the learned pleader for the Opposite Party admits that the judgment-debtor is not a raiyat.

I do not think that an order of this nature comes within sec. 115 of the Code. No case has as yet been decided. But we have general power of superintendence over the subordinate Courts under the Charter and I think that this is a case in which that power might fitly be exercised. Personally I should be very loth to hold

(1) I. L. R. 18 Cal. 188 (1890).

that we can alter wrong judicial orders under that power and incline to the views stated in *Tej Ram* v. *Harsukh* (2). But here though I do not for a moment suggest that the Subordinate Judge desires to be anything but entirely loyal to the orders of this Court, the practical effect of his action is that the orders of this Court passed last July with the consent of the party who is now endeavouring to obstruct their fulfilment, are still being disregarded while the gentleman who fills the office of Subordinate Judge, makes in another capacity an enquiry which, from the point of view of a Subordinate Judge, must be deemed wholly irrelevant and unnecessary That is an evil which this Court, in my opinion, is entitled to remedy in the exercise of its power of superintendence and we are entitled to direct that, whether the Sub-Divisional Officer holds an enquiry or not, the Subordinate Judge shall proceed with the sale at once.

The Rule is accordingly made absolute. The Petitioner is entitled to his costs from the Opposite Party. We fix the hearing-fee at 5 gold mohurs.

CHATTERJEE, J.—As this case arises out of a suit in which the matter in dispute exceeds one thousand rupees it is governed by the general laws and Regulations in force in the province and our general powers of superintendence under the Charter are in no way restricted by the Sonthal Pergunahs Regulations and Rules. I therefore agree in making this Rule absolute.

Rule made absolute.

(2) I. L. R. 1 All. 101 (1875).

[CRIMINAL APPELLATE JURISDICTION.]

GOVT. APP. NO. 9 OF 1913.

HOLMWOOD, J.
SHARFUDIN, J.
1913,
Heard, 27 and 28, November.
Judgment, 28, November.

DEPUTY LEGAL REMEMBRANCER OF BENGAL, Appellant,
v.
AMULYA DWAN, Accused.

Criminal Procedure Code (Act V of 1898), secs. 256, 258, 417—Indian Penal Code (Act XLV of 1860), sec. 406, I. P. C.—Appeal by Local Government against acquittal—Powers and duties of the High Court—Order of acquittal passed after cross-examination of prosecution witnesses subsequent to framing of charge.

The accused was placed on his trial for having committed criminal breach of trust in respect of some bales of jute. The accused admitted his liability. The trying Magistrate framed a charge under sec. 406, I. P. C., and after cross examination of the witnesses for the prosecution acquitted the accused under sec. 258, Cr. P. C., holding that the case was one of civil dispute:

Held (on an appeal by the Local Government under sec. 417, Cr. P. C)—*That in an appeal from an acquittal the High Court could not interfere unless the judgment of the Court below was wrong and perverse or without jurisdiction and based upon obvious errors in procedure, and there being nothing of the kind in the case the High Court should uphold the decision of the Magistrate even though wrong, because it would be based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter going to the jurisdiction or the regularity of the trial.*

That the order of acquittal having been passed subsequent to the framing of the charge and after the cross-examination of the witnesses for the prosecution was not irregular or without jurisdiction.

This was an Appeal preferred on the 26th of September 1913 against an order of acquittal made on the 18th March 1913 by N. Sen, Esq. Deputy Magistrate of Serampur, under sec 258, Cr. P. C., the accused having been charged with an offence under sec. 406, I. P. C.

The accused was placed on his trial before the Deputy Magistrate of Serampur for having committed criminal breach of trust in respect of 235 bales of jute inasmuch as the jute was entrusted to him by one Naffar Chandra Ghosh for sale to Messrs. Jewan Mall of Cossipore but he sold it to one Hari Sing and misappropriated the sale-proceeds. After recording the evidence adduced by the prosecution the Magistrate framed a charge under sec. 406, I. P. C., against the accused. Under sec. 364, Cr. P. C., the Magistrate examined the accused who also filed a written statement. The accused admitted his liability to Naffar Chandra Ghosh for the price of the jute in question and said that he had been admitting his liability from the beginning though the money realised by the sale had been lost. After the examination of the witnesses for the prosecution subsequent to the charge the Magistrate acquitted the accused under sec. 258, Cr. P. C., holding that no criminal case was made out and the matter was one for the Civil Court. The material portion of the Magistrate's judgment is set out below:

"Accused in his written statement supplementary to the examination, under sec. 364, Cr. P. C., admits liability to Naffar Chandra Ghosh for the price of jute in question and says that he has been doing so from the very beginning though the money realised by the sale has been lost. He has not exceeded the terms of contract he says.

"I have carefully gone through the recorded evidence and the cognate rulings

in this case and leaving out the material issues involved and concentrating my attention upon the main fact of the case, I find that in view of the above admission of liability by accused in this Court, as well as previously made, as deposed to by complainant himself or some of his witnesses, a criminal case for misappropriation cannot stand against the accused.

"As for the specific direction to sell to Jewan Mall only and to no other firm there is no evidence whatever to corroborate the complainant. In view of all this the question whether Hari Singh really stole the sale-proceeds for accused is immaterial.

"Broadly speaking, the present case is a matter for the Civil Court, on account of the accused's admission of monetary liability for the jute to Naffar Ghosh and absence of satisfactory proof of direction about sale to Jewan Mall. I hold that no criminal case lies against accused. He is acquitted under 258, Cr. P. C."

Babus Manmatha Nath Mukerjee and *Indra Narain Dey* for the Accused.

Mr. Orr for the Crown.

Babus Atulya Charan Bose and *Bir Bhusan Dutta* for the Complainant.

The JUDGMENT OF THE COURT was as follows :—

We are clearly of opinion after perusing the whole of the evidence in this case that the learned Magistrate was justified in finding that it was extremely doubtful whether this was not a Civil case brought to put pressure on the acccused to recover the money. All the arguments that have been used on the evidence to show that there was dishonest conversion and that the story of loss is not true depended upon the evidence which was given before the learned Magisirate drew up the charge on the 3rd March, and had he then acquitted the accused merely upon his own statement we should have held that such acquittal was irregular and without jurisdiction and that there could only be an order of discharge, because if the evidence before the charge was not sufficient for conviction the learned Magistrate was bound to discharge him and not to acquit him. But we find that some very significant cross-examination of the principal witnesses took place after the charge, and that in this cross-examination it appears that certain statements made by the complainant are contradicted by Babu Bepin Behary Banerjee, that there was some kind of settlement proposed and the allegation that Jiban Mal did not reject the consignment of jute in question is rendered very doubtful by the admission of the complainant himself, that Jiban Mal's man was in Court and he was not prepared to examine him, and by the manjhi's clear statement that the day before or two days before Jiban Mal had actually declined to receive the jute from this firm on the ground that it was very inferior. This jute also appears from the manjhi's statement to have been inferior, for he says that the first firm to whom the accused went to offer it refused to take more than 12 bales, because it was full of water. Now this cross-examination of the complainant and the manjhi and of Babu Bepin Behary may in our opinion have very properly affected the Magistrate's mind so as to induce him to have very grave doubts whether this case was not a case of civil nature brought for the purpose of bringing pressure on the accused to pay the money.

In appeal from an acquittal we cannot

interfere unless the judgment of the Court below is wrong and perverse, or without jurisdiction and based upon obvious errors in procedure. Nothing of the kind appears. The learned Magistrate has given his mind to the case, and even if he had been wrong his decision is one which we should be bound to uphold; because it would be based at the most on a doubtful weighing of facts and not on any irregularity or negligence, or other matter going to the jurisdiction or to the regularity of the trial.

For these reasons we must decline to interfere with the judgment of acquittal. The Appeal is dismissed.

Appeal dismissed.

[CRIMINAL REFERENCE.]

NO. 28 OF 1913, WITH APP. NO. 993 OF 1913.

HOLMWOOD, J.	THE KING-EMPEROR
SHARFUDDIN, J.	*v.*
1913,	MADAN MANDAL and ors.,
3, December.	Accused.

Criminal Procedure Code (Act V of 1898), sec. 307—Unanimous verdict, due to misdirection, of acquittal on charge of rioting, agreed to by Judge—Verdict of guilty of grievous hurt not charged—High Court, power of, on reference, to reconsider charge of rioting—Distinction between civil and criminal trespass—Criminal trespass, essential element in—Cutting across another man's land to save oneself and family from flood, if criminal trespass.

Of five accused persons, the jury unanilat..ly found one guilty under sec. 304, I.
That ... the Judge agreeing with that passed subseque him to transportation for charge and after ...r accused persons were the witnesses for th 148, $\frac{304}{149}$, $\frac{326}{149}$, I. P. irregular or without charge under sec. 326,
This was an A*j unanimously acquitted*
... of rioting and the Judge agreed with them but the jury found them guilty under sec. 326, I. P. C. The Judge made a reference to the High Court under sec. 307, Cr. P. C., on the ground that the verdict under sec. 326, I. P. C., was illegal and unwarranted by the evidence and should be altered to one under sec. 326 read with sec. 149, I. P. C.:

Held—*That, on the reference, the High Court could not consider the question of rioting in respect of which the Judge and the jury were agreed;* a fortiori *it could not consider any charge made by implication under sec. 149, although the verdict of the jury acquitting the accused of the charge of rioting was based on a misdirection as the Judge did not explain to the jury the distinction between civil and criminal trespass before telling them that the complainants had trespassed into the disputed land.*

That there being no charge under sec. 326, I. P. C., independently, there could be no verdict given upon it and the verdict of the jury finding the accused guilty under sec. 326, I. P. C., was illegal and void and must be set aside.

REAZUDDI *v.* KING-EMPEROR (1), PANCHU *v.* THE EMPEROR (2) *referred to.*

Criminal trespass depends on the intention of the offender and not upon the nature of the act, and when a man's intention is to save his family and property from imminent destruction it cannot be said that because he, with that object in view, commits civil trespass on his neighbour's land and cuts a portion of his neighbour's property (which he ordinarily would not be justified in doing) he is guilty of any criminal offence.

This was a Reference under sec. 307, Cr. P. C., dated the 16th of September

(1) 16 C. W. N. 1077 (1912).
(2) I. L. R. 34 Cal. 698 (1907).

THE KING-EMPEROR *v.* MADAN MANDAL.

1913, from W. Garlick, Esq., Additional Sessions Judge of the 24-Pergunnahs, disagreeing with the unanimous verdict of the jury who had found the accused not guilty of the charges framed against them under secs. 148, $\frac{304}{149}$ and $\frac{326}{149}$, I. P. C., but guilty under sec. 326, I. P. C.

The facts will appear from the Additional Sessions Judge's Letter of Reference, the material portion of which is set out below :—

"The jury have unanimously found one accused Kalachand guilty under sec. 304, Part I, and I have sentenced him to transportation for life. The other 4 accused were charged under secs. 148, $\frac{304}{149}$ and $\frac{326}{149}$. The jurors have acquitted them of the charge of rioting, but have found them guilty under sec. 326 without the aid of sec. 149. There was no charge against them under that section. Nor was there any wound amounting to grievous hurt that could have been inflicted by any. There is no evidence that any one of the four inflicted any particular wound. The evidence is only that these persons armed with *lathies* joined one Kalachand (who used a spear in beating Adel and Pancho). Adel and Panchu had 15 spear wounds and died from their effects. But they had only 3 *lathi* wounds between them, and it is not known who inflicted these, nor do they amount to grievous hurt.

"The conviction of these four persons under sec. 326 is therefore not only illegal because there was no charge against them, but is also unsustainable on the facts. Therefore I refer the case in order that the conviction under sec. 326 may be set aside or altered.

"The question remains whether on the finding of the jury the accused ought to be convicted under sec. $\frac{304}{149}$. The facts, as found by the jury, are these. The houses of Adel and Panchu were flooded by excessive rains. In order to get rid of the water, they cut the *ail* connecting their field with that of the accused. There was a drain in that field, but it was made by Madan himself and there is no evidence that it was ever connected with the field of Adel and Panchu. That drain led into Madan's tank but Madan had blocked the outlet. Adel and Panchu trespassed into Madan's land and at first tried to divert the drain by cutting a trench across Madan's field, and then started to cut the embankment that prevented its discharge into Madan's tank. They had no right to do this and were evidently trespassers. They were also committing mischief on Madan's land. Madan and others came and attacked him. Four had *lathies* but Kalachand had a spear and Panchu was unarmed and Adel had only a spade. The two trespassers retreated facing their assailants. All the accused fell upon them and beat them. Kalachand inflicted ten spear wounds on Adel and five on Panchu. Adel also had 2 *lathi* wounds on the head, and Panchu had one. The two fell mortally wounded and accused carried them to Madan's house and tried to save their lives. Both the men died in Madan's yard that day from the effect of spear wounds.

"On these facts Kalachand was charged with murder and all five were charged under secs. 148, $\frac{304}{149}$ and $\frac{326}{149}$. The common object set out in the charge was to cause grievous hurt to Panchu and Adel.

"Eight witnesses profess to have seen Adel and Panchu being wounded in jute field and three others saw them being carried from the field to Madan's house. If this evidence is believed, there is no doubt as to the facts of the case, and the only question is what offence was com-

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mitted in point of law. The jurors believe the evidence and I cannot venture to assert that the jury's verdict is wrong in point of fact.

"But the verdict of guilty under sec. 326 as against four accused is quite unsustainable. They were armed only with *lathies* and *lathi* wounds were not grievous. Moreover there were no charge at all against these four in respect of individual wounds inflicted by them, nor is there any evidence that any one inflicted any particular wounds. They can only be found guilty, if at all, by the help of sec. 149, I. P. C. But the jury finds they are not guilty of rioting. That finding I suppose is based on my direction that if the common object was only to eject trespassers from their field, it was not an unlawful assembly. And personally I think that view is correct and the four accused ought to be acquitted.

"But on the jury's finding these four accused ought to have been convicted under sec. $\frac{148}{149}$, I. P. C. The charge was that the common object was not to protect their rights but to cause grievous hurt. Jury has found the assembly consisted of five men and all five did in fact voluntarily cause grievous hurt and had no justification at all for doing so. There was therefore no ground at all for convicting them under sec. 326 and acquitting them under sec. $\frac{148}{149}$.

"At any rate the verdict as it stands is both illegal and was unwarranted by evidence. My own opinion is that the common object was to exercise their right of ejecting trespassers from their land, that the assembly was not an unlawful assembly and that the accused cannot be held responsible for the individual acts of Kalachand and should all be acquitted. But if jury's finding is accepted that none of the accused had any justification for beating Adel and Panchu, and that they all did in fact beat them, I think the finding of guilty under sec. 326 should be altered to one under sec. $\frac{148}{149}$."

Mr. K. N. Chaudhuri and *Babus Beni Madhab Chatterjee* and *Manindra Nath Banerjee* for the Accused.

M. Orr. for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a reference from the learned Additional Sessions Judge of the 24-Pergunnahs and an application for admission of appeal by one Kala Chand Mandal in a case in which the jury have unanimously found the accused Kala Chand guilty of an offence under sec. 304, Part I, I. P. C., and the Judge has sentenced him to transportation for life, and in the case of the other four accused persons has referred the verdict of the jury convicting them under sec. 326, I. P. C., to us on the substantial ground that the verdict is illegal, inasmuch as the accused were charged under sec. 304 read with 149 and sec. 326 read with 149 and the jury unanimously acquitted them under sec. 148 and the Judge agrees with that unanimous finding of the jury.

In his letter of reference the Judge says that the finding of the jury was he supposed based on his direction that if the common object of the assembly was only to eject trespassers from their field it was not an unlawful assembly, and personally he thinks that that view is correct and that the four accused who did not use spears ought to be acquitted. But in the end of his letter of reference he says that if the jury's finding is accepted that none of the accused had any justification for beating Adel and Panchu and they all

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in fact beat them, he thinks that the finding of guilty under sec. 326 as against Madan, Debiruddi, Syam Chand and Sup Chand should be altered to one under sec. 326 read with sec. 149.

Now this reference of the learned Judge read with his charge to the jury has thrown the whole case into a hopeless complication. At the outset the learned Judge was not right in charging the jury that Adel and Panchu trespassed into Madan's land without explaining to the jury the distinction between civil trespass and criminal trespass. If as the learned Judge says Adel and Panchu went and cut the *bund* for the purpose of saving their own house from flood they could not be held guilty either of criminal trespass or mischief. The learned Judge must know that criminal trespass depends on the intention of the offender and not upon the nature of the act; and when the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of his neighbour's property, which he ordinarily would not be justified in doing, he is guilty of any criminal offence. We can have no doubt, as the learned Judge has himself said, that the verdict of the jury acquitting the accused of the charge of rioting was due to this misdirection. But the verdict of the jury was unanimous and the Judge has agreed with it. Therefore he can make no reference under sec. 307 with regard to the verdict on the charge of rioting, and as a matter of fact he has not done so. Our hands therefore are tied. Upon this reference we cannot consider the question of rioting again, and *a fortiori* we cannot consider any charge made by implication under sec. 149, so that we are left with this result, as the learned Judge appears to have seen himself, that the verdict of the jury under sec. 326 was practically a judgment of acquittal, inasmuch as there being no charge under that section independently, there can be no verdict given upon it. If authority is required for that proposition it is to be found in the case of *Reazuddi* v. *King-Emperor* (1). That decision followed the decision in the case of *Panchu Das* v. *The Emperor* (2), though the proposition laid down in the latter case is the necessary converse and corollary to the proposition laid down in the former. Had the Local Government appealed before us we could of course deal with the Judge's misdirection to the jury and with any consequent failure in justice which might appear to have occurred. But in a reference under sec. 307 we are bound to weigh the opinion of the Judge and the jury, and we have no power to interfere with the unanimous verdict of the jury with which the Judge agrees; and the only verdict with which the Judge disagrees is the verdict which on the face of it is illegal and void and must be set aside. We are unable to see our way to substitute anything for this offence of which the jury appear to have thought that the four accused might be guilty because we are precluded now from considering the question of rioting or the question of any separate act of causing hurt with which the accused were never charged.

The result is that upon the reference we must set aside the verdict as against Madan Mandal, Sup Chand Mandal, Dabiruddi Mandal and Syam Chand Mandal and direct their acquittal and release.

(1) 16 C. W. N. 1077 (1912).
(2) I. L. R. 34 Cal. 698 (1907).

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As regards the case of Kala Chand (App. No. 993 of 1913) we can see no reason whatever for differing from the verdict of the jury or for modifying the sentence which has been passed upon him by the learned Sessions Judge. Leaving out of account the Judge's erroneous view of the law of trespass the case was one in which the accused might have been convicted of wilful murder as he inflicted no less than 15 spear wounds, ten upon Adel and five upon Panchu, and if the view of the learned Judge, that he went after Panchu to another place and deliberately speared him at a different time in a different place, be accepted it would only serve as an aggravation of his offence. We are not therefore inclined to admit his Appeal which will accordingly be summarily dismissed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 2994 OF 1910.

COXE, J.
RAY, J.
1913,
Heard, 24, July.
Judgment, 30, July.

SATCOWRI CHATTERJEE, Plaintiff, Appellant,
v.
PRIYANATH BASU and another, Defendants, Respondents.

Act XI of 1859, sec. 37—Putnidar, *purchase by, of zemindari at sale for arrears of revenue—Right to annul subordinate tenures, when* putni *registered under the act.*

The Plaintiff who was the owner of a putni *which was specially registered and so protected at a sale for arrears of revenue purchased the parent estate at a sale for arrears and sought to annul the tenures subordinate to the* putni :

Held—*That the Plaintiff was not entitled to annul the tenures subordinate to the* putni.

This was an Appeal preferred on the 5th of September 1910 against a decree of F. Roe, Esq., District Judge of Zillah 24-Pergunnahs, dated the 11th of June 1910, reversing a decree of Babu Aghore Nath Hazra, Subordinate Judge of that District, dated the 23rd of August 1909.

The Plaintiff was the holder of a *putni* protected by registration from annulment even on sale of the estate for default of revenue. The Defendants held under the Plaintiff a certain tenure, lakhiraj lands and building sites. The Plaintiff purchased the estate at an auction sale for arrears of revenue. In due course he notified by beat of drum that all incumbrances were annulled and he brought a suit for *khas* possession of the lands in the Defendants' possession. The Defendants' case was that the *putni* formerly held by the Plaintiff could not be annulled and was an absolute shield between the auction-purchaser and the Defendants' tenures and further that the Plaintiff having after the date of the confirmation of his auction-purchase received rent from the Defendants was estopped by waiver from annulling the Defendants' tenancy. The District Judge in appeal gave effect to both these contentions and dismissed the Plaintiff's suit.

Dr. Dwarka Nath Mitter for the Appellant.

Babus Basanta Kumar Bose, *Prokash Chunder Sarkar* and *Khirode Narain Bhuyan* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

In this case the Plaintiff was the owner of a *putni* that was specially registered and so protected at a sale for arrears of revenue. The parent estate fell into arrears and was sold. The Plaintiff purchased it and now sues to annul the

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NOTES.

erpretation of Hindu Wills.

No part of Hindu Law as it has developed in the nds of English Judges is more to their credit an the law relating to Hindu Wills. The authors the "Law relating to Hindu Wills" (Edition 01) were not probably very much beside the ark when they wrote: "It does not appear that *British Government* in seeking to protect the cial life of the Native races against unwelcome luences desired to arrest its natural development, to restrict growth and, as it were, to trify it. Nor does it appear that they desired prohibit the spontaneous assimilation of western eas or systems." (p. 4). The passage may wever be taken as fairly representing the titude of discriminating tolerance which the *nglish Courts* in this country and more particularly the Privy Council have taken up towards ns or ideas derived from foreign, including English, sources. But on the whole they have not favoured the introduction into the Hindu system of rules of English law of a purely technical character. In *Bhoobun Mayee's* case, 10 M. I. A. 279, the Privy Council went so far as to say "It would be to apply a very false and mischievous principle if it were held that the nature and extent of such power (power of adoption) can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on Feudal rules, regulated by Acts of Parliament and adjusted by a long course of judicial determination to the wants of a state of society differing as far as possible from that which prevails in India." Similarly, whilst upholding a power of appointment conferred by a Hindu testator, the same Tribunal in *Bai Motivahoo* v. *Bai Mamoobai*, L. R. 24 I. A. 93: S. C. 1 C. W. N. 366, uttered this warning: "They think they ought also to say that in their opinion the English law of powers is not to be applied generally to Hindu Wills."

And yet where no specific provisions are to be found in Hindu law or usage, these same Courts have never hesitated to apply the broader principles of English law to cases arising amongst Hindus and Mahomedans. In *Tagore* v. *Tagore*, I. A. Supp. 47 at p. 64, the Privy Council said "whilst however rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists." In *Nandi Singh* v. *Sita Ram*, 16 I. A. 44 at p. 47, the Privy Council adopted the principle that if an estate is limited to two jointly, the one capable of taking the other not, he who is capable of taking shall take," observing that, "this principle did not depend upon any peculiarity in English law" and was applicable to a deed of gift by a Hindu. The result of this attitude—a wholly reasonable one—is what might well have been anticipated—a steady enrichment of Hindu law by assimilation of English legal principles. It has effectually kept out the purely technical rules of English law which have not secured whole-hearted approval even in the land of their birth, though they have been unwaveringly followed in England by force

of precedent. As to others, Judges bred in the atmosphere of English law can hardly be expected to cast away, as soon as they land on Indian soil, their natural predilection for that law, and thus the Hindu law of Wills at the present day is in its structure and character more English than Indian,—whatever the learned authors cited above might say to the contrary.

The view here outlined receives strong confirmation from the judgment of Lord Moulton in *Venkata Narasinha* v. *Parthasarathy* recently reported by us (18 C. W. N. 554). In this case a Hindu left a Will whereby he authorised his two widows to make an adoption in the following words: "You should adopt a boy . . . whenever it strikes that our *samastanam* (family) should continue." The power of adoption was exercised by the surviving of the two widows after the death of the other, and the Privy Council held that on the death of one of the widows the power ceased. Lord Moulton said that the power clearly was a joint power and the occasion on which it was to be exercised depended on the joint opinion of the two widows;" and his Lordships proceeded: "Now it is clearly the law that in such a case the death of one of the donees puts an end to the joint power. This is not by virtue of any peculiar doctrine of English law or of any series of English decisions, it flows from the very nature of a joint power."—conferred, as here, on *personæ designatæ* and not on the occupants for the time being of a specified office, such for instance as executors or trustees. To demonstrate this completely his Lordship proceeded to paraphrase the words of the power in terms which would "not involve any appeal to legal doctrines as to joint donees of a power." The words of the power, his Lordship said, related to choice and adoption by two widows acting jointly. "Hence the words refer only to the period of time when both widows were living. It (the Will) was silent as to the period after the death of one of them." The power in this case being contained in a Will, to hold that the surviving widow could exercise it would (his Lordship said) be to provide for a period which the testator left unprovided for and unnoticed in the Will. For ourselves, we are not sure that the power being given by Will made any real difference. If it had been given by a non-testamentary instrument, the very same considerations would have applied, and it would have been impossible to avoid reference to legal doctrines as to joint donees of a power in the manner his Lordship has sought to do in the present case.

Lord Moulton's judgment, however, is of importance not merely for supplying one more illustration of the method by which the Hindu law has enriched itself by cautious assimilation into its system of rules and principles of English origin but also because it contained what appears to us to be the completest statement to be found anywhere of the principles of interpretation of Hindu Wills. His Lordship in the course of his judgment observes:

In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i. e.*, to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure—"The Court is entitled to put itself into the testator's armchair." Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably and in many cases certainly present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal and is true alike of Will of every nationality and every religion or rank of life.

After having laid down this "universal" principle of interpretation of all Wills, his Lordship proceeded to indicate its bearing on certain rules which are supposed to be specially applicable to Hindu Wills.

The fundamental principle does not clash with the principle that the Court Will not necessarily apply English rules of construction to such a Will as we have here to deal with. These rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *primâ facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or the surrounding circumstances, the Court can same to the conclusion that it is there used in a different sense In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of immediate vesting of an estate. Such rules are purely an English product based on English necessities and English habits of thought, and there would be no justification in taking them as our guide in the case of Indian Wills. Nor does this fundamental principle clash in any way with what is sometimes called "giving a liberal interpretation" to native Wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the "surrounding circumstances" which the

ourt must bear in mind, and it is justified in refusing to llow defects in expression in these matters to prevent the arrying out of the testator's true intentions. But those itentions must be ascertained by the proper construction of ie words he uses, and once ascertained, they must not be eparted from.

Applying these principles to the case, his Lordhip overruled the centention in support of the option that the testa'or being a Hindu must ave wished at all events to have a son to offer ıneral oblations to his spirit after his death, and ıat therefore the most reasonable interpretation f the power from the point of view of a Hindu as to hold that, failing both, one of the widows ıould adopt. This argument, it appears to us, one which cuts both ways. If a childless Hindu s supposed to be so completely dominated by the ligious motive, why should he not have adopted son in his life-time, and why should he leave it his widow or widows to fulfil or defeat his ıerished desire as suited her or their own discreon ? The language of the Will, in his Lordship's pinion did not indicate an overmastering desire the part of the testator of procuring a son for iritual purposes. It was held that the main otive of the power was the very secular one of rpetuating the family name by the adoption of near relation and it was left entirely in the disetion of his two widows whether this should be ne or not. Further that discretion they were rected to exercise jointly. The decision of the ivy Council accordingly was that the adoption the surviving widow was not made in exercise the power. In this view, their Lordships found unnecessary to decide the further question, ıether a power of adoption given to more than e wife jointly is a valid power under Hindu w. Had this question too been decided by their rdships, the decision would have taken rank t merely, as it will do, as a leading case on the erpretation of Hindu Wills but also as a leading e on the Hindu Law of adoption. But the dicial Committee is always very rightly reluctant record mere *obiter dicta* which often cause much barrassment to Courts when called upon to ide a case directly involving the issue.

-payment of Counsel's Fees.

The following editorial note in the columns of English *Law Journal* regarding counsel's fees l be found of interest by barristers and attorneys ctising in the High Courts in India.

Barrister's fee, by a tradition that is now deeply rooted practice, is an *honorarium*; it cannot be recovered by l process. All the more important is it, therefore, that honourable obligation which the great body of solicitors erve as to the due remuneration of counsel should be ed against those who do not. A case was brought the Divisional Court by the Law Society last week shows that the Court, no less than the Discipline Commitee, is ready to mete out proper treatment to solicitors who are unduly dilatory in the payment of counsel's fees. The solicitor, having instructed a barrister to appear in two cases at the same sessions, received from the Clerk of the Peace the fees due to him but claimed when some nine months afterwards formal application was made for the fees by the barrister, that he was entitled to retain them for an indefinite time. This was the position he adopted before the Discipline Committee, before whom, at the instance of the barrister, the question was eventually brought, but the Committee, regarding such an attitude as improper, held that he had been guilty of professional misconduct Before the Divisional Court this untenable position was abandoned. On the understanding that the fees were paid forthwith, the Court, induced, in the words of Mr. Justice Rowlatt, to take a 'lenient view,' merely ordered the solicitor to pay the costs of the inquiry before the Committee and before the Court. Here, it will be observed, the fees which the solicitor kept so long in his own hands were paid by a public authority, but that is not a material fact. A similar order was made by the Divisional Court some five years ago against a solicitor who, having received the amount of counsel's fees from an ordinary client, was found guilty of a desire to delay their payment. It would, however, be an ill thing for the interests of the profession as a whole if dishonourable neglect to pay counsel's fees were not regarded as professional misconduct, and it is gratifying to find that the Divisional Court, as indicated by the 'lenient view' it took in the present case, is prepared, if necessary, to adopt more severe measures against practitioners who are guilty of these irregularities.

CURRENT INDIAN CASES.

(CIVIL.)

Court Fees Act (VII of 1870), sec. 17, Sch. 1, Art. 1.

RAGHUBIR PROSSAD *v.* SHANKAR BAKSH SING, I. L. R. 36 All. 40 (F. B.)

In a suit for redemption or foreclosure the Court fee is payable on the principal amount secured by the mortgage. But that applies to the suit which is instituted in the Court of first instance. In the case of an appeal the Court-fee payable is an *ad valorem* Court fee on the value of the subject-matter of the appeal.

Vakalatnama.

MUHAMMAD ALI KHAN *v.* JAS RAM, I. L. R. 36 All. 46.

An appeal against the decision of a Munsif was filed by a vakil whose name was by an oversight omitted from the *vakalatnama*. The Judge remanded the case to the first Court for the trial of certain issues. After the Munsif returned his findings the case was again remanded and after the Munsif submitted his second finding a preliminary objection was taken to the competency of the appeal on the ground of the defect in the *vakalatnama*.

Held—That the appeal was not properly filed and the fact that the objection was not taken till a very later stage in the case would not validate the presentation of the appeal.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD SHAW.
LORD MOULTON.
LORD PARKER.
1914,
20, March.

M. M. JAWAD
v.
THE KING.

Special leave—Criminal case.

This was a petition for special leave to appeal from a conviction and sentence of three years for the offence of perjury. The Petitioner was a barrister at-law of the Honourable Society of the Middle Temple and an Advocate of the Chief Court of Lower Burma. He was convicted on 4th August 1911 of perjury by the Magistrate and the order was confirmed by the Sessions Judge and by the Chief Court which however reduced the sentence. By reason of the conviction his name was struck off the Roll of Advocates of the Chief Court, and the Benchers of the Middle Temple also took action against him. He had served his sentence.

Mr. F. E. Smith, K. C., with him *Mr. McCarthy*, submitted on his behalf that the conviction was based on a great deal of hearsay and irrelevant evidence, which ought not to have been admitted at the trial, and that the remaining evidence was not enough on which a jury could reasonably find him guilty. During the argument reference was made to *Dillet's* case, *Pillai's* case and *Clifford's* case.

Their Lordships rejected the petition.

Bramall & White, Solicitors for the Petitioner.

B. D.

PRIVY COUNCIL.

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD SHAW.
LORD MOULTON.
LORD PARKER.
1914,
20, March.

HIRJIBHAI NORROJI ANKLESARIA and another,
v.
JAMSETJI NUSSERWANJI GINWALLA and others.

Special leave—Appealable value—Limitation—Fraud.

This was a petition for special leave to appeal against a judgment and decree dated the 19th September 1912, which reversed the appellate judgment of the District Judge of Broach. The judgment of the High Court is reported in 15 Bombay Law Reporter p. 921. The suit was filed on the 21st June 1909 for an account of the assets of a testator who died in 1885. The Court of First Instance held that it was barred by limitation. The Plaintiff's contention was that the suit was within time, it having been filed within 3 years from the date of their discovering the fraud that had been practised upon them and their mother. The District Judge on appeal allowed the Plaintiff's claim. The High Court held that the facts found by the District Judge did not warrant the application of Article 95 of the limitation Act 1877, and that the suit was therefore barred. The High Court further refused the necessary certificate to the Plaintiffs to enable them to appeal to His Majesty in Council on the ground that the subject matter of the suit in the Court of First Instance, and of the Appeal was Rs. 10,000.

Mr. G. R. Lowndes for the Petitioners submitted that the subject matter of the suit was in fact of the value of upwards of Rs. 10,000, and that the High Court failed to appreciate the findings relating to fraud come to by the first two Courts, and that the suit was not barred by limitation.

Their Lordships rejected the petition with costs without hearing *Mr. L. DeGruyther, K. C.*, and *Mr. K. Brown* who appeared for the Respondents.

B. D.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
LORD MOULTON.
MR. AMEER ALI.
1914,
4, March.

A. H. FORBES,
v.
MAHARAJ BAHADUR SINGH and others.

Bengal Tenancy Act, secs. 65, 66, 148 (h), *195*—Putni, *sale of—Suit by vendors for back rents after sale—Proceeding under Reg. VIII of 1819 against vendee—Payment of arrears due to zemindar by* dar-putnidar—*Statutory lien on* putni *in favour of* dar-putnidar—*Vendor's decree if first charge and prior to* dar-putnidar's *lien.*

Their Lordships in reversing the judgment of Rampini and Sharfuddin, JJ., reported in I. L. R. 35 Cal. 737, *held*, that (1) the right to bring a tenure or holding to sale under sec. 65 appertains exclusively to the landlord, and a person to whom certain rents are due and who obtains a decree therefor after he has parted with the property in which the is situate has no such right.

(2) That the idea underlying the judgment of the High Court, that either from the nature of the debt being for arrears of rent or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt, is untenable. *Khetra Pal Singh* v. *Kritartha Moyi Dassi*, I. L. R. 33 Cal. 566 : s. c. 10 C. W. N. 547, distinguished.

(3) The special lien acquired by a *dar-putnidar* who has made a deposit under sec. 13 of Reg

VIII of 1819 is under sec. 195 of the Bengal Tenancy Act, exempt from any proceeding under the Tenancy Act.

Mr. L. DeGruyter, K. C., and *Mr. Dunne* for the Appellant.

Sir Robert Finlay, K. C., and *Mr. Ross* for the Respondents.

Appeal allowed.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No 1965 OF 1913. BHUTI SAHA Petitioner *v.* KING EMPEROR, Opposite Party, The 23rd January 1913.

Sitting of Court at late hour of night.

This was a Rule against the order of the Sub Divisional Magistrate of Thakurgaon dated 6th day of November 1913 directing the Petitioner under sec. 110 Cr. P. C. to execute a bond of Rs. 500 with two sureties for the same amount each to be of good bahaviour for 1 year or, in default, to undergo rigorous imprisonment for one year, an appeal from which order was dismissed by the District Magistrate of Dinajpore on 8th December 1913.

Their Lordships delivered the following judgment in this case

This was a Rule calling upon the District Magistrate of Dinajpur to show cause why there should not be a further cross-examination of the witnesses for the prosecution on behalf of Bhati Saha before the final order is passed on the ground that the proceedings took place at an hour of the night which is not recognized as Court hours and why any defence witnesses who could be shown to have been present should not be heard.

On reading the explanation of the Magistrate and hearing the learned Counsel for the Petitioner we do not think the case made in the petition is established, and we wish to emphasize that it is for those who seek our interference in revision to make out a clear case. The position is very much the reverse to that of an appeal.

The petition of the 6th of November does not show that there was any objection to the lateness of the hour, or that the Petitioner was unrepresented. We see that there was cross-examination of every witness who named Bhuti Shaha, on his behalf. *Mukhtearnamas* are on the record. There is nothing to show that the gentleman who cross-examined for Bhuti Shaha were not authorized to do so. There is nothing to show that any witnesses present for Bhuti Shaha were not examined, and the terms of the Rule show that unless this is established the second point would fail. On the contrary the Magistrate tells us that every witness tendered was examined, and we see that two defence witnesses did actually speak for Bhuti Shaha. None of the other seven accused have ever made any complaint of the trial, and although we do not in any way uphold the practice of sitting after dark unless lights are provided for the bar, in this case there appears to have been an acquiescence in the practice which has unfortunately become too frequent in the Sub-Division owing to the large amount of work which a single officer has to get through, and as there has evidently been an attempt to drive the Magistrate into a corner by misuse of his own excessive kindness in granting adjournments and the appellate Court finds that attempts were made to tamper with the witnesses during the longest adjournment, we must decline to interfere.

The age of the Petitioner which is actually 62 though he is stated to be an old man of 70 does not appear to us to be relevant in this connection.

It not being established that any witnesses who were present were not examined and the lateness of the hour having been satisfactorily explained we must discharge this Rule.

The Petitioner will now be liable to furnish security which he has been called upon to furnish or in default be imprisoned as ordered.

Mr. K. N. Chaudhuri and *Babu Girija Prosanna Sanyal* for the Petitioner.

CRIMINAL REVISIONAL JURISDICTION. Before IMAM AND CHAPMAN, JJ, Rev. No. 896 OF 1913. SAYED ABDULLAH ARAB, Petitioner, *v.* LALIT MOHAN MAZUMDAR, Opposite party. 29th August 1913

Criminal Procedure Code (Act V of 1898), sec. 439—Enhancement of sentence on the application of complainant.

Sentence of a fine of Rs. 25, in default a fortnight's rigorous imprisonment was passed on the Opposite party, on his conviction of an offence under sec. 323 I. P. C. by Babu Hari Charan Das, Deputy Magistrate of Maldah.

The Petitioner was a passenger in a 3rd class railway carriage from Katihar to Calcutta. When the train reached Harishchandrapur station the accused who was the assistant station-master tried forcibly to make the Petitioner get down from the carriage on the ground that the carriage had been reserved and in so doing caused hurt to the Petitioner. On the complaint of the Petitioner the accused was placed on his trial and convicted under sec. 323, I. P. C., and sentenced to pay a fine of Rs. 25, in default to suffer rigorous imprisonment for a fortnight. The accused was also directed to pay Rs. 13-4 as costs to the complainant and out of the fine the sum of Rs. 20 was ordered to be paid to complainant as compensation. The Magistrate found that the Petitioner

did suffer from bodily pain by the act of the accused. The Petitioner moved the High Court for enhancement of the sentence passed on the accused and a Rule was issued by Imam and Chapman, JJ., to show cause why the sentence passed upon the Opposite Party should not be enhanced on the ground that the sentence passed under sec. 323 I. P. C., was too light having regard to the gravity of the offence and wanton nature of the assault. At the hearing of the Rule the Vakil for the Opposite Party took the objection that the Petitioner had no locus standi to press for enhancement of sentence and that the Government or any competent officer on its behalf should have been moved in the matter. It was contended for the Petitioner that he had brough the matter to the notice of the Court which had ample power to interfere if it was satisfied that justice had not been done in the case.

Their Lordships overruled the objection and on a consideration of the whole case made the Rule absolute and passed the following order.

We think that the sentence passed on the Opposite Party, Lolit Mohon Mazumdar, in this case has been inadequate. But we understand that he has lost his appointment. Regard being had to that fact we refrain from enhancing the sentence of fine to one of imprisonment. But we are of opinion that the fine in this case should be Rs. 100 (Rupees one hundred) out of which, if realised, a sum of Rs 50 (Rupees fifty) should be given to the petitioner as compensation and we order accordingly.

We are informed that out of the fine of Rs. 25 originally inflicted, a sum of Rs. 20 was allowed as compensation. By this order we enhance the the fine from Rs. 25 to Rs. 100 and raise the amount of compensation from Rs. 20 to Rs. 50. In the event of a failure to pay the fine, Lolit Mohun Mazumdar will undergo rigorous imprisonment for one month.

The order of the Magistrate regarding costs remains untouched.

The rule is made absolute.

M. Wahed Hossain Babu Hit Lal Guha, for the Petitioner.

Babu Monmotha Nath Mukherjee, for the opposite party.

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD AND SHARFUDDIN, JJ. REV. No. 197 OF 1914. MURALIDHAR LAHA Petitioner *v* JOGESH CHANDRA MITRA Opposite Party. The 26th February 1914.

Excise Act (1 E B. and A. of 1910) sec. 53 (a)—*Illicit sale of exciseable article—Ice cream mixed with* bhang—*Duty of prosecution to prove exciseable nature of article sold—Necessity for expert evidence.*

This was a Rule against an order of Babu Hari Charan Das, Deputy Magistrate of Maldah, dated the 25th September 1913, convicting the Petitioner under sec. 53 (*a*) of the Excise Act I of 1910 (E. B. and A.) and sentencing him to pay a fine of Rs. 20.

Petitioner appeared in person when he obtained the Rule. No one was present at the time of the hearing of the Rule.

The Magistrate's Judgment was as follows :—

"The complainant who is the Excise clerk deposed that the accused sold him three pice worth of preparation of *sidhi* and ice-cream in the Excise Office yesterday at about 5 P. M. Sasi Bhusan Jha, Income tax clerk, has supported the statement of the complainant regarding sale of the preparation for which the accused was paid three pice.

"I find that the sale of the preparation of *bhang* and ice-cream has been satisfactorily proved and I find the accused guilty under sec. 53 (*a*) of the Excise Act of 1910 (E. B and A.)"

Their Lordships delivered the following judgment :—

This Rule must be made absolute on the ground on which it was issued There appears to be no evidence whatever that *sidhi* or *bhang* was mixed with the ice cream We would point out to the learned Deputy Magistrate who tried the case that statement of a clerk in the Excise Office that he bought three pice worth of preparation of *sidhi* ice-cream is not evidence establishing that the pound contains *sidhi* and we should also point that it is not for the defence to show that there no *bhang* in the ice cream. It is for the cution to establish that fact affirmatively. It is perfectly clear that in cases of this kind expert evidence must be examined to show the presence of any deleterious or exciseable article.

The conviction and sentence are set aside and the fine if paid must be refunded.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and CHATTERJEE, J. LETTERS PATENT APPEAL No. 95 OF 1913. BADIAHANNESSA BIBI, Defendant No. 2, Appellant *v.* AMBICA CHARAN GHOSE, Plaintiff, Respondent. 27th March 1914.

Purdanashin *lady—Deed, execution of—Mahomedan family—Burden of proof—Undue influence—Third party—Indian Contract Act (IX of 1872), sec. 16.*

The suit was brought by a mortgagee against a man and his wife, a Mahomedan *purdanashin* lady, on a mortgage bond. The transaction was one from which the wife derived no direct benefit for herself, as she was giving a mortgage by way of security for her husband.

At the time when the document was executed the lady was living with her husband, and it was found as a fact by the lower Appellate Court that

she evidently acted under the influence of her husband in consenting to mortgaging her house for her husband's debt.

The Plaintiff was a mukhtear and he was present on the only occasion when the contents of the document were read. The husband whose undue influence procured the execution of the document by his wife, was present when the reading of the document and explanation took place. The mortgagee knew that.

Held, that the burden of proving that the deeds taken from *purdah* women have been fairly taken, that the party executing them has been a free agent and duly informed of what she was about, rests on him who claims against the *purdanashin* lady.

Girish Chunder v. *Bhuggobutty* (13 Moo. I. A. 419) referred to.

An undue influence which may affect a *purdanashin* lady's understanding of a document may proceed from a third party.

Bank of Montreal v. *Stuart*, (1911) A. C. 120, referred to.

Held—That the findings in this case fell short of establishing that the mortgage was fairly taken or that the lady executing it was a free agent duly informed of what she was about, and it had not been shown that any independent person free from any taint of the relationship, or of the consideration of interest which would affect the act had been consulted that it, was not put before the lady what were the nature and consequences of the act, and the advice, if advice was given, was not removed entirely or at all from the suspected atmosphere, nor had the lady an opportunity of learning from the clear language of an independent mind, precisely what she was doing.

Babus Mahendra Nath Roy, *Brajendra Nath Chatterjee* and *Shyam Lal Bose* for the Appellant.

Babus Ram Chunder Mojumdar and *Sajani Kant Singh* (for *Babu Debendra Nath Bagchi*) for the Respondent.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEAL No. 11 OF 1913. SACHINDRA KISHORE DEY AND OTHERS, Defendants, Appellants *v.* RAJANI KANTA CHAKRAVARTY, Plaintiff, Respondent. 2nd April 1914.

Limitation Act, Art. 141—Property of Hindu inherited by two daughters—Dispossession by stranger—Death of one daughter—Other daughter if succeeds by inheritance or survivorship—Suit for recovery—Limitation.

This was an appeal by the Defendants. It arose out of a suit for recovery of possession on declaration of title. The material facts are as follows: One Kirti Narain died in 1865, leaving behind him two married daughters named Harasundari and Kasiswari, who were his legal heirs and a widowed daughter-in-law, named Umatara. Umatara after having been in possession of the estate left by Kirtinarain for over 12 years to the exclusion of his two daughters, sold away the same by a registered *kabala* to the Plaintiff's father in 1886. The Plaintiff, who had succeeded to the property after his father's death, was dispossed in 1909, by Kasiswari and her two sons, (who were the Defendants in this suit) Harasundari having died in 1899, without having either taken possession of, or, effecting a partition of, the inheritance. The Court of first instance decreed the suit to the extent of a moiety share of the lands. The lower Appellate Court decreed the whole suit and that decree was affirmed by Mr. Justice D. Chatterjee on second appeal.

It was contended for the Appellant that so far as the moiety share of Harasundari was concerned, it passed, after her death in 1899 to Kasiswari, who was entitled to the benefit of Art. 141 of the Limitation Act, as the next reversioner and that the Plaintiff was not entitled to recover the same. For the Respondent it was submitted, on the authority of the ruling of the Privy Council in the case of *Amirtalall* v. *Rajanikant*, L. R. 2 I. A. 113, that the two daughters succeeded to the estate of their father as joint-tenants, and that Kasiswari took by survivorship the share of Harasundari on her death, and that she, not being a reversioner, could not have the benefit of Art. 141 of the Limitation Act.

Held, the two daughters succeeded to the estate of their father as joint-tenants and not as tenants in common, and Kasiswari having taken by survivorship the share of her sister on her death, could not have the benefit of Art. 141 of the Limitation Act. *Amirtalall* v. *Rajani Kant*, L. R. 2 I. A. 113 followed.

Babu Gobindra Chandra Dey Roy for the Appellants.

Babu Sasank-jiban Roy for the Respondent.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION. Before COXE and D. CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE No. 37 OF 1912. THAKUR NATH, Defendant, Appellant *v.* GIRIJA NAND JHA AND OTHERS, Plaintiffs, Respondents. 8th April 1914.

Ejectment—Notice to quit—Licensee, if entitled to notice.

Babu Mahendra Nath Ray who appeared for the Appellant in opening stated that the Appellant Defendant who was a Sadhu, had been on the land for several years, and had improved it.

When a criminal proceeding was instituted against him by the landlord, a *chitta* was given to him confirming his possession by a 4 as. co-sharer landlord. The *chitta*, though not registered, ought to have been admitted in evidence. He was a licensee under the 4 as. co-sharer landlord and no trespasser hence notice to quit should have been given to him. Referred to Foa's "Landlord and Tenant," 4th Ed. pp. 9 and 603. Unless the license is determined by reasonable notice or otherwise, he cnn not be ejected. See I. L. R. 16 Mad. 97.

Dr. Dwarka Nath Mitter for the Respondents contended that mere possession did not give one any right to notice to quit. Brown and Shepherd, Transfer of Property Act, p. 353. Here all the landlords have joined to eject him as tres asser. Even if the Defendant were supposed to be a licensee, he was not entitled to notice *Kuch* v. *Hall*, Smith's Leading Cases, p. 494.

Held—That a licensee was not entitled to notice to quit in an action in ejectment.

K. M. G. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before FLETCHER AND RICHARDSON JJ. APPEAL FROM APPELLATE ORDER NO. 125 OF 1913. JUGAL KISHORE MARWARI AND ANOTHER, Decree-holders, Appellants *v.* CHINTAMONEY ROY AND ANOTHER. Judgment-debtors, Respondents. 15th April 1914.

Limitation—Step in aid of execution.

This appeal arose out of an application for execution of a decree which the decree-holders obtained on 14th April 1903 against the judgment debtors in the Munsif's Court of Gobindapur, District Manbhum. The first application for execution was filed on 23rd July 1903 and it was dismissed for default on 5th September, 1903. The second application for execution was filed on 9th July 1906. Notice for service of process on the judgment-debtors was issued on 21st July 1906 and service of notice was actually made on 27th July 1906 and one of the decree-holders actually went with the peon to serve the notice and identify the judgment-debtors on 27th July 1906. The case was dismissed on 4th August 1906, as no affidavit of service was filed, and the order passed on that date was "service of notice not proved. Case dismissed infructuous." The third application for execution was filed on 27th July 1909. The office submitted a note that the application was barred and on 28th July 1909 the decree-holders were ordered to shew within a fortnight why the application should not be treated as having been time-barred. On 9th August 1909 the Court passed the following order "having regard to rulings reported in 22 W. R. 484 and 23 W. R. 195, I order the petition to be registered." On 4th September the following order was passed "service of notice not proved. No steps taken. Case dismissed, infructuous." The fourth application for execution was filed on 24th April 1911 in the Munsif's Court at Amta within District Hughli after having been transferred from the Munsif's Court at Govindpur where the three previous applications for execution were made. The judgment-debtors pleaded that the present application for execution is not maintainable as the third application was time-barred, having been filed more than three years after 21st July 1906, the date of issue of notice to the peon in the course of the second application for execution. The first Court held that the present application is not time-barred as the order of the executing Court on 9th August 1909 holding that the said application for execution was not time barred is a judicial order and in face of the said order he cannot go into the question of limitation relating to the application of 1909. On appeals the lower Appellate Court held that the application was barred by limitation. The decree-holders thereupon preferred this second appeal.

On behalf of the Appellants it was contended that on the authority of *Mungul Prosad Dichit* v. *Girja Kant Lahiri*, I. L. R. 8 Cal. 51 (P. C.), the case is not time-barred. The order passed on 9th August 1909, was a judicial order and so long as it was not set aside, the judgment-debtors cannot raise the plea of limitation. It was also contended that 27th July 1906 should be considered as the starting point for limitation as on that day the decree-holders by accompanying the peon for service of process on the judgment-debtors took some step in aid of execution of the decree and in that case the third application for execution was within time.

Held—That the order passed on 9th August 1909 is not binding on the judgment-debtors as the said order was not passed after notice to the judgment-debtors and that they are entitled to raise the plea of limitation in the present case. That 27th July 1909 the date on which the decree-holders accompanied the peon to serve the process and identify the judgment-debtors was not the starting point for the period of limitation as such act does not constitute a step in aid of execution.

Babu Atul Krishna Ray for the Appellants.
Babu Jadu Nath Kanjilal for the Respondents.

A. T. M. *Appeal dismissed.*

SATCOWRI CHATTERJEE *v.* PRIYANATH BASU.

tenures subordinate to the *putni.* The lower Appellate Court has dismissed the suit and hence this Appeal.

In my opinion the lower Appellate Court is right. Several cases have been cited to show that the *putni* merged in the zemindari at the sale. The Plaintiff himself did not take this view as he afterwards sold an interest in the *putni.* And the point of law is by no means free from doubt. But whether the doctrine of merger applies to such transactions or not, no authority whatever has been shown us for holding that it can prejudice the rights of innocent strangers. If any one else had purchased the zemindari the present Defendants would have been safe. If the Plaintiff had surrendered the *putni* they would have been safe. It seems unreasonable to hold that the only contingency that destroys their rights is the purchase of the zemindari by their immediate landlord by whose predecessors-in interest their tenures were created.

If this view is correct it is unnecessary to deal with the other points raised in the Appeal. The Appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
LORD MOULTON.
MR. AMEER ALI.
1913,
Heard, 8, and 9, December.
1914,
Judgment, 2, February.

BIJOY GOPAL MUKERJI and ors., Appellants,
v.
GIRINDRA NATH MUKERJI and others, Respondents.

*Hindu Law—Alienation by widow—Consent of reversioners, evidence of legal necessity—*Ijara *for 60 years, executed to save property from destruction owing to litigation—Expectant reversioners taking the benefit of the lease, conduct showing sanction to alienation.*

S, a Hindu widow, who came into possession of her husband's estate on his death in 1832 as his sole heiress, was dispossessed by one of her husband's relations B, against whom and his brothers one of whom was A, she brought a suit for recovery of possession which was finally decided in her favour by the Privy Council in 1858. Being still unable to get possession, and as meanwhile adverse rights were (under the Limitation Act then in force) accruing in favour of persons in actual possession who refused to pay rent under the pretext that the title had not been settled, S in 1863 entered into an arrangement with the expectant reversioners, under which inter alia *a 60 years'* ijara *was granted to two of them one being A. The term was fixed at 60 years to facilitate practical settlement of the property so as to obtain its full value, though S being then 42 years old, it was evident to all concerned that the* ijara *would extend beyond her lifetime. A died in 1882 and S in 1893, whereupon A's sons who from 1882 to 1893 as A's heirs took the benefit of the arrangement sued to set aside the* ijara :

Held, affirming the High Court, *that the arrangement of which the* ijara *formed part was dictated by the necessities of the case, and the choice of the term of 60 years as the term of the* ijara *was made for the benefit of the estate and did not injure any one.*

That the conduct of the Plaintiffs themselves in taking for 11 years the benefit of the ijara *showed that they believed that the arrangement had been made in good faith and under such circumstances of necessity as would give it validity according to Hindu Law.*

BIJOY GOPAL MUKERJI *v.* GIRINDRA NATH MUKERJI.

That the Privy Council attached great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence of legal necessity, and the conduct of the Plaintiffs could be relied on as such evidence.

This Appeal raised the question whether an *ijara* executed by a Hindu widow for a term of 60 years was binding on the reversioners after her death. The facts sufficiently appear from their Lordships' judgment and the judgment of the High Court (Caspersz and Coxe, JJ.), dated the 4th June 1908, which was as follows:—

"The points arising for determination are: *first*—Whether Sayamoni Debi executed the ijara, dated the 7th September 1863, for legal necessity and whether, for any other reason, the *ijara* does or does not bind the present reversioners; *secondly*,—whether the doctrine of ratification bars the suit; and, *thirdly*, whether the suit is defective, because the Plaintiffs seek to recover not the whole property, but a ¾ths share of same.

"The third contention may be dismissed in a few words. The Plaintiffs did not sue to set aside the *ijara* but to recover possession of their share of the immoveable properties in dispute, and in accordance with the view adopted by the Judicial Committee on the question of limitation the suit cannot be defeated because the Plaintiffs did not sue to recover the entire property of Chandra Bhusan Mukerji.

"The facts do not appear to be seriously disputed, and learned Counsel and the learned Vakils representing the different parties in this and the other appeals, have argued on the inferences to be drawn from the facts and on pure questions of law. Sayamoni Debi brought her suit in 1844 not only against Baman Das Mukerji, but also against Annada Prasad Mukerji, the father of the Plaintiffs, and Gouri Prasad Mukerji, the father of Sarada Prasad Mukerji, and she was assisted by her cousin Umesh Chandra Roy, otherwise known as Moti Babu to whom she, on the 25th November 1851, gave an ekrar which is printed at page 227 of the paper-book in Appeal No. 71 of 1899 It was recited in that ekrar that the lady had become indebted to the extent of Rs. 38,000 for which she had executed a mortgage bond in favour of Umesh Chandra Roy's brother, Bhagaban Chandra Roy. She undertook to pay Rs. 50,000, including the previous Rs. 38,000, with interest at the rate of 12 per cent. per annum. when she had realized the costs and mesne profits due to her under the decree of the Sudder Court, and she gave security for that amount. This ekrar was entered into shortly after the decree of the Sudder Dewani Adalat, in favour of Sayamoni Debi, passed on the 30th September 1850. The litigation continued until the decree of the Privy Council (in 1858) to which we have already referred.

"There can be no doubt as to the *bonâ fides* of the claim advanced by Sayamoni Debi and the fact cannot be controverted that she had been involved in protracted litigation for the attainment of her just rights and the rights of her husband's reversioners.

"After obtaining her decree from the Privy Council Sayamoni Debi recovered possession of the three properties mentioned in the *ijara* of the 7th September 1863, where it was recited that she was in possession of those properties by collecting rent. Reading the *ijara* we find that Sayamoni Debi leased for a term of

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60 years the whole of the taluks, indigo factories, gardens, tanks, &c., described in the schedule, possession of which had not been taken, together with the three properties possession of which had been recovered. The lessees undertook to pay Sayamoni a balance of Rs. 5,300 annually after paying the Government revenue amounting to Rs. 7,030 odd. They, also, undertook to assist Sayamoni in duly executing the decree of the Privy Council and she covenanted that she would do so. The arrangements were embodied in the *ijara* lease and the ekrarnamas, Exs. A and A (2)—all of the same date. At that time the lessees Annada Prasad Mukerji and Sarada Prasad Mukerji were disputing with Baman Das Mukerji But they adjusted their differences in the year 1866 when Baman Das Mukerji took a *dar-ijara* of the ⅓ d interest in the *ijara* of the 7th September 1863 This *dar ijara* was in the name of Baman Das Mukerji's son, but there can be no question that Baman Das was the person beneficially interested. The Defendants Nos. 9 to 13, the Appellants in the present appeal, derive their title, as we have already stated, from Baman Das Mukerji.

"The Plaintiffs did not bring the suit in their capacity of sons of Annada Prasad, one of the original *ijaradars*, but as the reversionary heirs of the husband of Sayamoni Debi, who granted the *ijara*. But in considering the circumstances in which that *ijara* was granted we cannot shut our eyes to the fact that the Plaintiffs are standing upon a technical legal right and not upon any equities affecting the welfare of the descendants of Mahadeb Mukerji, who effected the partition in the year 1814.

"We have already observed that the Subordinate Judge decreed the suit for all properties with the exception of certain properties lying within the districts of Mymensingh and Faridpur, the claim to which in his opinion could not prevail, because the Plaintiffs had ratified the *ijara* in respect of those properties after Sayamoni's death in 1893. On the question of legal necessity the Subordinate Judge held that the *ijara* was at most a beneficial arrangement not amounting to legal necessity in the sense in which that expression is used in Hindu Law. It will be convenient to consider this question first.

"The doctrine of legal necessity has been elaborated in a series of judicial decisions. Each case must be judged upon its own facts. There can be no doubt that when Sayamoni entered into the arrangement with Annada Prasad Mukerji and Sarada Prasad Mukerji, her fortunes were at a very low ebb. She was in debt and her cousin Moti Babu and her gomashta had been convicted by a Criminal Court in connection with some case arising out of an attempt to execute decrees for rent in the property of which she had obtained nominal possession. The *ijara* arrangement turned out to be eminently successful because her principal opponent Baman Das Mukerji took a *dar-ijara* in the year 1866 and the numerous parties who have been impleaded in the present litigation, or rather, such of them as were then alive, regarded the *ijara* as a sound and honest disposition of her property by Sayamoni Debi. It can be said that, as the term of 60 years was evidently beyond the then expectation of life of Annada Prasad and Sarada Prasad, it may be reasonably inferred that they considered it a beneficial arrangement not only for themselves but for their descendants. A sense of peace and security was induced.

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For thirty years, until the death of the widow in 1893, derivative titles were created and acted upon. The Plaintiffs must establish a very strong case indeed to induce a Court of justice, equity and good conscience to set aside a beneficial arrangement of this kind and one that has had such far-reaching consequences.

"For the Plaintiffs it has been argued that Sayamoni Debi was coerced by cruel necessity into granting the *ijara* and that she might very well, if she had been desirous of parting with her life estate, have granted it for the term of her natural life and not for 60 years. We, however, think that the very fact that the term actually adopted was sixty years and not the uncertain space of human life is a very strong indication that all the parties interested sought to make a definite arrangement possessing the best elements of finality, and, if we find that the arrangement was for the benefit of the estate, and did actually benefit the estate, we should apply and even broaden the principle adopted in the case of *Dayamani Debi* v. *Srinibash Kundu* (1). There it was said that a Hindu widow, as regards her management of the estate, has not less power than the manager of an infant's estate and that the reversioners were not entitled to set aside permanent leases granted by her which were found to be beneficial to the estate and by which they were found to have been benefited. The principle is based upon the decisions of their Lordships of the Judicial Committee and it was applied in *Venkaji Shridhar* v. *Vishnu Babaji Beri* (2), where Sir C. Sargeant, C. J., said: "A widow like a manager of the family must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs:" *a fortiori*, if Sayamoni Debi made a good bargain for herself and if that bargain did not prejudice the position of the then reversioners, it should be given effect to, and the present reversioners ought not to be allowed to obliterate the history of nearlyhalf a century. No doubt the authorities to which we have been referred as showing that costs of litigation may amount to legal necessity are not precisely in point. It does not appear that the *ijara* was entered into merely to meet the costs incurred by Sayamoni Debi in the litigation. But the concurrent ekrarnama is provided for the liquidation of all her debts and if the widow chose to become an annuitant and to make over her estate to the next taker some of whom accepted the arrangement then and there, and some of whom subsequently accepted it, there is no reason on principle or authority why such an arrangement should be set aside. We are disposed to give a broad meaning to the word "arrangement." It does not necessarily imply an agreement, see *Manning* v. *Eastern Counties Railway Company* (3), but here it proceeded on representations of facts, not of mere intentions. *Narain Das* v. *Ramanuj Dayal* (4). In connection with the subject of subsequent assent we rely on *Bajrangi Singh* v. *Manokarnika Baksh Singh* (5), where their Lordships of the Judicial Committee observed that the consent of the reversioners was sufficient and that it was immaterial that it was given after the execution of the deed then in question and they applied the maxim "*Omnis ratihabitio retrotrahitur et mandato priori*

(1) I. L. R. 33 Cal. 842 (1906).
(2) I. L. R. 18 Bom. 534 (1893).
(3) 12 M. and W. 237 (253) (1843).
(4) I. L. R. 20 All. 209 (P. C.) (1897).
(5) I. L. R. 35 I. A. 1: s. c. 12 C. W. N. 74 (1907).

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acqui patatur." Transactions of this kind may become valid by the consent of all those who are likely to be interested in disputing them. *Rajlukhee Dabea* v. *Gokool Chandra Choudhry* (6). The circumstances of the present case warrant an application of the further principle that if parties arrange to avoid the necessity for legal proceedings, their arrangement is supported by sufficient consideration. Apart from legal necessity a widow can validly alienate property that has devolved on her from her husband with the consent of the reversioners. The widow can make such an alienation by the entire surrender of her own interest and thereby accelerate the interest of the reversioners, or, she can, as in the present case, part with her direct interest in the estate and convert it into an annuity. Subject to the payment of the annuity the transferee would acquire an absolute interest. *Behari Lal* v. *Madho Lal* (7), *Hem Chandra Sanyal* v. *Sarnamoyi Debi* (8).

"Our attention has been called to the judgment of Sir John Stanley, C. J, and Burkitt, J, in *Gobind Krishna Narain* v. *Khunni Lal* (9), where quoting Mr. J. C. Ghosh's book on Hindu Law, it was said "A decree against a widow to bind the reversioner must have been passed after full contest and a compromise decree, or a decree on an arbitration, can have no higher footing than an alienation by the widow." On the facts of that case, the doctrine of family settlement of doubtful claims was not applied. The case of *Imrit Konwar* v. *Roop Narain Singh* (10) was a case of compromise by a widow as against her minor daughter. But the *ijara* of the 7th of September 1863 was not a compromise. There was no settlement then effected of doubtful claims. Nevertheless, the principle of family settlements in our opinion is applicable to an arrangement by which the persons interested in the property mutually consent that the property shall be managed in a particular and convenient manner, and, if the arrangement does not seriously prejudice the parties to it or those who come after them, a Court of Equity will be slow to set it aside.

"How, then, have the Plaintiffs been prejudiced by the *ijara* of the 7th September 1863? We have been unable to find a satisfactory answer to this question. The test is how long has the arrangement been acted upon. In *Ramanathan Chetty* v. *Murugappa Chetty* (11), Lord Macnaughten observed: "The unbroken usage for a period of 19 years is, as against the Appellant, conclusive evidence of a family arrangement to which the Court is bound to give effect,**** It was one which the Court would, no doubt, have sanctioned, if its authority had been invoked." In *Helan Dasi* v. *Durga Das* (12), the test of long usage was not necessary because other considerations were found to be sufficient. See *Williams* v. *Williams* (13) and *Stapilton* v. *Stapilton* (14). Sayamoni lived for 30 years after 1863, the suit of the Plaintiffs was instituted on the 30th April 1897. This long period of rest was attributable to the measures taken by Sayamoni. She had executed her decree and obtained possession of three properties; she had entered into negotiations for an adjustment of

(6) 18 Moo. I. A. 209 (228) (1869).
(7) L. R. 19 I. A. 30: s. c. I. L. R. 19 Cal. 236 (1891).
(8) I. L. R. 22 Cal. 364 (361) (1894).
(9) I. L. R. 29 All. 487, 494 (1907)
(10) 6 C. L. R. 76, 81 (1880).
(11) L. R. 33 I. A. 139: s. c. 4 C. L. J. 189 (1906).
(12) 4 C. L. J. 323, 331 (1906).
(13) L. R. 2 Ch. App. 294 (1867).
(14) 1 Atk. 2; 1 W. and T. L. C., 7th Edn. 223 (1739).

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her claims, and had actually remitted Rs. 1,72,000 on account of mesne profits to Baman Das Mukerji; she had received a sum of Rs. 42,000 up to 8th February 1861. Apart from legitimate and natural influences no coercion had been exercised on Sayamoni. She was in a position of superiority to Baman Das Mukerji owing to the decree of the Privy Council. He actually begged her to show him some consideration. In a deposition given by Sayamoni on the 6th June 1889 (pages 1 to 9 of the paper-book in Appeal No. 94 of 1899) the lady, shortly before her death, said: "In the execution case Baman Das Babu alone was the judgment-debtor, Annada Prasad and Gouri Prasad were not judgment-debtors, consequently what I remitted was remitted to Baman Das Babu alone. I made an *ijara* settlement with Annada Prasad and Sarada Prasad at the time of the family dispute amongst my husband's elder brothers. Being in difficulties on account of my debts, and as both the parties were particularly eager about it, I granted the said *ijara* settlement for a term of 60 years." Such was the impression left on the mind of this aged lady 26 years after the transaction, and we think that her impression should not be disregarded. A prudent management of the property of Chandra Bhusan Mukerji was called for. It was situated in numerous districts; it had been out of possession for 26 years at least (1832-1858) and adverse rights must have grown up. The usual method of management in such cases is by granting sub-leases of convenient parcels of the estate. Then, the disputes arising in the course of execution proceedings had resulted in loss of collections. Any one conversant with the management of landed property in the mofussil must be well aware that disputes between co-sharers lead to a total cessation of rent collections. In our opinion, therefore, the end justified the means adopted by Sayamoni, who in securing that end, which was a prudent and effective management of the properties decreed to her after a protracted litigation, acted within her powers, and the fact that her principal opponent took a *dar-ijara* and accepted the situation in the year 1866, conclusively shows that the *ijara* arrangement was made for the benefit of the estate and did not prejudice any one.

"We have referred to the growth of adverse rights during 1832-1858. It appears that, under the law prevailing before the present Limitation Act came into operation, adverse possession against a widow was held to be adverse possession against the reversioners. The estate of Sayamoni was, therefore, in danger of being lost unless the parties opposing her came to terms and took the management into their own hands.

"For these reasons we think the Plaintiffs should not be allowed to take possession of the properties in suit until the expiry of the *ijara* term of 60 years."

Hence this Appeal.

Mr. L. DeGruyther, *K. C*, and *Mr. Eddis* for the Appellant submitted that the *ijara* was not binding upon the Plaintiffs as it was not shewn to have been made for any legal necessity. On the contrary it was executed under duress when she was in a helpless condition. The *ijara* was good for her lifetime only. In the absence of legal necessity or the consent of all the reversioners to the transaction the alienation was void under the Hindu Law. *Hunooman Parshad* v. *Munraj Konwaree* (15) was applicable to a man—a

(15) 6 Moo. I. A. 393 (1856).

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guardian—only and not to a Hindu widow. She must prove necessity or consent of reversioners. Mayne's Hindu Law, pp. 840 and 841. *Collector of Masulipatam* v. *Cavaly Venkata Narainappa* (16). The consent of reversioners either raises a presumption that the widow's alienation was a proper one or it evidences an acceleration of the reversioner's interests. But in order to accelerate the estate of the reversionary heir she must convey to him her estate absolutely. *Nobokishore* v. *Hari Nath* (17), *Behari Lal* v. *Madho Lal* (7). That was not the case here. The consent of a reversioner only raises a presumption which is rebuttable. *Debi Prosad* v. *Golap Bhagat* (18). The High Court erred in treating it as a part of a family arrangement. That case was never set up nor was it supported by evidence. At best a family arrangement was a compromise which was not binding on the reversioners unless fairly and properly obtained. Here it was screwed from her. It was true that the Appellants' father benefited under the *ijara*, but the Appellants were not bound by their father's acts. Their title is not through him but direct. *Bajrangi Singh* v. *Manokarnika* (5), *Rup Narain* v. *Gopal Devi* (19).

Sir R. Finlay, K. C., and *Mr. Lowndes*, Counsel for the Respondents, were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON :—The substantial question in this Appeal is the validity of an Ijara executed on the 7th September 1863, for a term of 60 years, by a Hindu widow, named Sayamoni Debi, under circumstances which it will be necessary to refer to in some detail.

Sayamoni Debi was the widow of Chandra Mohan Mukerji. Her husband died in 1832 without leaving any issue, making her his sole heiress. The property consisted chiefly of landed property of considerable value.

Sayamoni was a *purdanashin* lady and probably not very capable of managing a large estate. She appears to have been dispossessed of the property by one of her husband's relatives, Baman Das Mukerji, and was compelled, in 1844, to bring a suit against him and his two brothers, Gouri Pershad and Annoda Pershad, to recover it. This litigation lasted till 1858, when, on appeal to Her Majesty in Council, the rights of Sayamoni to the estate of her husband were finally established. But although this was the case, it is evident that she did not thereupon obtain possession of the property. Further difficulties were raised and much of the property was threatened with the growth of adverse rights in the actual possessors of the land, who refused to pay rent under the pretext that the title had not been settled, and seeing that, prior to 1858, adverse possession against a widow ranked as adverse possession against the reversioners, there can be no doubt that the whole estate was in very serious peril.

While this state of things was still continuing the Ijara now in question was executed by the widow. Although at this distance of time it is impossible to ascertain with accuracy all that then happened, it is evident that this Ijara was part of a

(5) L. R. 35 I. A. 1 : s. c. 12 C. W. N. 74 (1907).
(7) L. R. 19 I. A. 30, 31 : s. c. I. L. R. 19 Cal. 236 (1891).
(16) 8 Moo. I. A. 529, 550 (1861).
(17) I. L. R. 10 Cal. 1102, 1108 (1884).
(18) I. L. R. 40 Cal. 721 (F. B.) : s. c. 17 C. W. N. 701 (1913).
(19) L. R. 36 I. A. 103 : s. c. 13 C. W. N. 921 (1909).

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general family settlement whereby the widow divided up the family property amongst the various reversioners, reserving to herself only a comparatively small annual income which may fairly be looked on as representing maintenance. The Ijara itself was granted to Annoda Pershad and Saroda Pershad, who was the son of Gouri Pershad who had died in the interval. The third brother, Baman Das Mukerji, did not directly take any interest under the Ijara, but in October 1863 a Dar-Ijara was granted to his son of a portion of the property, and we find also that a large sum due from him on account of mesne profits was remitted by Sayamoni, so that it is clear that all branches of the family shared in the settlement.

If the term of the Ijara had been for the life of Sayamoni, no question could have arisen such as is now before their Lordships. But doubtless from the necessities of the case, in order to facilitate the practical settlement of the property so as to obtain its full value, the term was made for a fixed period of 60 years. Inasmuch as the lady was 42 years of age at the date when the Ijara was granted, it is evident that all the parties realised that the term would extend beyond her lifetime, and thus affect the rights of the reversioners whosoever they might happen to be. So far as the persons are concerned who then represented the reversion, it is clear that all this was done with their consent. They all took large interests under the arrangement, and have continued to enjoy them so long as they lived.

One of the parties who principally benefited by the Ijara was Annoda Pershad who was one of the actual lessees under the Ijara. He died in 1882, so that Sayamoni (who died in 1893) survived him 11 years. The Appellants are four sons of Annoda Pershad, and on the death of Sayamoni they became entitled directly to share in any family property of which she was the life tenant, and they have brought this action to set aside the Ijara, on the ground that it was an unauthorised interference by the widow with the reversionary interest which did not belong to her. The Court below, in a careful and well reasoned judgment, have decided that, on the facts of the case, the arrangement of which the Ijara formed part was in truth dictated by the necessities of the case, and that the choice of the term of 60 years as the term of the Ijara was made for the benefit of the estate and did not injure anyone.

Their Lordships agree with this Judgment. They are of opinion that the case depends entirely on the facts, and that it raises no new question of law as to the powers of a Hindu widow to deal with family property in case of necessity with the consent of then present reversioners, and they are, therefore, of opinion that the Appeal fails.

Counsel for the Appellants laboured to show that the so-called settlement by which peace for 30 years was brought into the family and, in their Lordships' opinion, the family property was in fact saved, was an outrageous and flagrantly unjust arrangement forced upon a helpless *purdanashin* widow by her influential relations in whose hands she was, and that any person either at the time or since must have known from its terms that it had been extorted by duress or engineered by fraud. Their Lordships are of opinion that Counsel entirely overlooked the evidence against this contention which is derived from the conduct of his own clients. From the year 1882, when Annoda Pershad died to the year

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1893 when Sayamoni died, they themselves took the benefit of this arrangement which they now stigmatise as a gross fraud. It is suggested on their behalf that they thus made themselves participants in it solely because it was profitable so to do. Their Lordships decline to believe them to be as unscrupulous as they desire to be considered. As against them it is a fair inference from their conduct that they believed that the arrangement had been made in good faith, and under such circumstances of necessity as would give it validity according to Hindu law, and as it has always been a feature of Hindu law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid, their Lordships in this case consider that the conduct of the Appellants themselves during those years affords evidence upon which the Respondents are entitled to rely.

Their Lordships will therefore humbly advise His Majesty that this Appeal should be dismissed. The Appellants will pay the costs.

Solicitors: *Messrs. Sanderson, Adkin, Lee* and *Eddis* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEAL No. 47 OF 1911.

JENKINS, C. J. D. CHATTERJEE, J. 1914, Heard, 19, 20, 25 and 26, March. Judgment, 26, March.	NANDA KUMAR HOWLADAR, Plaintiff, Appellant, *v.* RAM JIBAN HOWLADAR, Defendant, Respondent.

Fraud—Decree, suit to set aside, as fraudulent—Pleading—Onus—Kind of fraud to be proved when decree contested—Contrivance, misleading of Court by—Res judicata—*Evidence Act (I of 1872), sec. 44.*

Per JENKINS, C. J.—*The jurisdiction to impugn a previous decree for fraud should be exercised with care and reserve, so as not to encourage in litigants the idea that the final judgment in a suit is to be merely a prelude to further litigation.*

Fraud must be established by proof before the propriety of the prior decree can be investigated.

Decrees whether made ex parte *or by consent or after contest, apparent or real, are equally liable to be attacked for fraud, the character of the fraud varying with the circumstances of each case. One who seeks to impugn a decree passed after contest takes on himself a very heavy burden, and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous.*

A prior judgment cannot be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where, and in what way, the fraud was committed.

SHEDDEN *v.* PATRICK (1) *referred to.*

The fraud must be actual positive fraud, a meditated and intentional contrivance to

(1) 1 Macqueen 535 (1854)

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keep the parties and the Court in ignorance of the real facts of the case and obtaining a decree by that contrivance.

PATCH *v.* WARD (2) *followed.*

Per curiam.—*The decision in the previous suit was* res judicata *in the present case.*

This was an Appeal preferred on the 14th of April 1913 against a decree of Chapman, J., dated the 17th of March 1913, passed in S. A. No. 182 of 1911, which had been preferred against a decree of Babu R. K. Nag, Subordinate Judge of Backergunge, dated the 10th of November 1910, reversing a decree of Babu Basanta Kumar Pal, Munsif at Patuakhali, dated the 30th of September 1909.

The facts of the case are thus set out by Chapman, J.—

"The Plaintiffs are the holders of a six annas share of a *howla.* The tenure has been partitioned. The Plaintiffs' case was that they were in immediate possession of all the lands allotted to their six annas share and that in spite of this the Defendant No. 1 fraudulently obtained an entry in the Settlement Record to the effect that he the Defendant No. 1 held a *nim-howla* under the Plaintiffs and that the Plaintiffs were in cultivating possession of the land as his the Defendant No. 1's tenant. After obtaining this entry in the Settlement Record the Defendant No. 1 sued the Plaintiffs for rent and obtained a decree. The present suit was for a declaration that the rent decree obtained by Defendant No. 1 was inoperative and that the Plaintiffs were in possession of the land not as the tenants of Defendant No. 1 but in their own right as *howladars.*"

The Munsif dismissed the suit but on appeal the Subordinate Judge decreed the Plaintiffs' suit.

Defendant No. 1 appealed to the High Court and contended that the suit was barred by reason of the previous decision in the suit for rent.

CHAPMAN, J., upheld this contention holding as follows :—"The question at issue in the rent suit was whether the present Plaintiffs held the lands as the tenants of Defendant No. 1 or in an independent capacity. That is exactly the same issue that was raised in the present suit. I am aware that the Court has always been slow to treat the decision in a suit for rent as *res judicata* upon a question of title and I have endeavoured to distinguish the question decided in the rent suit from the question raised in the present suit but have been unable to do so.

"It is then contended that the Plaintiff was entitled in the present suit to assail the decision in the rent suit upon the grounds that that decision was based upon an entry in the Settlement Record which was obtained by fraudulent means. But the issue whether the entry was obtained fraudulently or not was expressly raised and decided in the rent suit and cannot in my opinion be re-opened. I hold this view quite independently of the principle which has been laid down in this Court that a decree cannot be assailed collaterally merely upon the grounds that it is based upon perjured evidence."

His Lordship accordingly set aside the judgment and decree of the Subordinate Judge and dismissed the suit with costs in all Courts.

The Plaintiff thereupon preferred this further appeal under the Letters Patent.

Babu Brajendra Nath Chatterjee for the Appellant.—If the previous decree in

(2) L. R. 3 Ch. App. 203 (1867).

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the rent suit was obtained by fraud, then it cannot operate as *res judicata*, sec. 44, Evidence Act. Fraud vitiates everything, even the most solemn proceedings of a Court of law.

[JENKINS, C. J.—What was the fraud here, your client was not prevented from contesting the previous rent suit?]

The fraud here consisted in the perjured evidence by means of which the Defendant got his rent decree. The evidence was not only false, but was known to him to be false. When a man gets a decree by means of evidence which he knows to be false, by means of documents known to be forged and by himself suppressing evidence which if produced would have proved his case to be false, he commits a fraud upon the Court and thereby misleads the Court into making a decree which that Court would not have made if the truth was known to it. There are cases in this Court and also in the Madras High Court where it has been held that a decree obtained by means of perjured evidence known to be false, is liable to be set aside. *Kedar Nath* v. *Hemanta Kumari* (5), *Lakhmi Charan* v. *Nur Ali* (6) and *Venkatappa Naick* v. *Subba Naick* (7). In this case the Subordinate Judge has found that the Defendant when he brought the rent suit against me, knew that I held no *karsa* (tenancy) under him, that his sub-tenure (nimhowla) was not existing, that the rent receipts he produced were forgeries and that the kabuliyats produced by him were sham documents; these are findings of fact arrived at by the lower Appellate Court and they are conclusive in Second Appeal. These findings warrant the conclusion that the previous rent decree was obtained by fraud, by gross fraud.

[*Babu Gunada Charan Sen* for the Respondent.—Cites *Mosuful Huq* v. *Surendra Nath Ray* (8), *Mahomed Golab* v. *Mahomed Sulliman* (9) and *Abdul Huq* v. *Abdul Hafez* (10)].

The case in *Abdul Huq* v. *Abdul Hafez* (10) does not touch the question; it only holds that fraud gives a cause-of-action for a suit for setting aside the decree and so far it is in my favour. The decision in *Mosuful Huq* v. *Surendra Nath* (8) is an *obiter*, *vide* page 1006; so also the decision in *Mahomed Golab* v. *Mahomed Sulliman* (9). Even if these decisions are held not to be *obiter dicta*, I submit they are not good law.

[JENKINS, C. J.—Have you got any decided case to show that a decree in a contested suit has been set aside on the ground of fraud?]

There is no Indian case so far as I am aware but there are English decisions which hold that contested decrees may also be set aside on the ground of fraud. Vide *Cole* v. *Langford* (11), *Abouloff* v. *Oppenheimer* (12) and *Vadala* v. *Lawes* (13). Once it is admitted that an *ex parte* decree obtained by means of fraud could be set aside by a suit, it follows from the provisions of sec. 9, C. P. C. (1908), that a suit will lie for setting aside, on the ground of fraud, a contested decree also. The fraud whether in a contested suit or non-contested suit gives rise to a cause-of-action and a Civil suit lies on such a cause-of-action.

Fraud does not cease to be fraud because

(5) 18 C. W. N. 447 (1913).
(6) 15 C. W. N. 1010 (1911)
(7) I. L. R. 29 Mad. 179 (1905).

(8) 16 C. W. N. 1002 (1912).
(9) I. L. R. 21 Cal. 612 (1894)
(10) 14 C. W. N. 695 (1910).
(11) [1898] 2 Q. B. 36.
(12) L. R. 10 Q. B. D. 295 (1882).
(13) L. R. 25 Q. B. D. 310 (1890).

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the suit is contested. When in a contested suit, a Plaintiff succeeds in getting a decree by his fraud, it only proves that he is a very clever deceiver. In Halsbury's Laws of England, Vol. 18, p. 316, we find that a decree obtained by fraud, whether made *ex parte* or in a contested suit, is liable to be set aside. Of course when the suit was contested, the Court, in order to set aside the decree in that suit, will require very strong evidence of fraud. But the question whether the evidence of fraud in this case was strong or not could not arise in Second Appeal. The lower Appellate Court has believed the evidence of fraud and come to a finding of fact which this Court cannot question.

[JENKINS, C. J.—The English cases you cite are all cases on foreign judgments. In the case of foreign judgments different considerations might arise.]

I submit the decisions would have been the same if the judgments which were set aside on grounds of fraud, were judgments of English Court. There are observations in those English cases which show that the same principles would also apply to judgments of English Courts. Foreign judgments could operate as *res judicata* (*vide* sec. 11, C. P. C.) and also they could not be questioned on the merits. Sec. 13, C. P. C., shows foreign judgments are conclusive unless they are vitiated by the circumstances enumerated there.

[JENKINS, C. J.—But in sec. 13 you have the provision that a foreign judgment obtained by fraud is not conclusive.]

Yes, a similar provision we have in sec. 44, Evidence Act, in respect of all judgments.

[JENKINS, C. J.—How do you get over the decision in 21 Calcutta case? When would litigation end, if a defeated Defendant in a contested suit, can re-open the whole question in a fresh suit brought by him for setting aside the decree on the ground of fraud?]

I admit litigation will be somewhat prolonged. But it is better that litigation should be a little prolonged than that a litigant who has succeeded in getting a decree by fraud, should be allowed by law to enjoy the fruit of his own fraudulent act. Two principles are firmly established in equity—one is that multiplicity of action should not be allowed, and the other is that no person should be allowed to be the gainer by his own wrong. Where there is conflict between these two principles, I submit the latter should prevail over the former. A person who has got a decree by his fraud, cannot complain if he is exposed to collateral attacks intended to deprive him of the dishonest advantage he has secured to himself; otherwise his fraud will be perpetuated. This case itself illustrates my point; if the Defendant could successfully plead that my suit to set aside the fraudulent decree does not lie, then the result will be that he will for ever get rent from me and I shall be deprived of my *howla* right over the land. The learned Chief Justice in *Mahomed Galab* v. *Mahomed Sulliman* (9) observes that to obtain a decree by perjured evidence is a fraud of the grossest kind, still he holds that no suit would lie for setting aside the decree. Why? because there would then be no finality to litigation. But the Privy Council decisions in *Radha Raman Shaha* v. *Pran Nath Roy* (14) and *Khagendra Nath* v. *Pran Nath* (15) go to show that prolongation of litigation is not a matter for consideration in a suit

(9) I. L. R. 21 Cal. 612 at p. 619 (1894).
(14) 5 C. W. N. 757 (1901).
(15) C. W. N. 473 (1902).

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brought for setting aside a decree on the ground of fraud. In those Privy Council decisions, the Defendant first applied to set aside the *ex parte* decree under sec. 108, C. P. C. (1882), failed there, because it was held that summons were not suppressed, then he appealed and there also failed and then after these litigations he instituted a suit for setting aside the *ex parte* decree on the ground of fraud. And it was not even suggested in those cases that the suit did not lie because otherwise litigation would be much prolonged.

In this case the question whether a suit for setting aside a contested decree on the ground of fraud, lies or not, does not really arise. Because my suit is for the declaration that the Defendant has no *nim howla* and by way of anticipation I plead that the decree which the Defendant has got in the rent suit, is inoperative, having been obtained by fraud. This I could do under sec. 44, I. E. Act, as was done in the case of *Benode Behari* v. *Nistarini Dasi* (16).

[JENKINS, C. J.—But what is the fraud alleged here and how has fraud been found?]

Fraud alleged and found are these:—The Defendant sued me for rent of a *karsa* and it has been found by the Sub-Judge and (that finding is unassailable in second appeal) that the *karsa* is a myth. So the Defendant knowingly sued for rent of a *karsa* which did not exist. The entry in the settlement record that the Defendant has the *nim howla* was obtained by suppression of two decrees which had declared that no *nim howla* existed under the 16 annas *howladars*. The rent receipts filed were forgeries and the *kabuliyats* produced were sham documents.

(16) I. L. R. 33 Cal. 180 (P. C.): s. c. 9 C. W. N. 961 (1905).

These facts were sufficient to prove that the decree in the rent suit was obtained by fraud.

[JENKINS, C. J.—But two Courts before which witnesses were examined and which had opportunities to observe the demeanour of witnesses had previously held otherwise on the evidence.]

No doubt so, but the law is that the findings of fact arrived at by the Appellate Court even by reversing the findings of the first Court are conclusive in Second Appeal.

My next point is that that the previous decree could not operate as *res judicata* on the question of existence or non-existence of the *nim howla*. In an ordinary rent suit where the relationship of landlord and tenant is denied, the only question directly and substantially in issue is whether the Defendant is the tenant of the Plaintiff. The question whether the Plaintiff (landlord) has any title to the land does not become a matter directly and substantially in issue. The words in sec. 11, C. P. C., are "directly and substantially." The landlord's title, may be indirectly in issue, but it is never directly in issue, except in those rent suits in which the tenant sets up a conflicting title to the land either in himself or in some third person and that third person is a party to the suit. The fact that the Legislature has not allowed Appeal or Second Appeal in many rent suits while there is no conflict of title between the landlord and tenant lends support to this view.

It would be disastrous if in a petty rent suit of the value of Rs. 5 or 6, a decision of the Court on the title of the landlord could operate as *res judicata* in a subsequent title suit. Formerly the rent suits were tried by the Revenue Courts whose

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decision on the question of the landlord's title could never operate as *res judicata*, but now ordinary Civil Courts try those rent suits and their adjudication on the question of title may operate as *res judicata*. But the Legislature did not change its policy as to the question of *res judicata* by changing the form of rent suits.

The law remains practically the same, because of the provision in sec. 11, C. P. C., which lays down that unless a matter is directly and substantially in issue its adjudication cannot operate as *res judicata*. It cannot be said that without deciding the title of the landlord the rent suit could not be decided. If A lets out land to B, A is entitled to get rent from B, irrespective of the question whether A has title to the land or not. So it is not always necessary for the Court to decide whether the landlord has title to the land or not, except in one class of cases where the tenant sets up conflicting title in himself. There is no reported case in which an adjudication on the question of landlord's title in a rent suit where the tenant did not set up any conflicting title in himself, has been held to be *res judicata* in a subsequent title suit. Refers to *Dwarka Nath* v. *Ram Chand* (17), *Sahadeb* v. *Ram Rudra* (18).

Again in order to plead *res judicata*, a party must prove the pleadings of the previous suit. In this case the Defendant has not proved the pleadings in the previous rent suit and so it could be determined what questions were precisely in point in that rent suit. Vide *Gurdeo Singh* v. *Chandrika Singh* (19).

Babu Gunada Charan Sen for the Respondent.—The decision in the rent suit operates as *res judicata* on the question of existence or non-existence of the *nim-howla*. There the tenant not only denied the relationship of landlord and tenant but also denied the existence of the *nim-howla*, that is the landlord's title. And it was found that the *nim-howla* did exist. Reads the judgment in the rent suit and cites *Ram Behari* v. *Surendra Nath* (20), *Lilabati* v. *Bishun Chobey* (21). The question whether the entry in the settlement record was correct or not was also decided in the rent suit, so it is not now open to the Appellant to prove that entry fraudulent. Not only does the decision operates as *res judicata* but the grounds of the decision may also operate as *res judicata*. The Munsif has found that the entry in the settlement record was obtained with the knowledge of the tenant. As to the question of fraud, the decision in the rent suit will itself operate as *res judicata* on the question of fraud. The tenant Defendant contested that suit, produced his evidence to prove that the entry in the settlement record was fraudulent and the evidence produced by my client was false, but the Court held on the evidence adduced by both sides, that my client's case was true and gave a decree in his favour. So the findings of the Munsif in the rent suit will operate as *res judicata* in this suit in which that decree has been attacked as fraudulent. The tenant could have appealed from the rent decree but he did not do so, so that decree has become final. Refers to *Mosuful Huq* v. *Surendra Nath Ray* (8), *Mahomed Golab* v. *Mahomed*

(17) 3 C. W. N. 266 F. B. s. c. : 26 Cal. 428 (1899).
(18) 10 C. W. N. 820 (1906)
(19) I. L. R. 36 Cal. 193 (1907).

(8) 16 C. W. N. 1002 (1912).
(20) 19 C. L. J. 34 at pp. 39 and 40 (1913).
(21) 6 C. L. J. 621 at pp. 628 and 630 (1907).

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Sulliman (9), *Abdul Huq* v. *Abdul Hafez* (10).

Babu Brajendra Nath Chatterjee in reply.—The cases cited by the other side are all distinguishable and not in point. The existence of the *nim howla* was not directly and substantially in issue. I concede that the rent decree may be *res judicata* on the question whether I held the land as a tenant under the Defendant but the question whether the Defendant had the *nim howla* under my *howladar* was not directly in issue in the rent suit. A ground of decision may operate as *res judicata* only when without that ground the decision could not have been made. But the rent suit could have been decreed without deciding whether the Defendant held the *nim howla* under me. The finding of the Munsif that the entry in the settlement record was correct was only an expression of his opinion on a piece of evidence and such expression can never operate as *res judicata* in a subsequent suit between the parties. The doctrine of *res judicata* has its limits and cannot be pushed so far. As to the contention that the decision of the Munsif in the rent suit does also operate as *res judicata* on the question of fraud, the observation of the learned Judges in *Abouloff* v. *Oppenheimer* (12) and *Vadala* v. *Lawes* (13) give a complete answer. The Munsif was never called upon to decide in the rent suit that fraud was being practised upon him by the Plaintiff in that suit. The question of the Plaintiff's fraud was not before the Munsif.

(9) I. L. R. 21 Cal. 612 (1894).
(10) 14 C. W. N. 695 (1910).
(12) 10 Q. B. D. 295 at pp. 302, 306, 307 (1882).
(13) 25 Q. B. D. 310 at pp. 311, 313 (1890).

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—By this suit the Plaintiffs seek to establish their title to land. The first Defendant contends that the validity of this title has been decided adversely to the Plaintiffs by the decree of a competent Court in a previous suit between the parties, and so cannot now be tried.

The Plaintiffs reply that the previous decree cannot support the plea of *res judicata*, and, alternatively, that it was obtained by fraud. Mr. Justice Chapman, reversing the decree of the lower Appellate Court, held that the decree in the previous suit supports the plea of *res judicata* and that there is no evidence that the decree was obtained by fraud. From this judgment the present appeal has been preferred. The jurisdiction to impugn a previous decree for fraud is beyond question: it is recognised by sec. 44 of the Evidence Act and is confirmed by a long line of authority. But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated (Mitford on Pleadings, 113). Decrees may be (1) by consent: (2) *ex parte*, or (3) after contest, apparent or real: and though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case. One who seeks to impugn a decree passed after contest takes on himself a very heavy burden, and it is not satisfied by merely inducing the Court

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to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous. A prior judgment, it has been said, cannot be upset on a mere general allegation of fraud or collusion: it must be shown how, when, where, and in what way, the fraud was committed. [*Shedden* v. *Patrick* (1)]. Sir John Rolt, L. J., in *Patch* v. *Ward* (2), discussing what is meant by fraud when it is said that a decree may be impeached for fraud, said: "the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance." And Lord Selbourne in *Ochtenbein* v. *Papelier* (3) quotes as sound law the *dictum* of Chief Justice DeGrey in *The Duchess of Kingston's* case (4) that a judgment, "like all other acts of the highest judicial authority is impeachable from without: although it is not permitted to show that the Court was mistaken, it may be shown that they were misled."

Both suits now under consideration turn on the existence or non-existence of an alleged *nim-howla*, a question of fact to be determined largely by the appreciation of evidence. The Munsif in the former suit affirmed the existence of the *nim-howla*, and from his decision no appeal was preferred.

In this suit the Court of first instance came to the same conclusion on the evidence in this case. The lower Court of Appeal, however, for some reason did not agree with this appreciation of the evidence and therefore held the decree in the former suit fraudulent. There is, however, no suggestion that the decree in the previous suit was fictitious or that the [illegible] in this suit were prevented by any contrivance from placing before the Court in the former suit any material relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit. In effect, when analysed, the judgment of the lower Appellate Court is no more than a retrial of the merits of the original suit and a determination that the Judge who decided that suit was mistaken. But the Court in this suit has no jurisdiction to decide on the merits of the former judgment: its function was to decide whether that judgment was vitiated by fraud

There, therefore, was an error of law committed by the lower Appellate Court and Chapman, J, rightly reversed its decree, for as fraud was not proved, the prior decree sufficiently supports the plea of *res judicata*.

The Appeal must, therefore, be dismissed with costs.

D. CHATTERJEE, J.—The fraud alleged in this case was the wrongful procurement by the Defendant of the entry of the *nim-howla* in the record-of-rights. The same allegation was made in the rent suit, and the matter was adjudicated upon in the presence of both parties. It was a matter substantially in issue in that case and I think it would be clearly offending against the rule of *res judicata* to allow the Plaintiffs to re-open that question.

I agree, therefore, in dismissing this Appeal.

Appeal dismissed.

(1) 1 Macqueen 539 (1854).
(2) L. R. 3 Ch. App. 203 (1867).
(3) L. R. 8 Ch. App. 695 at p. 698 (1873).
(4) 20 How. St. Tr. 544: s. c. 2 Sm. L. C. (6th Ed.) 679 (1776).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 592 OF 1911.

CARNDUFF, J.
RICHARDSON, J.
1914,
11, February.

GOBINDA CHANDRA CHUCKERBUTTY, Plaintiff, Appellant,
v.
NANDA KUMAR DAS and anr, Defendants, Respondents.

Specific Relief Act (I of 1877), sec. 22—Indian Contract Act (I of 1872), sec. 16—Contract for sale of land in lieu of hushing up of departmental enquiry against a public servant, if enforceable—Court of equity, jurisdiction of, to refuse specific performance of contract not invalid or void under the Indian Contract Act.

In a suit for specific performance of a contract for sale of land it appeared that in consequence of a charge being laid at the instance of the Plaintiffs against one of the Defendants who was the record-keeper of the Court of the District Judge a departmental enquiry into the matter by a Subordinate Judge was ordered and while this was in progress the two Defendants who were father and son were approached by the Plaintiffs who promised to hush up the said enquiry if the Defendants would execute a conveyance in their favour in respect of certain land and the result was the contract in suit:

Held—*That the contract was one of which specific performance ought not to be ordered.*

That there may be cases which cannot be brought within the four corners of any of the provisions of the Indian Contract Act as to the invalidity or voidability of agreements but in which nevertheless a Court of equity may properly refuse to exercise its jurisdiction under the Specific Relief Act.

This was an Appeal preferred on the 13th of March 1911 against the decree of Babu Sripati Chatterjee, Subordinate Judge of Zillah Barisal, dated the 28th of November 1910, confirming the decree of Babu Mohim Chundra Chuckerbutty, Munsif at that place, dated the 9th of June 1909.

The Plaintiffs sued for specific performance of a contract of sale of land. Both the lower Courts dismissed the Plaintiffs's suit. Hence this Second Appeal by the Plaintiff.

The facts will appear from the judgment of the Subordinate Judge, the material portion of which is set out below:

"The immoveable properties, said to have been agreed to be sold, formerly belonged to the Plaintiffs themselves. In the year 1890 these were purchased by the late Babu Pyari Lal Ray, for Rs. 39 only at a sale in execution of a decree against the Plaintiffs. The present Defendants Nos. 1 and 2 are father and son. The Defendant No. 2, Lalit Kumar Das, now employed as the Head Clerk in the District Judge's Office, formerly was the Record-keeper of that Court. The immoveable properties above referred to were purchased by him or his father, from Babu Pyari Lal's sons, for Rs. 10 and Rs. 90 under two *kobalas*, in Jaista and Pous 1312. In the year 1907 the Defendant No. 1, Nanda Kumar Das, instituted a suit, No. 91, against one Mohan Nandi, for arrears of rent of some lands he held under one of the properties above referred to. Mohan hotly contested the suit at the instigation and with the help of the present Plaintiffs whom I shall call the Chakerbuttys. During the pendency of that suit Mohan Nandi made a complaint to the District Judge against Lalit Kumar (the Defendant No. 2) charging him with some misconduct as the Record-keeper of his Court. The District Judge made over

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Mohan's application to the Second Subordinate Judge for inquiry and report. The contract of sale, sought to be enforced by the present suit of the Chakerbuttys, is said to have been agreed to while the Second Subordinate Judge was actually examining Mohan's witnesses in support of the charges he had brought against Lalit Kumar.

"A young pleader of the Courts here, is one of the most important witnesses on the Plaintiffs' side. It was indeed he who brought about this contract of sale. An old pleader of this place, gave his deposition against Lalit Kumar before the Second Subordinate Judge. This appears to have wholly upset the minds of Lalit Kumar and his relatives. His brother, Moti Lal, with tears in his eyes, approached the young pleader and requested him to see if he could induce the Chakerbuttys to hush up the charges they had brought in Mohan's name. Then Lalit Kumar himself also made the same request to the pleader saying that he (Lalit) would agree to any terms he the pleader would think reasonable and proper. Lalit even agreed to part with all the properties of the Chakerbuttys he had purchased from Pyari Babu's sons. The pleader also believed that Lalit Kumar was in danger of losing his post. It was in this state of mind that the pleader approached the present Plaintiff No. 1, Gobinda Chandra Chakerbutty, with the object above referred to. Gobinda wanted that all the properties purchased by the Defendants from Pyari Babu's sons must be reconveyed to himself and his co-sharers without any consideration whatever excepting that they would hush up the charges brought against Lalit Kumar. The pleader pressed him to pay Rs. 300 and after some haggling he at last agreed to pay Rs. 250 not only for the properties above referred to, but also for all arrears of rents due from all tenants, including all decrees also that the Defendants had already obtained for such arrears and would obtain in their Suit No. 91 of 1907 against Mohan Nandi. Lalit Kumar and his father agreed to this, and it is this contract that is sought to be enforced by this suit.

"The price agreed to was grossly inadequate. That coupled with the circumstances under which the Defendants were compelled to agree to the bargain is clear evidence of undue advantage taken over them by the Plaintiffs."

Babus Nilmadhub Bose and *Hirendra Nath Ganguly* for the Appellant.

Babus Mahendra Nath Ray and *Gunada Charan Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

CARUDUFF, J.—This Appeal arises out of a suit for the specific performance of a contract for the sale of land. The suit was dismissed by both the Courts below, and one of the Plaintiffs appeals to this Court.

The land originally belonged to the Plaintiffs. It was sold in execution of a decree against them, and purchased by one Peary Lal Rai. Peary Lal Rai then conveyed it to the Defendants Nos. 1 and 2, who are father and son. The Plaintiffs' case was that these Defendants executed a *kobala* for the sale of the property to them for Rs. 250, but that the instrument was not registered or delivered and had since disappeared. They sought, therefore, for a decree requiring the execution and registration of a fresh *kobala*.

The Court of first instance found that the contract alleged had been entered

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into, but held that it was not a contract which should be enforced by a Court of Equity because it had been obtained by undue influence, the chief consideration for it was opposed to public policy, the price fixed by it was grossly inadequate, and the Plaintiffs had been guilty of unfair practice and had taken advantage of the Defendants. The lower Appellate Court has disposed of the case by assuming, though not finding, the *factum* of the agreement and affirming the decision of the first Court that specific performance ought not, in the circumstances, to be decreed.

It appears that a charge of some sort had, at the instance of the Plaintiffs, been brought against the second Defendant in respect of his conduct as record-keeper of the Court of the District Judge, and that a departmental enquiry into the matter by one of the Subordinate Judges had been ordered. While this was in progress, the second Defendant and his father were approached by the Plaintiffs who were anxious to recover the land and promised to "hush up the enquiry" which they had been instrumental in initiating, if they would execute a conveyance in their favour.

The learned Vakil for the Appellant contends that these facts do not bring the case within the scope of the provisions of sec. 16 of the Contract Act, which deal with "undue influence." He further contends that it is impossible to say that the agreement to hush up the enquiry into the conduct of the second Defendant was opposed to public policy when there is nothing on the record to show what the charge or complaint against that Defendant was. He argues that, although the jurisdiction of a Court to decree specific performance is discretionary, the discretion, which is expressly given by sec. 22 of the Specific Relief Act of 1879, must be exercised judicially, that is to say that in this country, in connection with a matter of contract, the Courts should be guided by the rules laid down in the Indian Contract Act of 1872, and by those alone. There remains, then, only the ground of the grossly inadequate price fixed, and that is not sufficient unless the inadequacy was so gross as to lead to an inference of fraud.

It seems to me, however, that there may be cases which cannot be brought within the four corners of any of the provisions of the Indian Contract Act as to the invalidity or voidability of agreements, but are nevertheless cases in which a Court of Equity may properly refuse to exercise its jurisdiction under the Specific Relief Act. Sec. 22 of the latter enactment itself shows that this is so: and both principle and authority appear to point to the same conclusion. There are—see Fry on Specific Performance, 5th Ed., p. 195—"many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of equality and fairness in the contract which are essential in order that the Court may exercise its extraordinary jurisdiction in specific performance." "In judging of the fairness of a contract" —see *ibid*, page 200—"the Court will look not merely at the terms of the contract itself, but at all the surrounding circumstances;" and "it is enough, generally speaking, to induce the Court to refuse performance, that there are any circumstances about the making of the contract which render it not fair and honest to call for its execution."

I think, therefore, that the proposition for which the learned Vakil contends, is

not one that can be accepted; and, having regard to all the circumstances of the case before us, I think that the Courts, below were right in holding that the contract was one of which specific performance ought not to be decreed. I would, consequently, dismiss this appeal; but, in view of the conduct of the Defendants, who pleaded, first, that there had been no contract at all, and, secondly, that it had been induced by undue influence and so forth, and of the circumstance that they did not venture into the witness-box, I would make no order as to costs.

RICHARDSON, J.—I agree.

Appeal dismissed without costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 484 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
21, June.

HARIHAR SINGH,
Petitioner,
Appellant,
v.
MAHESHUR PROSAD,
Opposite Party,
Respondent.

Provincial Insolvency Act (III of 1907), sec. 43—Insolvent, acts of bad faith of—Proceedings in their nature criminal—Necessity of framing charge, etc.

A proceeding against a debtor under sec. 43 (2) of the Provincial Insolvency Act is in the nature of a criminal proceeding, and, as in all criminal cases, it is necessary in such a proceeding that there should be a charge, a finding and a conviction as a foundation for the sentence, and everything should be strictly and accurately pursued, and if on any of these three points a substantial defect should appear, it would be a ground for reversing the proceeding.

This was an Appeal preferred on the 9th of September 1911 against an order of B. A. Cullis, Esq., District Judge of Zillah Mozufferpur, dated the 28th of August 1911.

The Appellant who was arrested in execution of a decree obtained by the Respondent, was released by the Court on bail on his expressing his desire to apply for adjudication as an insolvent. Subsequently he applied for such adjudication but the Respondent decree-holder opposed his application alleging that the Petitioner had sufficient properties to pay off his debts and that he had not disclosed all the properties owned by him, many of which he had transferred in the *farzi* names of his relatives; and alleged, amongst other instances one, *viz.*, of a Touji bearing No. 17791, which Petitioner had inherited from his cousin, but which he had fraudulently got entered in the name of his grandson Parbodh Singh under his own guardianship. The Receiver appointed by Court in reporting on the Petitioner's assets and liabilities, substantially confirmed this allegation. He reported that the Petitioner's story that Parbodh Singh was the adopted son of his cousin was falsified by a plaint filed by the Petitioner himself. Upon receiving this report and after some further proceedings the District Judge on 28 8 11 recorded an order to the following effect: "I have read the Receiver's report. . . . The insolvent has been examined and cross-examined on the subject of T. No. 17791 and merely re-asserts what he said before. I agree with the finding of the Receiver and regard it as clearly proved that the insolvent has wilfully made false entries in his inventory of property. He is therefore under sec. 43 of Act III of 1907 sentenced to one year's simple imprisonment. If at any time he should satisfy his creditors in full or as far as they

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consider he is able, I should be prepared to deal more leniently with him."

The Petitioner appealed.

Babu Jogendra Chandra Ghose for the Appellant.

Babu Akhoy Kumar Banerjee for the Respondent.

The JUDGMENT OF THE COURT was delivered by

JENKINS, C. J.—In my opinion the order of the Judge sentencing this insolvent to a maximum term of imprisonment of one year cannot be sustained. It must be understood that proceedings such as these are in the nature of criminal proceedings: and, "in all criminal cases it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence. Everything should be strictly and accurately pursued: and if on any one of these three points a substantial defect should appear, it would be a ground for reversing the proceeding." The section itself provides safeguards which have not been observed, for it is prescribed that the Court "in every such case shall record the facts constituting the offence with the statement (if any) made by the debtor." More than that, the Judge has arrived at his conclusion of guilt not on evidence but substantially on the report of the Receiver. It is true that there was also a deposition of the debtor, but the learned Vakil who appears to support the order of the learned Judge is unable to suggest that there was anything in the deposition of the debtor that would justify the order and the sentence that has been passed. In the circumstances there is but one course open to us, and that is to reverse the order of the Judge and to direct that the insolvent be set at liberty.

The Respondent must pay the insolvent's costs of the appeal—hearing-fee, two gold mohurs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 4171 OF 1910.

STEPHEN, J.
MULLICK, J.
1913,
9, July.

IMAM ALI PATWARI,
Defendant, Appellant,
v.
ARFATUNNESSA*,
Plaintiff, Respondent.

Mahomedan Law—Kabinnamah—*Condition that husband should live with wife in wife's father's house as* khanadamad *and for divorce upon breach, if valid—Civil Procedure Code (Act V of 1908) or. 40, r. 22—Point not decided Respondent's favour, if may be urged without cross-objection.*

A condition in a kabinnamah *that the husband shall live with the wife in her father's house and that if he broke this condition she would be entitled to divorce him is invalid under the Mahomedan Law, and her claim for deferred dower following upon such a divorce must fail.*

The Respondent in an appeal can urge in support of the judgment a point not decided in his favour without presenting a cross-appeal.

This was an Appeal preferred on the 19th of December 1910 against a decree of M. Yusuf, Esq., District Judge of Zillah Noakhali, dated the 23rd of November 1910, reversing a decree of Babu Ananta Nath Mitra, Munsif at Lakhipur, dated the 2nd of June 1910.

The Appellant who had another wife living married the Respondent in Sraban 1312, on executing a *kabinnamah* whereby he stipulated *inter alia* that he would live with the Respondent in her father's house as *khanadamad* and that on his

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failure to do so, the Respondent would have power to divorce him on expiry of one year from the date of the breach of contract. On account of an alleged breach of this contract the Respondent divorced the Appellant on 4th Aughran 1316, and brought this suit to recover Rs. 550 payable to her under the *kabinnamah* as dower, Rs. 250 on demand and Rs. 300 on dissolution of marriage.

The Munsif gave her a decree for the former amount only holding that there was "no valid reason for her divorcing the Appellants. On appeal, the District Judge reversed this finding holding that the Defendant had broken the condition in the *kabinnamah* in Bhadra 1314, and gave her a decree for the full amount of her claim.

The Defendant preferred this Second Appeal.

Babu Ramesh Chander Sen for the Appellant.

Babu Gunada Charan Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This suit is brought by a Mahomedan wife for declaration that she is divorced and for prompt and deferred dower. There is now no question as to the justness of the demand for the prompt dower. As to the deferred dower the question rests on certain terms in a *kabinnamah* between the two parties. The condition which is laid down by the terms to which we have referred is that the husband is to live with the wife in her father's house and that if he breaks this condition she is to have a right to divorce him. That of course implies that the wife will continue to live in her father's house.

The first Court held that the contract was not illegal, but the condition we have referred to was not fulfilled. He accordingly gave a decree only for the prompt dower. Against this the wife appealed to the lower Appellate Court. In considering the question the Judge refused to consider whether the condition to which we have referred was or was not illegal on the ground that the Respondent had not entered any cross-appeal on the subject.

We are now asked to say that this decision of his was wrong and that the contract was in fact an illegal one. The findings of fact by the lower Appellate Court are sufficient for us to proceed to the determination of the case on the validity of the contract. We have no doubt that the Defendant had a right to ask for a decision on this point in the lower Appellate Court, since it was a point on which he could have upheld the decision of the Court below. Therefore the Judge was wrong in not considering it.

There is some good authority for the statement that the condition that the wife shall be at liberty to live with her parent is void. We may for this refer to Wilson's Digest of Anglo Mahomedan Law, sec. 56, Abdur Rahim's Institutes of Mussalman Law, Article No. 7, para. 3 and to the decision in the case of *Abdul Piroj Khan* v. *Husseinbi* (1). We hold therefore that this condition is illegal and that the Plaintiff is accordingly not entitled to use it for supporting her claim to divorce and consequently to the deferred dower.

Accordingly we allow this Appeal and though we differ from the Munsif in the reasons given for his decision we affirm

(1) 6 Bom. L. R. 728 (1904).

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his decree. The Appellant is entitled to his costs in this Court and in the lower Appellate Court.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 393 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
5, May.

RADHA GOBINDA MISRA, Auction-purchaser, Petitioner,
v.
RAGHU NATH MISRA and others, Claimants, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 21, r. 101—Joint possession with judgment-debtor if possession in one's own interest—Scope of section.

A claimant who has an interest in the land of which possession has been delivered in execution of a decree either as a member of the family of the judgmentdebtor or otherwise and who is affected by the delivery of possession, is a person who is in possession in respect of his own interest, though jointly with the judgment-debtor, and he can claim to be in possession of the property on his own account within the meaning of r. 101, Or. 21 of the Civil Procedure Code.

This was a Rule granted on the 1st of April 1913 against an order of the Munsif of Jajpur, dated the 6th of January 1913.

The facts of the case will sufficiently appear from the judgment.

Babu Susil Madhub Mullick for the Petitioner.

Mr. Misra and *Babus Probodh Kumar Das* and *Promatha Lal Dutt* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside an order under Rule 101 of Or. 21 of the Code of Civil Procedure of 1908. That Rule provides for an adjudication of a claim preferred by persons who have been dispossessed by a decree-holder auction-purchaser, and lays down that where the execution Court is satisfied that a claimant of this description was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put in possession of the property. The Petitioner before us obtained a mortgage decree against a member of a joint Mitakshara family. He became the purchaser in execution of that decree. When possession of the property was delivered to him, a person who claimed to be a purchaser from a member of the family other than the judgment-debtor preferred a claim under sub r. (1) of r. 101. The contention of the claimant, who is the Opposite Party in this Rule, was that he was in possession of the property on his own account and that consequently he was not liable to be dispossessed by the auction-purchaser. The Court below has found as a fact that the claimant was in joint possession of the property along with the judgment-debtor. The question consequently arises whether his claim may be allowed under r. 101. On behalf of the execution purchaser, it has been contended that rr. 100 and 101 do not apply to a case of this description. It has been urged that when two persons are jointly in possession of a property, and in execution of a decree obtained against one of such persons, the decree-holder proceeds to take possession of the property, or if a purchaser at a sale held in execution of a decree obtained against one of such persons proceeds to take delivery of the property, the other person

who is dispossessed cannot contend that he is in possession on his own account, as his possession admittedly is joint possession with the judgment-debtor. In support of this view reliance has been placed upon the case of *Cooverji Heruji* v. *Dewetsey Bhojal* (1). In this case, Mr. Justice Strachey observed that "a member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account, as his possession is possession of the family, unless there is evidence to show that he set up a right to a particular piece of land adversely to the family, which, it has always been held, must be very strictly proved. In so for as the learned Judge lays down that a member of a joint Mitakshara family cannot say that he is in possession of a specific portion of the joint property on his own account, the proposition is unquestionably correct ; but in so far as the learned Judge lays down that a person who is in joint possession is not in possession on his own account, the proposition appears to us to be open to criticism. The point now taken was raised before this Court in the case of *Sankar Nath* v. *Madan Mohan* (2), where it was observed, on the assumption that r. 100 and 101 were applicable to a case of this character, that an order for restoration of possession ought not to specify the share held by the claimant. It was pointed out in this case that, upon the question raised, there was a divergence of judicial opinion and that, in the case of *Gobinda Nair* v. *Kesava* (3), a view had been taken contrary to that adopted in the case of *Cooverji* v. *Dewey* (1). The point, however, was left open, as the case was decided on other grounds. We are of opinion that the view taken in *Govinda Nath* v. *Kesava* (3), is well-founded on principle. In this case Mr. Justice Mutu Swami Ayyar held that a claimant, who has an interest in the land, of which possession has been delivered, either as a member of the family or otherwise and who is affected by the delivery of possession, as he himself is in possession, is really a person who is in possession in respect of his own interest though jointly with the judgment-debtor, and he can, consequently, claim to be in possession of the property on his own account within the meaning of sec. 331 of the Code of 1882. His joint interest with the judgment-debtor cannot prevent him from claiming in good faith in respect of his own interest. The effect of his obstruction and claim may be to set up a case in favour of the judgment-debtor against the execution purchaser, if the joint right of the judgment debtor is in every respect similar to his." But this can make no difference, as the claimant should not lose his joint right, because his co-tenant cannot set up his right as against the execution purchaser. In our opinion the terms of r. 101 are comprehensive enough to cover a case of this description. There is no anomaly involved in the view we take. The only effect of our order in favour of the claimant is to restore him to joint possession in the same manner as before-in other words, the execution purchaser is placed in possession only to this extent that the possession of his judgment-debtor is terminated and he has to remain in joint possession, along with the claimant, as his judgment-debtor had previously done. We must hold accordingly that the Court

(1) I. L. R. 17 Bom. 718 (1893).
(2) 11 C. L. J. 61 (1909).
(3) I. L. R. 3 Mad. 81 (1880).

(3) I. L. R. 3 Mad. 81 (1880).

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below had jurisdiction to entertain the claim.

The result is that this Rule is made absolute in part and the order of the Court below varied to this extent only, namely, that the claim is allowed and the claimant is restored to joint possession as before, so that he will be in joint possession with the execution purchaser. There will be no order for costs in this Rule.

Rule made absolute.

CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2869 OF 1911.

MOOKERJEE, J. }
BEACHCROFT, J. }
1913,
Heard, 12 and 13, August.
Judgment, 13, Augus

SITARAM, Plaintiff, Appellant,
v.
RAMA PROSAD RAM and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), Or. 26, r. 10 (2)—Commissioner, right of parties to examine—Court's leave if may be withheld arbitrarily—Report not giving reasons for conclusion —Stamp Act (II of 1899), sec. 36, Sch. I, Art. 1 —Acknowledgment.

A statement to the effect as follows: "Rs. 2,115—balance due" followed by the date and the debtor's signature is an acknowledgment and should be stamped as such.

But under sec. 36 of the Evidence Act if such a statement, though unstamped, has been admitted in evidence by the Court of first instance, it cannot be rejected by the Appellate Court.

The Legislature in making the report of the Commissioner admissible in evidence by itself and his examination in connection therewith subject to the Court's leave intended to afford protection to him from vexatious examination at the instance of either party. The permission to examine the Commissioner cannot however be arbitrarily withheld.

When the Commissioner has not given reasons for his conclusions it is a proper case for the examination of the Commissioner as a witness.

This was an Appeal preferred on the 20th of November 1911, against the decree of L. C. Adami, Esq., District Judge of Zillah Cuttack, dated the 31st of July 1911, affirming the decree of Babu Probodh Chandra Sinha, Munsif, 2nd Court at Puri, dated the 12th of September 1910.

The facts of the case will sufficiently appear from the judgment.

Babus Provas Chandra Mitter and *Susil Madhab Mullick* for the Appellant.

Babus Baidyanath Dutt and *Bhupendra Kumar Ghose* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Plaintiff in a suit for recovery of money from four persons as Defendants. Of these, the first two are brothers, and they are the step-brothers of the other two Defendants. The case for the Plaintiff is that the Defendants were members of a joint family, that the first Defendant was the head and as such looked after their affairs. The Plaintiff asserts that the Defendants have from time to time borrowed money from him to carry on a trade in rice, that accounts were adjusted between the parties on the 25th October 1908, when a sum of Rs. 2,115-9 was found due ; and that the third Defendant on behalf of himself and his brothers signed the statements. The Plaintiff allows credit for payments alleged to have been subsequently made to him,

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and seeks to recover the balance of Rs. 2,000.

The two sets of Defendants filed distinct written statements. The first two Defendants admitted that there had been transactions between them and the Plaintiff; but they alleged that although a sum of more than 10,000 had been paid to them on different occasions, the debt had been repaid. The third and fourth Defendants denied that there had ever been any transactions between them and the Plaintiff; they further stated that they were separate in mess and residence from the other Defendants and had no concern with them. In substance, they repudiated all liability under the transaction mentioned in the plaint. On these pleadings, four issues were raised in these terms: first, "whether the third and fourth Defendants are liable for the transaction, secondly, whether there was an adjustment of accounts between the parties on the 25th October 1908, and Rs. 2,115-9 was then found due by the Defendants and whether they had signed the Plaintiffs' account book in acknowledgment of that debt; thirdly, to what rate of interest are the Defendants liable? and fourthly, whether the debt had been paid off? When the case came up for trial before the Court of first instance, the matter was referred for disposal to a Commissioner on the assumption that the case was one for adjustment of accounts. This order was made apparently with the assent of both the parties. Before the Commissioner, the parties went into evidence in detail and the proceedings were much protracted. He ultimately submitted a report in favour of the Plaintiff. This report was rejected by the Court of first instance and the Court proceeded to consider the case on the merits. As regards the statement signed by the third Defendant, the Court came to the conclusion that it was not properly stamped and was not admissible in evidence. The document was consequently rejected and the result was that upon the remainder of the evidence on the record, no decree could be made in favour of the Plaintiff. Upon appeal that decree of dismissal has been affirmed by the District Judge. In the present appeal, the decree of the District Judge has been assailed on the ground that the procedure adopted by the Court of first instance was substantially erroneous and had produced an error in the decision of the case on the merits. The argument has been developed under three heads; first, that the statement of account should not have been thrown out in view of the provisions of sec. 36 of the Indian Stamp Act of 1899; and if the statement is accepted, it is good evidence against the third Defendant and affords sufficient foundation for a decree against him; secondly, that even if the statement is not held to be admissible, the first two Defendants are liable upon the admission made in their written statement, namely, that they had from time to time received large sums of money from the Plaintiff; and the burden of proof was upon them to establish that the debt had been repaid as alleged in their written statements; thirdly, that the report of the Commissioner should not have been rejected, that even if it was rejected, the Court should have either directed a fresh enquiry by the Commissioner or based its decision upon the entire evidence on the record, that is, the evidence taken in Court as also the evidence taken by the Commissioner. In our opinion, it is clear that the suit has not been properly tried.

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In so far as the statement alleged to have been signed by the third Defendant on the 25th October 1908 is concerned, the District Judge has found that it was as a matter of fact executed by the third Defendant. Its genuineness cannot consequently be questioned in second appeal. The only question for consideration is, whether it was inadmissible in evidence, because it was not stamped. On behalf of the Appellant it has been contended that it was not an acknowledgment within the meaning of the Indian Stamp Act; and in support of this view reliance has been placed upon the decision in *Galstaun* v. *Hutchison* (1). We are not prepared to accept this contention as well-founded The statement is in these terms:—"Rs. 2,115 *baki dena niti Kartick sudi ekom sambat 1965, Bakalam Gouri Sankar.*" This plainly is an acknowledgment that Rs. 2,115 was due at the date when the statement was signed. The terms of this statement are in material particulars different from those before the Court in the case of *Galstaun* v. *Hutchison* (1). This was clearly a document which was required to be stamped under the provisions of the Indian Stamp Act. But it was accepted in evidence by the Court of first instance, and in view of the provisions of sec. 36 of the Indian Stamp Act, it is plain that it should not have been, at a subsequent stage of the proceeding, rejected by the Court. [*Punchanund* v. *Taramoni* (2)]. The document must thus be treated as part of the evidence on the record; it is *primâ facie* good evidence against the third Defendant and affords foundation for a decree against him, unless he is able to explain how and why it came to be signed by him. He may possibly be able to show that he executed it under circumstances which do not make it binding as against him; this, therefore, will be the first point for consideration.

If it is found that the document binds Gouri Sankar, the next question will be, does it bind the other Defendants, that is, had Gouri Sankar authority to make an acknowledgment so as to prejudice their position. If this is answered in the negative, the case against these Defendants must be investigated on the accounts between the parties. As already stated, the Plaintiff founds his claim on the transactions mentioned in the plaint which, according to his allegation, culminated in a settlement of accounts on the 25th October 1908. If the Defendants or some of them are able successfully to repudiate that statement, the matter will be reopened; and in that event, the case will be retried on the basis of the pleadings. The first two Defendants admitted in their written statement that they received large sums from the Plaintiff from time to time. Their allegation is that these sums have been repaid. The burden of proof primarily rests upon them to establish the plea of payment.

As regards the report of the Commissioner, we may point out that the course adopted by the Court of first instance was not quite in accordance with law. The Defendants applied for the examination of the Commissioner as witness. The Court rejected the application, on the ground that the Defendants were not entitled to examine the Commissioner as a witness. The Court had apparently in view the provisions of r. 10 (2) of Or. XXVI of the Code of 1908 which corresponds to sec. 180 of the Code of 1859 and sec. 393 of the Code of 1882. That sub

(1) 16 C. W. N. 945 (1912).
(2) I. L. R. 12 Cal. 64 (1885).

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rule is in these terms :—"The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and form part of the record; but the Court or with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report or as to his report or as to the manner in which he has made the investigation." It will be observed that the Commissioner may be examined with the permission of the Court by any of the parties to the suit. The object of this provision is obvious. The Legislature intended to afford protection to the Commissioner who is a quasi-judicial officer, and such protection is afforded on grounds of public policy so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination. As was explained by the Judicial Committee in the case of *O'Rourke* v. *The Commissioners for Railways* (3), and by the House of Lords in *Duke of Buccleuch* v. *Metropolitan Board of works* (4), a similar protection is afforded to every person occupying a quasi-judicial office; and in the provisions of sec. 121 of the Indian Evidence Act the Legislature in this Country has adopted the same principle. In the case before us, the permission of the Court was sought by one of the parties; that permission cannot be arbitrarily withheld. The District Judge has made it a matter of adverse comment against the Plaintiff that the Commissioner was not examined; apparently his attention was not drawn to the circumstance that the application for examination of the Commissioner had been made by one of the parties but had been refused by the Court of first instance. In the circumstances of this case, the application should have been granted, because one of the objections taken to the report of the Commissioner is that it does not give reasons for the conclusions. It is precisely in a case of this description that the examination of the Commissioner may prove useful. We must hold accordingly that the report of the Commissioner has been rejected on insufficient grounds and that an opportunity should have been afforded to the parties to clear up matters by the examination of the Commissioner.

(3) 15 App. Cases 371, (377) (1890).
(4) L. R. 5 H. L. 418, (433, 462) (1872).

The result is that this appeal is allowed, the decrees of the Courts below set aside and the case remanded to the Court of first instance to be retried in accordance with law. The Court will consider whether a Commissioner should or should not be appointed. If a Commissioner is appointed, the matter referred to him for investigation must be specified. We feel bound to add that a Commissioner was appointed by the Court of first instance originally, not so much for the benefit of the parties as to suit the convenience of the Court. The result has been that four years have been wasted without any appreciable advantage to the parties. The cost incurred up to this stage will abide the result.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 4 OF 1914.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
30, January.

JUTHAN SINGH,
Petitioner,
v.
RAM NARAIN SINGH,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Non-examination of witness on either side—

JUTHAN SINGH *v.* RAM NARAIN SINGH.

Final order on documentary evidence dating back to ten years previous to date of proceeding—Magistrate's duty under cl. 4—Jurisdiction.

In a proceeding under sec. 145 Cr. P. C. no witness was examined on either side but the Magistrate decided the case on the documents filed before him, the latest of those documents dating back to about ten years before the date of the proceeding. It appeared that one of the parties was present in Court but was not examined:

Held—*That the Magistrate was bound to take such further evidence as became necessary after a consideration of the documents, and the final order was without jurisdiction.*

Cl. 4 of sec. 145 clearly provides that the Magistrate shall not exercise his jurisdiction under the section unless and until he has sufficient evidence before him.

This was a Rule granted on the 22nd of January 1914 against the order of the Deputy Magistrate of Chapra, dated the 28th of November 1913, declaring the Opposite Party to be entitled to possession of the disputed land until evicted therefrom in due course of law.

On the 14th October 1913, on receipt of a police report, the Deputy Magistrate of Chapra directed under sec. 144 Cr. P. C. Ram Narain Sing and Juthan Sing forbidding them to do anything on the disputed land and on the 5th November 1913, after hearing arguments drew up proceedings under sec. 145 Cr. P. C. in respect of land bearing survey Nos. 1054, 1056, 1086, and fixed the 28th November 1913 for hearing. Both sides filed written statements and the 28th November 1913 the final order was made. The material portion of the Magistrate's judgment is set at below.

"No witness is present on behalf of either party. As the case under sec. 145 Cr. P. C. entirely depends on documentary evidence I proceeded with the case. Heard arguments of both sides and also perused the documentary evidence.

* * * * * * *

"2nd party claims the land bearing survey Nos. 1054, 1086. The name of Ram Narain Sing 2nd party is entered in survey khatian in respect of plot No. 1034 as his zerait land. It appears that a civil suit was brought by Kesho Dharri and two brothers in respect of the said plot and it was decreed in favour of the 2nd party on the 12th July 1902 and upheld by the appellate Court on the 4th March 1903. In the said suit Gunraj was Defendant along with Ram Narain Sing 2nd party and stated that he Gunraj Sing had no interest or connection with plot No. 1054. In the face of the above fact, the police report that the 1st party got the said plot from Gunraj Sing falls to the ground and appears to me unreliable. As regards plot No. 1086 it is entered in the name of Sudarsan Sing as bataidar under Ram Narain Sing 2nd party in the survey khatian. Sudarsan Sing is said to be servant of Ram Narain Sing and does not claim the said plot.

"From the *zurpeshgi* deed as well as from the sale deed both dated 29th April 1902 executed by Krishna Ram in favour of 1st party it is quite clear that the eastern boundary of plot No. 1056 is plot No. 1086 belonging to Ram Narain Sing 2nd party. First party's own documents mentioned above go to prove that 2nd party is in possession of plot No. 1086.

"Under the above circumstances I am satisfied that Ram Narain Sing 2nd party is in possession of the land bearing survey Nos. 1054 and 1086 and that Juthan Sing 1st party is in possession of the land

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bearing survey No. 1056 and I declare them to be entitled to possession thereof until evicted therefrom in due course of law."

Babus Atulya Charan Bose and *Rajender Proshad* for the Petitioner.

Babus Dasarathi Sanyal and *Ganesh Dutt Singh* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:

This was a Rule calling on the District Magistrate of Saran and the Opposite Party to show cause why the order under sec. 145 Cr. P. C, should not be set aside as made without jurisdiction, inasmuch as the trying Magistrate had not any evidence before him of later date than 1903 and his jurisdiction in this case only extends to deciding who was in actual possession on the date of his proceeding.

It is urged before us in showing course against the Rule that the mistake made by the Magistrate is merely a wrong inference or insufficient inference from the evidence that was before him, and this is an error of law and not a point of jurisdiction. But it is clearly a point which goes directly to the jurisdiction. There was evidence available. The Second Party was himself in Court. He had only to go into the witness box and say that the possession which is evidenced by these documents of 1903 is continuing up to the present date, and there being no rebutting evidence, the Magistrate would then have jurisdiction to decide the matter. Sec. 145, cl. 4 has clearly provided that the Magistrate shall not exercise that jurisdiction unless and until he has sufficient evidence before him. "The Magistrate shall then without reference to the merits of the claims of any of such parties to right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary." Now it is obvious when the Magistrate has taken these documents and considered their effect, he was bound to hold that they were not sufficient proof that the possession so evidenced had continued up to the date of his proceeding, and he was found to take such further evidence as thereby became necessary; and in these sec. 145 proceedings where the Magistrate acts *suo motu* in order to prevent breaches of the peace in his District, it is most important that he should have the power of directing the course of the proceedings, and it is certainly a defect in the exercise of his jurisdiction when he leaves the case on the record absolutely unproved.

The order under sec. 145, Cr. P. C., must therefore be discharged, and if necessary fresh proceedings should be taken according to law.

Rule made absolute.

[CRIMINAL REFERENCE.]

REF. No. 263 OF 1913.

HOLMWOOD, J.
SHARFUDDIN, J.
1913,
27, November.

LALIT MOHAN SINGHA, Petitioner,
v.
KUNJO BEHARY GHOSH, Accused, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 250—Compensation to accused—Final order if should be contained in order of discharge or acquittal—Proviso, meaning of—Imprisonment in default of payment of fine, when to be ordered.

Where in discharging the accused under sec. 253, Cr. P. C., the Magistrate in his order of discharge declared the case to be vexatious and directed the complainant

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under sec. 250, Cr. P. C., to pay compensation to the accused subject to any cause being shown by him, and no cause being shown by the complainant the Magistrate the day after made his previous order absolute and further directed the complainant to suffer simple imprisonment for 30 days in default of payment of the compensation :

Held—*That the Magistrate's order directing the payment of compensation was in strict compliance with sec. 250, Cr. P. C.*

It is sufficient that the Magistrate fixed the compensation in his order of discharge. The proviso to sec. 250 clearly contemplates that the direction in the first paragraph of the section shall be considered as in the nature of a rule and that that rule shall not be made absolute until the complainant has shown cause.

HARU TANTI *v.* SATISH ROY (1) *distinguished.*

So far as the sentence of imprisonment in default of payment was concerned the High Court held that there was an obvious error and ordered it to be amended in terms that the compensation shall be recovered as if it were a fine and in the event of its not being so recovered there shall be simple imprisonment.

This was a Reference from the Sessions Judge of the 24-Pergunnahs, dated the 26th of September 1913, under sec. 438, Cr. P. C., for revision of the order of the Deputy Magistrate of Barasat, dated the 8th and 9th of August 1913.

On the complaint of the Petitioner the Opposite Party was placed upon their trial before the Deputy Magistrate of Barasat on a charge under sec. 379, I. P. C. The Magistrate after trial discharged the accused under sec. 253, Cr. P. C., and passed an order to the following effect in the judgment: "I therefore declare the case to be vexatious and direct under sec. 250, Cr. P. C., that subject to any cause to be shown by him the complainant do pay Rs. 50 to the accused as compensation."

The day after the Magistrate passed the following order :—"No cause shown by complainant who was present yesterday. Above order made absolute, complainant to suffer simple imprisonment for 30 days, in default of payment of the compensation." The complainant thereupon moved the Sessions Judge of 24-Pergunnahs who under sec. 438, Cr. P. C., made a reference to the High Court recommending that the order should be set aside.

Babu Harendra Nath Mukerjee for the Accused Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference made to us by the learned Sessions Judge of the 24 Pergannahs in a case in which the Magistrate has directed compensation of 50 Rupees to be paid by the complainant to the accused on the ground that the case was frivolous and vexatious. There is also an error in the form of the order to which the learned Judge has drawn our attention, namely, that the order directs that in default of payment the accused is to suffer simple imprisonment for 30 days. This is an obvious error. Before dealing with the main question we direct that this portion of the order of the Magistrate be set aside and in lieu thereof it is said that the compensation shall be recovered as if it was a fine, and in the event of its not being so recovered there shall be simple imprisonment for 30 days. This is a mere formal amendment.

(1) I. L. R. 38 Cal. 802 (1910).

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But as regards the main question we are referred to the ruling in *Haru Tanti* v. *Satish Ray* (1) in which the facts are clearly distinguishable from the facts of the present case, inasmuch as the Sub-Divisional Magistrate there had discharged the accused on the 3rd September 1910, called upon the complainant to show cause why he should not pay 20 rupees to each of the accused as compensation under sec. 250, and then on the 6th of September directed the complainant to pay 10 rupees to each of the accused. The Judge in that case freely admitted that the course taken by the Sub-Divisional Magistrate did seem to be perfectly clear and reasonable but that his procedure might not fulfil the requirements of sec. 250, Cr. P. C, strictly speaking. On the face of the facts therein set out, that was so. But this is not at all the state of facts in the present case. In the present case, the Magistrate in his order of discharge and in the very same sentence in which he was discharging the accused declared the case to be a "mistake of law" and morally speaking maliciously false. But as the factum of the taking away of the *kobala* was true he held he could not prosecute under sec. 211, but that the case had been instituted against the accused for the purpose of vexing and harassing them and to force them to return the *kobala*; he therefore declared the case to be vexatious by his order of discharge and directed the complainant to pay Rs. 50 compensation to the accused subject to any cause to be shown by him. Now the learned Judge in the case in *Haru Tanti* v. *Satish Ray* (1), in giving reasons for their decision, may seem at first sight to lay down that the Magistrate must necessarily stop in the middle of his judgment and call upon the complainant and say "I cannot discharge the accused until you have shown cause why I should not discharge him." That cannot be the law, and if the learned Judges had intended to lay down any such proposition we should respectfully dissent from them. But we must apply the order which we find in the report to the circumstances of the case with which the learned Judges were dealing, and the law that they lay down that the requirements of sec. 250, Cr. P. C, must be fulfilled in every case is perfectly sound and good law; and we do not think that the learned Judges intended to lay down an impossible procedure in these cases. It is sufficient that the Magistrate fixed the compensation in his order of discharge. If the complainant was not in Court at the time the order of discharge was passed the Magistrate certainly would not be justified in keeping the accused person in custody with the charge hanging over him while the complainant is being fetched to show cause. It might be that the complainant could not be procured for a month. The words of the section are perfectly clear—the Magistrate may in his discretion by his order of discharge or acquital direct the person upon whose complaint or information the accusation was made to pay to the accused such compensation not exceeding 50 rupees as the Magistrate thinks fit,—and this is exactly the course that has been followed here. Then comes the proviso—before making any such direction the Magistrate shall record and consider any objection which the complainant may urge against the making of the direction. That clearly contemplates that the direction in the first paragraph shall be conditional or in the nature of a Rule and that that Rule shall not be made

(1) I. L. R. 38 Cal. 802 (1910).

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Contents.

NOTES.

Constitution of Benches.

The constitution of the Courts and the distribution of business amongst them have been as follows, from Wednesday the 22nd April last.

GROUPS I AND VI.—The Hon'ble Mr. Justice N. R. Chatterjea and the Hon'ble Mr. Justice Beachcroft.

GROUP II.—The Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Richardson.

GROUP III.—The Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice Chapman.

GROUP IV.—The Hon'ble Mr. Justice Woodroffe and the Hon'ble Mr. Justice Carnduff.

GROUP V.—The Hon'ble Mr. Justice Coxe and the Hon'ble Mr. Justice D. Chatterjee.

CRIMINAL BUSINESS.—The Hon'ble Mr. Justice Sharfuddin and the Hon'ble Mr. Justice Teunon.

SPECIAL APPEALS OF THE VALUE OF RS 1,000 AND UNDER.—The Hon'ble Mr. Justice Mullick.

PRIVY COUNCIL DEPARTMENT AND APPEALS FROM THE ORIGINAL SIDE.—The Hon'ble Chief Justice and the Hon'ble Mr. Justice Stephen.

ORIGINAL SIDE.—The Hon'ble Mr. Justice [illegible], the Hon'ble Mr. Justice Chaudhuri and [illegible] Hon'ble Mr. Justice Imam, sitting singly.

The Criminal Procedure Amendment Bill.

The Bill to amend the Code of Criminal Procedure which has been introduced in the Supreme Legislative Council proposes to introduce a very large number of amendments. It is fairly comprehensive and carefully drafted. Since the passing of Act V of 1898 a large number of judicial decisions have accumulated which it is necessary to incorporate by legislation. Some very useful changes which the actual working of the Code showed to be necessary have been embodied in the Bill but in several instances the changes proposed are so very radical that we cannot but view to them with misgivings.

The absence of a definition of an "accused" in the Code has very often presented many difficulties and raised complications especially on account of the fact that the Code of Criminal Procedure not merely provides for the procedure of trials for offences but deals with the prevention of crime and other incidental matters necessary for the maintainance of peace and order. The proposed change in sec. 340 of the Code practically supplies a definition of an 'accused' and under the new sec. 340 any person accused of an offence before a Criminal Court or against whom proceedings are instituted under the Code in any such Court is an accused person. The inclusion within the category of accused persons of every one on whom a Criminal Court may exercise jurisdiction carries with it the disadvantage that an accused person cannot take oath and give evidence, but the Legislature has been careful enough to enact that persons against whom proceedings under secs. 133, 144, 145, 488, 552 of the Code may be pending will be competent to examine themselves as witnesses. This change is quite in accord with the trend of judicial opinion.

Another very important and necessary change introduced by the Bill is the addition of a new clause to sec. 418 whereby it is provided that when in the case of a trial by jury any person is sentenced to death any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as on a matter of law. We have had occasion to refer to this subject from time to time and have pointed out the gross anomaly of the existing law and we are glad to find that the Legislature has thought fit to set it right.

The law relating to the settlement of differences of opinion between Judges in the High Court in matters of appeal and revision is also sought to

be changed and we think that the change is for the better. It has been uniformly held that the whole case is open before a third Judge hearing a reference under sec. 429 and he can differ from both the Judges who heard the case in the first instance. The Legislature now provides that in such cases of difference of opinion the matter will be re-heard before a Bench consisting of the first two Judges with the addition of a third Judge and the opinion of the majority will be the judgment of the Court.

It is a well-known proposition of law that every Court has inherent jurisdiction to take such steps as may be necessary to give effect to its order but when the law on any particular subject is codified the absence of a provision to this effect in express terms is sometimes misleading and in cl. 136 of the Bill it is proposed to enact a new sec. (561A) to the effect that nothing in the Code shall be deemed to limit or affect the inherent power of the Court to make such orders as may be necessary to give effect to any order under the Code and to prevent abuse of the process of the Court. Even if superfluous this new provision will be of use in the practical application of the Code.

The change in law relating to first offenders is also an important one and we entirely approve of it. The new sec. 562 in the Bill very much enlarges the scope of the present section which contemplates only cases of convictions for offences punishable with 2 years' imprisonment. Under the new section Courts will have power to release offenders on probation in cases of conviction for offences punishable with 3 years' imprisonment and in cases under secs. 317, 325, 335, 381, I. P. C. It is now made clear that the section does not merely apply to the cases of youthful offenders. The period for which an offender may be released under this section has been extended from one to three years and in the case of a minor provision has been made that a bond for good behaviour shall be executed by a surety only.

Turning now to the other changes we find that it is intended in cl. 12 of the Bill to enact that a person refusing to attend and witness a search by a police officer shall be punishable under sec. 187, I. P. C., and the refusal of any person attending a search to sign the list of the articles seized shall not affect the legality of the search. We fail to see the necessity for this change and we believe that there has seldom been a case in which a search has been frustrated by the obstinacy of witnesses. The rule that a search shall be conducted in the presence of two respectable men and the search list shall be signed by them is one not merely of technicality but of substance in that it is enacted to guarantee the reality of the search and the discoveries made thereat. If the section is enacted in the form proposed in the Bill all that will be necessary for an unscrupulous police officer conducting a search in violation of law will be to step into the witness box and say that the persons called upon by him to witness the search refused to do so or that they refused to sign the search list. We do not see the wisdom of giving a weapon in the hands of the police which is open to serious misuse and the abuse of which may bring the procedure itself into discredit.

We also do not approve of the amendment of sec. 165 in the manner suggested in order to obviate, as the framers of the Bill put it, the difficulties arising from the decisions of the Calcutta High Court in *Ishwar Chandra Ghosh* v. *King-Emperor*, 12 C. W. N. 1066, and *Bajrangi Gope* v. *King-Emperor*, 15 C. W. N. 343. In the first of the aforesaid cases it was held by Brett and Ryves, JJ., that sec. 94 of the Code cannot be taken to apply to the case of an accused person on his trial to whom a notice has been issued to produce an incriminating document. In the second case it was laid down by Holmwood and Sharfuddin, JJ., that sec. 165 of the Code does not authorise a general search by the police for stolen property in the house of an absconding offender. It speaks of a specific document or thing which may be the subject of summons or order under sec. 94. The new sub-section to be added to sec. 165 gives authority to a police officer to make a search if he has received information or has reasonable grounds for believing that anything necessary for the conduct of an investigation into any offence which he is authorised to investigate may be found within the limits of the police station of which he is in charge.

We fail to see how this sub-section will obviate the difficulty created by the case reported in 12 C. W. N. 1016 which deals with an accused undergoing trial in a Court and not one whose case is under investigation by the police. So far as the other ruling is concerned the framers of the Bill propose to overrule it and the change seems to us to be retrograde and quite uncalled for. The material words in the present section are "production of any document or thing necessary to the conduct of an investigation." The words, as they are, are wide enough. But the words proposed to be put in are "anything necessary for the conduct of an investigation." The language is indeed so very vague that no police-officer of any intelligence need feel the slightest difficulty in furnishing an excuse within its meaning for

holding a search of any person's house. It will practically authorise an investigating police-officer to hold a roving enquiry with power to ransack peoples' houses on the mere chance of lighting upon something likely to assist him in the investigation. Such a law would be opposed to the very spirit of fair investigation embodied in a long line of English authorities too well-known to need citation.

We notice that cl. 9 of the Bill proposes to give power to a private person to arrest any person against whom a reasonable suspicion exists that he has committed a non-bailable and cognizable offence thus extending the present sec. 59 of the Code which authorises only the arrest of a person who commits a non-bailable and cognizable offence in view of the person arresting him. It is said that this change is made following the analogy of English law but we apprehend that this provision would be liable to abuse by men of the class of informers and spies and this makes us diffident about the expediency of extending the power of arrest by a private person in the manner contemplated in the Bill.

Cl. 27 of the Bill proposes to add a new section to sec. 162 permitting the use of a statement recorded under sec. 161 for corroborating the evidence of a witness when such statement or a part thereof is used to impeach the credit of such witness. The ruling in I. L. R. 36 Cal. 281: s. c. 13 C. W. N. 197, *King-Emperor* v. *Fanindro*, is to some extent responsible for this amendment but this decision is at variance with other decisions and we do not think that a sufficient case has been made out for the Legislature giving effect to this decision in preference to a plurality of others to the contrary. We discussed in detail this particular point, namely, the bearing of sec. 157 of the Evidence Act on sec. 162, Cr. P. C, quite recently (*Vide* 18 C. W. N. 98, 107N.) We propose to continue our examination of the provisions of this Bill in subsequent issues.

CURRENT INDIAN CASES.

(CIVIL.)

Easement.

DHED MULIA BHANA *v.* DHED SUNDAR DANA, I. L. R. 38 Bom. 1.

The definition of 'easement' in the Easements Act applies just as much to a projection of eaves in a dry country where there is no discharge of rainwater as in a country where there is an abundant rainfall and there is discharge of water (*Chotalal Haria Chand* v. *Manilal Bhagalbhai*, I. L. R. 37 Bom. 491).

If the Defendant has acquired an easement from a projection of eves ten inches over the Plaintiff's land he can raise the height of those eaves so long as he does not throw an increased burden upon the servient tenement. That is provided by sec. 23 of the Easements Act, (*Harvey* v. *Walter*, L. R. 8 C. P. 162.)

Limitation—Art. 181.

DALTO ATMARAM *v.* SHANKER, I. L. R. 38 Bom. 32.

A consent decree provided for satisfaction of the decretal debt by instalments. Three years from the due date of the last instalment becoming payable expired and an application was made for a decree absolute for sale of the property of the Defendant under the terms of a consent decree.

Held—That this was an application under the Civil Procedure Code and as such fell within the scope of Art. 181 of the Limitation Act. (*Amlook Chand Panack* v. *Sarat Chandra Mukherji*, I. L. R 38 Cal. 913).

Land Acquisition Act (I of 1899)—Compensation.

DAYA KHUSHAL *v.* THE ASSISTANT COLLECTOR, SURAT, I. L. R. 38 Bom. 37.

Where land is acquired for the purpose of quarrying what the Court has to determine is the market value of this land and it may be that a willing purchaser would increase the price otherwise payable for the land by reason of its adaptability as a quarry and this is a matter which ought to be considered in awarding compensation.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD, AND CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE NO. 2970 OF 1911. KALA GAJI AND OTHERS Defendants Appellants *v.* MAHESWAR CHOWDHURY, Plaintiff Respondent. 8th April 1914.

Ejectment—Under-raiyat—Denial of landlord's title—Previous rent suit.

The Plaintiff was the *gomasta* of the landlord of the village. He obtained certain lands from the landlord and let them out to the Defendant. In a previous rent suit brought by the Plaintiff against the Defendant, the Defendant pleaded that he always paid his rent to the Plaintiff for the benefit of the landlord and that the Plaintiff was nothing more than a *gomasta*, and he was a raiyat holding directly under the landlord. That rent suit was decided in his favour and the Plaintiff sued again, alleging that on establishment of his title as raiyat he could eject the Defendant without notice as trespasser.

Held, that the Plaintiff having pleaded that the Defendant was an under-raiyat and the Defendant

not having denied tenancy in the land but having stated that he held it on a higher basis he still remained an under-raiyat and could only be ejected upon notice.

Dhora Kairi v. *Ram Jewan Kairi*, I. L. R. 20 Cal. 101, followed.

Moulvi Nuruddin Ahmed and *Babu Rajendra Prosad* for the Appellants.

Babus Tara Kishore Chowdhury and *Bepin Chandra Mullick* for the Respondent.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before COXE, AND IMAM, JJ. APPEAL FROM ORIGINAL DECREE NO. 12 OF 1910. BHAIRO PERSHAD AND ANOTHER, Appellants *v.* GAJADHAR PERSHAD SAHOO AND OTHERS, Respondents. Heard, 26th March, 2, 3 and 6th April, 1914. Judgment, 8th April, 1914.

Indian Limitation Act (IX of 1908), sec. 19—Acknowledgment of liability.

The appeal arose out of a suit on a *hatchitta*, instituted on the 10th November, 1904. The suit was dismissed on some preliminary point but was remanded by the High Court for trial on the merits. The lower Court disbelieved the *hatchitta* but gave the Plaintiffs a decree on the *hatchitta* of the previous year, and held that the suit was saved from limitation by reason of certain acknowledgments made in a letter Ex. 4 c. The letter said that the writer after looking into the account would sign it.

Held, that was not an acknowledgment of liability on an account stated.

Andrappa Chetty v. *P. Devaragulu*, I. L. R. 36 Mad. 68, *referred to.*

Maniram Sett v. *Sett Rupchand*, I. L. R. 33 Cal. 1047, *distinguished.*

Dr. Rash Behary Ghose, Babus Baldeo Narayan Singh and *Jyotis Chandra Sarkar* for the Appellant.

Babus Mahendra Nath Ray, Lakshmi Narayan Singh and *Kulwant Sahey* for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION.—Before D. CHATTERJEE AND CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE NO 3109 OF 1911. BAISNAB CHARAN DE AND ANOTHER, Plaintiffs, Appellants *v.* RAMKUMAR KOR AND OTHERS, Defendants, Respondents. 22nd April 1914.

Bengal Tenancy Act (VIII of 1885), sec. 85, sub sec. 2—Under-raiyati lease for term exceeding 9 years erroneously registered if void—Previous possession as tenant not claimed.

This was a suit for *khas* possession by the Plaintiffs of a certain piece of land. Plaintiffs' case was that Defendants Nos. 12 and 13 had raiyati right in the land and they granted a sub-lease of the land to Plaintiffs by a *patta* dated 26th Sravan 1270 M. E. The lease purported to be a *kayemi* lease and was registered. Defendants were trespassers upon the land in the sense that their right in the land had been sold away in execution of a rent decree obtained against them by Defendants Nos. 12 and 13 and they had not been ousted from the land. Plaintiffs averred that Defendants Nos. 1 and 5 in collusion with Defendants Nos. 6 and 11 refused to give up possession of the land and dispossessed the Plaintiffs in Bhadra 1270 M. E. by destroying the standing crops upon the land.

Both the lower Courts dismissed the Plaintiffs' suit and held that the under-raiyati lease to the Plaintiffs, although registered, being for a term exceeding 9 years was wholly void and did not confer any title to the Plaintiffs. The lower Courts further held that Plaintiffs were not admittedly in possession of the land by virtue of their lease and therefore they had no subsisting interest in the land which they could prove by other means independent of the written lease which was void being for a term exceeding 9 years. They further held that the said lease being void Plaintiffs' title could be questioned by any one, namely, the superior landlord, or the raiyat or trespassers like the Defendants.

Babu *Probodh Kumar Das* (with him Babu *Dwarka Nath Chakravarti*) for the Appellants submitted that an under-raiyati lease for a term exceeding 9 years was merely voidable and the lease having been admitted to registration it should have been held valid at least up to the term of 9 years. There was nothing in sec. 85 of the Bengal Tenancy Act which would make the sub-lease in question wholly void. Defendant being trespassers on the land were not competent to dispute Plaintiffs' title.

[D. CHATTERJEE, J.—The decision in 17 C. W. N. 59 has settled the point.]

That case did not decide the broad question whether the sub lease would be wholly void.

Babu *Kshitish Chandra Sen* for the Responde was not called upon.

Held, that the point in this Appeal was covered by the decision of *Jarip Khan* v. *Dorta Bewa* reported in 17 C. W. N. 59.

H. C. S. *Appeal dismissed.*

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absolute until the complainant has shown cause, for, as we have pointed out, it is quite impossible to imagine that in every case the complainant will be in Court at the time the order of discharge is passed. We think that the case of *Haru Tanti* v. *Satish Roy* (1) is clearly distinguishable from the present case, and that not only was the Magistrate's order in this case reasonable and proper, but that he complied strictly with the requirements of sec. 250, Cr. P. C.

We therefore direct that the order be confirmed subject to the formal amendment which we have directed in the earlier part of our judgment.

Reference discharged.

(1) I. L. R. 38 Cal 302 (1910).

[PRIVY COUNCIL.]

[APPEAL FROM THE SUPREME COURT OF HONG KONG.]

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD SHAW.
LORD MOULTON.
LORD SUMNER.

1914,
Heard, 9, February.
Judgment, 6, March.

IBRAHIM, Appellant,
v.
THE KING, Respondent.

Foreign Jurisdiction Act, 1890, and China and Corea Order-in-Council 1894—Arts. III, V, cls. (1), (3), (4), XXXV (2), Order-in-Council—Ex-territorial jurisdiction over foreigners—"British protected person," jurisdiction over—Jurisdiction of Supreme Court of China and Corea to try Afghan soldier enlisted in Indian Army for murder committed at Canton—Consent of Ameer to exercise of jurisdiction, if to be implied from public recruitment of Afghans to the Indian Army—Proof of exercise of ex-territorial jurisdiction in China by oral evidence—Admissibility—English rules of evidence how far binding on Supreme Court at Hong Kong—Statement by accused in answer to question by commanding officer when in custody, if admissible—Substance and not mere formalities of law, to be complied with—Misdirection to jury on matter of comparatively small importance, if a ground for reversal—Privy Council when will interfere with order in criminal case—Violation of natural justice.

The specified conditions under which only, according to cl. (3) to Art. V of the China and Corea Order-in Council 1904, the Supreme Court of China and Corea has civil and criminal jurisdiction over a "foreigner" as such have no application to "British protected persons" who even when in fact natural born foreigners are "British subjects" as defined by Art. III and so subject to the jurisdiction of that Court under cl. (1) to Art. V.

The accused, a natural born subject of the Ameer of Afghanistan, was duly enlisted and enrolled in a British Indian regiment, took the oath of allegiance to his Majesty and made a solemn declaration undertaking among other things to go wherever ordered by land or sea, and whilst serving with the detachment of that regiment which was encamped on Shameen Island at Canton as a guard of the Concession, was alleged to have murdered a Subadar of that regiment. The Acting Consul at Canton, who also served as Judge under Art. XIX of the Order-in-Council, gave evidence (which was uncontradicted) "that the place of murder was within his jurisdiction and that the jurisdiction exercised at Canton on Shameen was the same ex-territorial jurisdiction as was exercised throughout China by the Supreme Court, that Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over them, and that consular protection extends to trying persons and protecting them if they are improperly arrested."

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Held—*That sec. 4 (1) of the Foreign Jurisdictions Act 1890 did not make this evidence inadmissible to prove that by "usage, sufferance or other lawful means" His Majesty has jurisdiction at Canton.*

That the accused being, during his service in the Indian Army, subject to military law was entitled to His Majesty's protection and was a "British protected person" within Art. III.

When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country where all are serving together in the armed forces of His Majesty.

Protection enjoyed by virtue of the Foreign Jurisdiction Act 1890, "or otherwise," as mentioned in Art. III, includes that derived from other statutes, Imperial or Indian, applicable to the person in question.

Quære:—*Whether the Court could take judicial notice of the political change in China in considering the question of jurisdiction.*

Quære:—*Whether it may not be reasonably inferred from the practice (which is a matter of public knowledge) of enlisting native Afghans in the Indian Army whereby they are* de facto *brought under the authority of His Majesty, that the Ameer does in fact consent to such enlistment with its consequences, so as to bring such enlisted Afghans within the terms of cl. (4) Art. V,* i.e., *"foreigners with respect to whom any State, King, Chief or Government whose subjects they are consents to the exercise of power or authority by His Majesty."*

The officer commanding the detachmen who spoke to the accused shortly after the occurrence, deposed to having asked the accused why he had done such a senseless act—not thereby meaning to convey a threat or inducement—and to the accused having replied that he was being abused by the deceased three or four days and that without a doubt he had killed him. The Judicial Committee found that the words of the officer though formally a question were really an exclamation of dismay.

Held—*That the prosecution having by the evidence of this officer proved to the satisfaction of the trial Judge that the statement of the accused was voluntary in the sense that it had not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, its admission in evidence was not in breach of the long established rule of English Criminal law which makes statements obtained from the accused by pressure of authority and fear of consequences inadmissible in evidence and which casts on the prosecution the onus of proving that the statement relied on was voluntary.*

On the question whether the statement should not have been excluded from evidence on the ground of its having been made by a person in custody in answer to a question put by a person having authority over him and having custody of him through his subordinates.

Held, on a review of English authorities, *that the English law on the point was still unsettled, some Judges being of opinion that such a statement is admissible in evidence without exception, whilst others treat its exclusion from evidence as a matter for the judge's discretion depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case.*

IBRAHIM *v.* THE KING.

That the trial Judge in admitting this evidence decided in accordance with what at any rate was a "probable opinion" of the present law if it was not actually the better opinion, and his so doing was not a violation of "the principles of natural justice," calling for His Majesty's interference.

That even if the evidence was admissible in the exercise of the trial Judge's discretion, that discretion in the present case was not shown to have been exercised improperly.

With reference to Act XXXV (2) of the China and Corea Order-in-Council which provides that, subject to the provisions of that order, criminal jurisdiction under the order shall, as far as circumstances admit, be exercised on the principle of and in conformity with English law for the time being:

Held—*That in the absence of any provision in the order on the point modifying or excluding the principles and practice of English law, the question of the admissibility of the statement of the accused might justly be treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong-Kong, subject, however, to the following reservations · (1) That such law and practice are not to be considered as in all respects and particulars binding on that Court; (2) That regard must be had to the necessary distinction that must be drawn between the criminal procedure of a European country whose jurisprudence has a defined history extending over many centuries and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of law by European Judges whose duty it is to have regard alike to the principle of British justice and to the necessities of local order; (3) That the words "so far as circumstances admit" may well* (i) *refer to absence of facilities at Hong Kong for formal proof of Statutes passed and administrative orders made in various parts of His Majesty's dominions, and* (ii) *be intended to cover some necessary departures from the formalities only as distinguished from the essentials of English justice, when as in the present case a force detailed for the protection of European residents beyond His Majesty's dominions in the midst of a population often turbublent and at the particular time disturbed, was itself disturbed by such a crime as the murder of a Subadar by a native private in the ranks.*

That in view of the position which the Privy Council held in regard to criminal proceedings, the Judicial Committee did not in this case decide what the rule of English law should be with regard to the admissibility in evidence of statements made by an accused person in answer to a question put by a person in authority in whose custody he is, that should be left to a Court which exercises the revising functions of a general Court of criminal appeal.

CLIFFORD *v.* THE KING-EMPEROR (23) *referred to.*

The Privy Council cannot in a criminal matter allow an appeal on grounds that would not have sufficed for granting leave to appeal. Misdirection as such or irregularity as such will not suffice. There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of law into a new course, which may be drawn into an evil precedent in future.

(23) 40 I. A. 241 (1913).

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EX PARTE MACREA (27), R. *v.* BERTRAND (28) *followed.*

RIEL *v.* THE QUEEN (24), *In re* DILLET' (25) *referred to.*

The jurisdiction of the Privy Council in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter.

Held, *upon a review of the evidence, that the preponderance of unquestioned over the questioned evidence (the accused's statement to the commanding officer) was so great, that it was impossible, at any rate highly improbable, that the Jury was substantially influenced by that evidence. Therefore, the fact that the Judge left the objectionable evidence for the consideration of the jury without any warning to disregard it did not justify the conclusion that there was any miscarriage of justice, substantial, grave or otherwise.*

Semble :— *Where it is highly improbable that evidence improperly admitted can have had any influence on the verdict of the jury, the Appellate Court will be justified in refusing to interfere.*

MAKIN *v.* A. G. FOR NEW SOUTH WALES (29) *considered.*

This was an appeal by special leave from a conviction for murder and sentence of death. The facts of the case sufficiently appear from their Lordship's judgment.

Mr. A. Romer Macklin, for the Appellant, submitted that he was a subject of the Ameer of Afghanistan and was therefore not amenable to the jurisdiction of His Britannic Majesty's Court. The Treaty of Tientsin, 1858, conferred criminal jurisdiction in China on His Majesty over British subjects only. The Crown had failed to prove that the Court had jurisdiction over the Appellant. The Full Court wrongly decided that he was a British subject within Arts. 3 and 50 of the China and Korea Order-in-Council. It was not shewn that the Crown had acquired jurisdiction from the Republic of China or the Ameer. The Indian Legislature had no jurisdiction to enlist foreigners in the army.

[*Sir Robert Finlay, K. C.*, for the Crown interposed and said that he relied upon "*de facto* service" under secs. 2 and 10 of the Indian Army Act.]

Again, the confession alleged to have been made by the Appellant to Major Barrett was inadmissible and if that had not been wrongly admitted the jury would probably have acquitted him as they did at the first trial. Reliance was placed on *Makin* v. *A. G. for New South Wales* (29).

Their Lordships reserved judgment without hearing *Sir R. Finlay, K. C.*, and *Mr. Hansell* who appeared for the Crown.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—The Appellant, Ibrahim, is a natural-born subject of the Ameer of Afghanistan, who was duly enlisted and enrolled on January 12th, 1911, in the 126th Regiment of Baluchistan Infantry at Quetta. He took the oath of allegiance to His Majesty and made a solemn declaration undertaking among other things to go wherever ordered by

(24) 10 A. C. at p. 675 (1885).
(25) 12 A. C. 459 (1887).
(27) [1893] A. C. 346.
(28) 16 L. J. N. S. 752.
(29) L. R. [1894] A. C. 57 (1893).

(29) L. R [1894] A. C 57 (1893).

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land or sea. On September 4th 1912, he was a private serving with the detachment of that regiment which was encamped on Sha-mien or Shameen Island at Canton as guard of the Concession. On Shameen are situated the various European Settlements including the British. About 10-30 p.m. Subadar Ali Shafa, a native officer in the same regiment, was murdered. Ibrahim was charged with the crime, tried before the Supreme Court of Hong Kong, and convicted. He was sentenced to death, but sentence was respited pending the hearing of this appeal, which is brought by special leave *in formâ pauperis.* His grounds are two: first, that the jurisdiction of the Court was not established, and, second, that there was a grave miscarriage of Justice by reason of the misreception of evidence.

The jurisdiction of the Supreme Court of China and Corea is conferred by the Foreign Jurisdiction Act, 1890, and by the China and Corea Order-in-Council, 1904 and includes criminal jurisdiction. Art. V provides that: "the jurisdiction conferred by this order extends to the persons and matters following, in so far as by Treaty, grant, usage, sufferance or other lawful means, His Majesty has jurisdiction in relation to such matters and things, that is to say:

"(1) British subjects, as herein defined, within the limits of this order . . . ;

"(3) foreigners, in the cases and according to the conditions specified in this order and not otherwise;

"(4) foreigners, with respect to whom any State, King, Chief or Government, whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to the exercise of power or authority by His Majesty."

By Art. VI it is provided that "all His Majesty's jurisdiction, exerciseable in China or Corea for the hearing or determination of criminal or civil matters . . . shall be exercised under and according to the provisions of this Order in Council and not otherwise."

The contention, therefore, is that the jurisdiction of the Supreme Court, conferred by and only exerciseable in accordance with the Order-in-Council, was not shown to extend, and therefore for the purposes of this case, did not extend, to Ibrahim, who is admittedly an Afghan and a subject of the Ameer.

Art. III of the Order defines a "British subject" thus: "British subject includes a British protected person, that is to say, a person, who either (*a*) is a native of any protectorate of His Majesty and is for the time being in China or Corea, or (*b*) by virtue of the Foreign Jurisdiction Act, 1890, or otherwise enjoys His Majesty's protection in China or Corea."

There was no evidence of any treaty or other instrument by which the Ameer had agreed with the Crown for the exercise by His Majesty of power or authority over his subjects; but it may be reasonably inferred from the practice of enlisting native Afghans in Indian native regiments, whereby they are *de facto* brought under the authority of His Majesty, a practice which is matter of public knowledge, that the Ameer does in fact consent to such enlistment with its consequences. Whether or not this suffices to bring such enlisted Afghans within the terms of Art. V. (4) of the Order-in-Council, "foreigners, with respect to whom any State, King, Chief or Government whose subjects . . they are . . .

consents to the exercise of power or authority by His Majesty," it is not necessary for their Lordships now to determine.

The British Vice-Consul, who in September 1912 was also Acting Consul at Canton, is Judge of a Provincial Court, held at Canton under Art. XIX. of the Order, which is a Court of Record, and by Art. XXII. exercises "all His Majesty's jurisdiction, civil and criminal, not under this Order vested exclusively in the Supreme Court." He was called as a witness at Ibrahim's trial and deposed that the place of the murder was entirely within his jurisdiction; that the jurisdiction exercised at Canton on Shameen is the same exterritorial jurisdiction as is exercised throughout China by the Supreme Court; that it is still in force; that "the Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over them"; and that consular protection extends to trying persons and protecting them if they are improperly arrested." This evidence was not modified under cross-examination or contradicted in any way by evidence for the defence. The witness went on to say that he conducted the preliminary examination in this case and considered it expedient that the case should be sent for trial to Hong Kong (an opinion in which Major Barret, commanding the detachment, concurred), thus satisfying the provisions of Art. L. of the Order with regard to the transfer of the case from Shameen to Hong Kong.

Their Lordships are of opinion that s. 4 (1) of the Foreign Jurisdiction Act, 1890, does not prevent this evidence from being admissible upon the question and that in the absence of contradiction and of any grounds for real doubt, this evidence by itself satisfied all the conditions of proof requisite to establish the jurisdiction of the Supreme Court at Hong Kong. It shows that, by usage, sufferance or other lawful "means," His Majesty has jurisdiction at Canton; that it in fact extends to persons of the class to which Ibrahim belongs; that in the case of Ibrahim himself it was exercised, so far as the preliminary examination went; and that its exercise, both generally and in this particular case, was suffered by the Chinese authorities holding office *de facto*, and that they made no objection. Incidentally it disposes of a point taken in argument, that whatever jurisdiction may have been ceded, agreed or suffered by the Imperial Government of China, it could not be deemed to persist by sufferance or otherwise since recent changes in the constitution and form of government of China took place. Even if such change had been proved, as it was not, or even if the Court could under the circumstances in any way take judicial notice of a political change in a neighbouring State, this evidence was sufficient to show that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred. It was suggested that the Vice-Consul was not testifying to the exercise of jurisdiction and sufferance thereof in fact, but was only expressing his opinion that jurisdiction ought to extend to such a case as Ibrahim's, which he said was the first case committed to the Supreme Court from Canton. The judges of the Supreme Court, on the hearing of the points reserved to the Full Court, did not so take it, neither do their Lordships, and were it not for the gravity and importance of the case they would not think it necessary to pursue this question of jurisdiction further.

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Was Ibrahim a British-protected person because, "by virtue of the Foreign Jurisdiction Act, or otherwise he enjoys His Majesty's protection in China"? The words "or otherwise" must at least include the operation of other statutes, Imperial or Indian, applicable to the person in question, and the various legislative provisions referred to in the elaborate and valuable judgments in the Court below amply establish that, after enrolment and during service in the Indian Army, Ibrahim was a soldier of the Crown and subject to military law while stationed at Shameen. That being so, their Lordships think that it needs no express provision to entitle him to His Majesty's protection. When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country, where all are serving together in the armed forces of His Majesty. Their Lordships are clearly of opinion that Ibrahim as of right "enjoyed His Majesty's protection" in China, and in virtue thereof was subject also to the jurisdiction of the Supreme Court of China.

Lastly, under this head reliance was placed on the words "and not otherwise" in Art. V (3) of the Order. These words do not import that, if a person is in fact a foreigner, he can only be brought under the jurisdiction set forth in the Order "in the cases and according to the conditions specified therein." They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such, is to be brought within the jurisdiction, he can be so dealt with only in the cases and according to the provisions specified, but when a person is brought under the jurisdiction as "a British-protected person," and the fact that he is a foreigner is only accidental, the limitation contained in the words "and not otherwise" in Art. V (3), does not apply.

Their Lordships think it unnecessary further to pursue the points argued as to the necessity for proof of the Treaty of Tientsin, 1858; the validity of the proof of the Indian Army Act, 1911 (which, for reasons hereinafter appearing, is so formal a matter as to be immaterial on the present appeal); the conditions under which the Crown may enlist aliens in its Indian forces; and the effect of the preamble and recitals in the China and Corea Order in Council, 1904.

The second ground for this appeal is as follows:—Some 10 or 15 minutes after Subadar Ali Shafa was shot Major Barrett, the officer commanding the detachment, who had been summoned from a little distance, arrived at the camp. He found Ibrahim in custody and in bonds, sitting on the step of the guard-room. "When I got up to Ibrahim," says the Major, "I said, 'Why have you done such a senseless act?' I said nothing else. Did not threaten him in any way. I offered no inducement of any kind, nor did anybody else to my knowledge or in my presence . . . when I spoke to accused I was sorry for him because he had killed the Subadar." This last observation their Lordships treat only as evidence of the way in which the question was put, tending to show that it did not convey a command or inducement to Ibrahim of any kind. In truth, except that Major Barrett's words were formally a question they appear to have been indistinguish-

able from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service. To this Ibrahim replied in Hindustani, "Some three or four days he has been abusing me; without a doubt I killed him."

It is argued that Ibrahim's statement was inadmissible, (*a*) as not being a voluntary statement but obtained by pressure of authority and fear of consequences; and (*b*) in any case as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinates who had made him prisoner.

On this it becomes incumbent on their Lordships to consider the rule of English criminal law applicable to such circumstances. This somewhat exceptional duty arises because, by Art. XXXV (2) of the China and Corea Order in Council, it is provided that "subject to the provisions of this order criminal jurisdiction under this order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being." There are no provisions in the order material on this point as modifying or excluding the principles and practice of English law, and their Lordships think that the matter may be justly treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong Kong. At the same time they are not to be understood to decide, that such law and practice are in all respects and particulars binding on that Court, nor do they overlook in any way the necessary distinction that must sometimes be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of the law by European Judges, whose duty it is to have regard alike to the principles of British justice, and to the necessities of local order. Nor do their Lordships fail to observe that the words, "so far as circumstances admit" may well be applicable to such circumstances in the present case as the facts, that the facilities for formal proof of statutes passed and administrative orders made in various parts of His Majesty's dominions cannot be as copious in Hong Kong as they are in this country, and further that when, as in the present case, a force detailed for the protection of Europeans resident beyond His Majesty's dominions in the midst of a population, often turbulent and at the particular time disturbed, is itself disturbed by such a crime as the murder of a Subadar by a native private in the ranks, such words may well cover and be designed to cover some necessary departure from the formalities only as distinguished from the essentials of English justice.

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *R.* v. *Thompson* (1), a case,

(1) [1893] 2 Q. B. 12.

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which, it is important to observe, was considered by the trial judge before he admitted the evidence. There was, in the present case, Major Barrett's affirmative evidence that the prisoner was not subjected to the pressure of either fear or hope in the sense mentioned. There was no evidence to the contrary. With *R.* v. *Thompson* (1) before him, the learned Judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial Judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule.

The Appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.

It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired by a person in authority, is a rule of policy. "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it." [*R.* v. *Warwickshall* (2)]. It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice. [*R.* v. *Baldry* (3)]. Accordingly, when hope or fear were not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong [illegible] as to their weight.

In the earlier part of the nineteenth century there was strong judicial authority for admitting a prisoner's statements, even though obtained by constables, who had him in custody, by considerable insistence in the way of interrogation [*R.* v. *Thornton* (4), *R.* v. *Wild* (5), *R.* v. *Kerr* (6)]; and even so late as *R.* v. *Baldry* (3), a case decided on the rule as to hope and fear, Parke B. observes at p. 445, "by the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary and there is no doubt that any inducement in the nature of a promise or of a

(1) [1893] 2 Q. B. 12.

(2) 1 Leach C. C. 298 (1783).

(3) 2 Den. C. C. R. 430 (1852).

(4) 1 Moo. C. C. 27 (1824).

(5) 1 Moo. C. C. 452 (1835).

(6) 8 C. and P. 176 (1837).

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threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way: whether it would not have been better to have allowed the whole to go to the jury it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence . . . justice and commonsense have too frequently been sacrificed at the shrine of mercy." The law, however, was considered to be fairly settled (see *R.* v. *Cheverton* (7) and *R.* v. *Reason* (8), *R.* v. *Fennell* (9), and the references collected in the note to *R.* v. *Brackenbury* (10). When Judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law (*e.g.*, *R* v. *Pettit* (11), *R.* v. *Berriman* (12), a case when the accused was not yet in custody)

In 1885 *R.* v. *Gavin* (13) re opened these questions. Then A. L. Smith J, excluded a statement made to a constable, who questioned his prisoner in a way that amounted to cross examination. He laid it down that a constable has no right to ask questions without expressly saying that the answers cannot be relevant evidence. In 1893, Day, J., [*R.* v. *Brackenbury* (10)] declined to follow this decision, in a case when the question and answer preceded the arrest, and Cave, J., in *R.* v. *Male* (14), rejected a statement made by a prisoner in custody to a constable who had cross-examined him, saying merely that the police have no right to manufacture evidence, though in 1896, [*R.* v. *Goddard* (15)], he appears to have concurred in the admissibility of very similar matter. Two years later, Hawkins, J., [*R.* v. *Miller* (16)], allowed the accused's answers to be proved against him when he had been cross-examined before arrest, saying that he did not expressly dissent from *R.* v. *Gavin* (13), but that "every case must be decided according to the whole of its circumstances," but in 1898 (*R.* v. *Histed* (17)], he excluded the answers of a prisoner in custody, on the authority of *R.* v. *Gavin* (13), saying that the constable was entrapping the prisoner and trying by a trick to set a broken-down case on its legs again. Since then the current of authority has run the other way. In *Rogers* v. *Hawken* (18), a case of questions before arrest, a Divisional Court, consisting of Russell, L. C. J, and Mathew, J, judges not prone to lean against a prisoner, held that the statement was admissible and observed that "*R.* v. *Male* (14), must not be taken as laying down that a statement of the accused to a police constable without threat or inducement is not admissible. There is no rule of law excluding statements made in such circumstances," and in *R.* v. *Best* (19), the Court of Criminal Appeal (including Channell, J.) held that "it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial," adding that *R.* v *Gavin* (13), is not a good decision. Here,

(7) 2 F. & F. 833 (1862).
(8) 12 Cox. 228 (1872).
(9) L. R. 7 Q B 150 (1881).
(10) 17 Cox C. C. 628 (1893).
(11) 4 Cox C. C 164 (1850).
(12) 6 Cox C C 388 (1854)
(13) 15 Cox C. C. 656 (1885)
(14) 17 Cox. C. C. 689 (1893).
(13) 15 Cox C. C. 656 (1885).
(14) 17 Cox C. C 689 (1893).
(15) 60 J. P. 491.
(16) 18 Cox C. C 54 (1895).
(17) 19 Cox C. C. 16 (1898).
(18) 67 L. J Q B. 526 (1898).
(19) [1909] 1 K. B. 692.

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however, it is to be observed that the actual decision was that under the proviso of sec. 4 of the Criminal Appeal Act, 1907, the Court would not interfere in that case. It did not expressly declare that statements of an accused, when in custody, in reply to a policeman's questions, are always admissible evidence against him unless they are rendered involuntary by reason of hope or fear induced by a person in authority. The point has been before the Court of Criminal Appeal more recently. In 1905 (*R.* v. *Knight and Thayre* (20), statements were rejected, because obtained from the accused before arrest by means of a long interrogation by a person in authority over him. Channell, J., adverted thus to the case of questions put by a constable after arresting—" when he has taken anyone into custody . . . he ought not to question the prisoner . . . I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence." The same learned judge in *R.* v. *Booth and Jones* (21), in 1910 observes, " the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question or a Magiste, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question it is inadmissable ; what happens is that the Judge says it is not advisable to press the matter " ; and of this, Darling, J., delivering the judgment of the Court of Criminal Appeal, observes " the principle was put very clearly by Channell, J."

The learned trial judge in the present case, in addition to the argument of counsel for the defence, had before him a case decided in 1908 by the full Court at Hong Kong, *R.* v. *Wong Chiu Kwai* (22), in which the English authorities up to that time were very fully examined Before admitting the evidence of the appellant's statement he consulted Gompartz, J., who had been a party to that decision, and accordingly it is clear that he admitted the statement only after the fullest consideration. The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned Judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a " probable opinion " of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that " violation of the principles of natural justice " which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial Judge did not follow,

(20) 20 Cox C. C. 711 (1905).
(21) 5 Cr. App. Rep. 177, 179 (1910).

(22) Hong Kong Law Rep. III. 89.

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the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shown to have been exercised improperly.

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal [*Clifford* v. *The King-Emperor* (23)]. Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists [*Riel* v. *The Queen* (24)], nor unless "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done" [*In re Dillet* (25)]. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing [*Riel's* case, *ubi supra*; *ex parte Deeming* (26)]. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice [*Ex parte Macrea* (27)]. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future [*R.* v. *Bertrand* (28)].

Their Lordships were strongly pressed in argument with the case of *Makin* v. *A. G. for New South Wales* (29), in which Lord Herschell, L. C, delivered an elaborate exposition of the principles on which a Court of Criminal Appeal should act. Although in that case these observations are technically *obiter dicta*, since the Board held that the evidence complained of at the trial had been rightly admitted, they are most weighty in themselves, and they have since been adopted by the Court of Criminal Appeal in *Rex* v. *Dyson* (30) though with some later qualification. In *Makin's* case, however, their Lordships had to determine the true construction of sec. 423 of the New South Wales Act, 46 Victoria, No. 17, which in defining a strictly appellate jurisdiction in criminal matters, provided "that no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated, unless for some substantial wrong or other miscarriage of justice." It was held there that to transfer the decision of the guilt of the accused from a jury, acting on oral testimony, to

(23) 40 I. A. 241 (1913).
(24) 10 A. C. 675 (1885).
(25) 12 A. C. 459 (1887).
(26) [1893] A. C. 422.
(27) [1893] A. C. 346
(28) 16 L. T. 752 : 10 Cox. C. C. 618 (1867).
(29) L. R. [1894] A. C. 57 (1893).
(30) [1908], 2 K. B. 454

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an Appellate tribunal, possessing that testimony only in writing, cannot be said to involve no miscarriage of justice, and hence that a Court of Criminal appeal is not entitled to dismiss the appeal by retrying the case on shorthand-notes, or by holding that, if the trial judge had excluded the evidence, which he wrongly received, the verdict would probably have been the same. In other words such a proviso is not to be construed as investing a statutory Court of criminal review with the functions of the original trial Judge and jury. This is a very different matter from the duty of this Board in advising His Majesty as to the exercise of his prerogative in relation to facts as they are made to appear to this Board by admissible material. Even in *Makin's* case, however, reservation was made of cases "where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury," and this reservation is not to be taken as exhaustive. In England, where the trial Judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, sec. 4, may refuse to interfere, if it thiks that the jury, giving heed to that warning, would have returned the same verdict, *R.* v. *Lucas* (31), *R.* v. *Stoddart* (32), *R.* v. *Norton* (33), *R.* v. *Loates* (34), *R.* v. *Wilson* (35), or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance *R.* v. *Westacott* (36), *R.* v. *Mullins* (37), or most unlikely to have affected the verdict, *R.* v. *Solomon* (38). Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction *R.* v. *Fisher* (39). The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute highly improbable" for "impossible" in Lord Herschell's reservation above quoted.

Their Lordships think that the jurisdiction, which they exercise in appeals in criminal matters, involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter. The facts of the present case must, therefore, be stated. They are briefly as follows :—

During the hot weather of 1912 the Sepoys of the 126th Beluchistan Regiment at Shameen lived and slept a great deal in the open air.

The camp was near the Central Avenue, shaded by trees and lit by the electric light standards in the Avenue. On the night in question the native officers, including Subadar Ali Shafa, were sitting in chairs near the road. Ibrahim and three other Sepoys were not far off in a group playing cards. The time was about 10-30 p. m. The Subadar went up to them, accused them of gambling, searched them; took away $3.80 of Ibrahim's money and ordered them to

(31) 1 Cr. App. Rep. 234.
(32) 73 J. P. 348 (1909).
(33) [1910], 2 K B. 496, 501.
(34) 5 Cr. App. Rep. 193 (1910)
(35) 6 Cr. App. Rep. 207 (1911).
(36) 1 Cr. App. Rep. 248.
(37) 5 Cr. App. Rep. 13 (1910).
(38) 2 Cr. App. Rep. 80 (1909).
(39) [191] 1 K. B. 149 (1909)

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be confined to the lines. He abused Ibrahim with offensive language, against which Ibrahim protested, and then returned to his chair. A little time afterwards the sentry saw a man going into the camp itself to the place where the men's rifles were kept, and gave an alarm. A shot was fired, and the Subadar after calling to the guard to turn out, and walking a few steps, fell dead, a bullet having passed through his body. Almost at once a man was seen a few paces from the sentry, standing behind a tree and pointing his rifle in the direc ion of the place where the native officers were sitting. This last significant fact was elicited by the jury themselves. He was immediately seized and proved to be Ibrahim. He had his own service rifle in his hand, iden ified by its number Five rounds, enough to fill one clip, were missing from his bandolier. Four cartridges were in the magazine of his rifle, the bolt of which was open , one, empty and still hot, was found on the ground. The rifle was fouled from recent discharge. No one else with a rifle was seen outside the camp when Ibrahim was seized.

This story, which did not depend at any point on the evidence of one witness only, was amply corrobora ed in various ways. Beyond an indefinite suggestion that Ibrahim had been instigated to commit this crime, which came to nothing the only attack on the witnesses was founded on discrepancies between them in matters of detail, or on the suggestion that they had amplified their evidence between the first trial, when the jury disagreed, and the second. It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, subs'antial, garve or otherwise. They will humbly advise His Majesty that the Appeal should be dismissed.

Solicitors *Langlois*, *Harding*, *Warren* and *Tate* for the Appellant.

Solicitors . *Sutton*, *Ommanney* and *Rendall* for the Crown.

B. D *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON
LORD SUMNER.
LORD PARMOOR
SIR JOHN EDGE.
MR. AMEER ALI
1914,
Heard, 23 and 24, February.
Judgment, 24, February.

SRIMUTTY MANOKARANI DEBI, Appellants,
v.
HARIPADA MITTER and others, Respondents.

Hindu widow, alienation by, for legal necessity—Duty of purchaser to make enquiry—Admission by parents in an affidavit in a different suit against the interest of infants, if admissible in evidence in a subsequent suit by the latter for recovery of property as reversionary heirs of maternal grandfather—Recital in conveyance by Hindu widow of legal necessity, if evidence—Delay of reversioner in bringing suit for recovery of property alienated by Hindu widow, when suit brought within statutory period of limitation—Non-filing of account books when explained—Prejudice.

In a suit by Hindu reversioners for recovery of immoveable property left by their maternal grandfather and sold by their

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maternal grandmother for alleged necessity, the purchaser's representative adduced oral evidence to show that the widow had sold it for her husband's debts. This evidence was found by the trial judge to be unreliable but the learned judge, adverting to documentary evidence, chiefly relied on an affidavit which was filed in another suit and was signed by the reversioners' mothers and fathers and which contained a statement to the effect that certain other premises had been mortgaged by the widow (grandmother) for her husband's debt and that her daughters and sons-in-law had joined for protecting the reversioners' (the present Plaintiffs') interest, and the Judge held that the affidavit was admissible, regarding "the parents as the guardians of the Plaintiffs and as capable of making admissions against their interest on their behalf:"

Held (on appeal by JENKINS, C. J., and WOODROFFE, J, and affirmed by the Judicial Committee of the Privy Council) *that there is nothing in the Indian Evidence Act to support the view of the learned Judge or make the affidavit relevant.*

That the present Plaintiffs had in no sense derived their interest in the subject-matter of the suit from their parents, nor could their parents be regarded as having been expressly or impliedly authorised by them to make the admission.

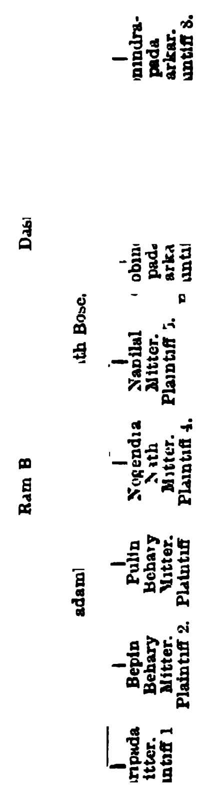
That when the suit was brought long after the alienation but within the period of limitation and the delay was explained as being due to the pendency of another suit and also to want of means:

Held, *that the delay did not operate to the prejudice of the Plaintiffs' suit for declaration and possession.*

This was an Appeal from a judgment and decree, dated the 4th February 1910, of the High Court of Judicature at Fort William in Bengal, in its Appellate Jurisdiction, which reversed a judgment and decree dated the 30th March, 1909, of Stephen, J., of the same High Court in its Ordinary Original Civil Jurisdiction.

The facts of the case may be shortly stated as follows:—

The litigation relates to house No. 26, Prinsep Street, in the town of Calcutta, which was originally owned by one Ram Bulluv Bose, whose relationship to the Plaintiffs will appear from the following pedigree:—



The said Ram Bulluv Bose died in 1857, leaving his widow Monmohini Dasi, his son Lokenath Bose and two daughters him surviving, and the son became his heir under the Hindu Law.

On the 15th July, 1857, one Jadunath Mitra applied to the Supreme Court of Judicature of Fort William, in Bengal, for

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grant of letters of administration in respect of the estate of the said Ram Bulluv Bose, deceased. He stated that the said Lokenath Bose was an infant and that the said Monmohini Dasi was unwilling to administer the estate of the said deceased. By an order dated the 12th September, 1857, the Court made the grant, and thereupon the said Administrator Jadunath Mitra administered the said estate.

The said Lokenath Bose died in 1866, still in his infancy, and his mother Monmohini Dasi succeeded to a life estate of a Hindu widow in all the properties left by him, including the house now in dispute.

By a conveyance dated the 21st December, 1867, the said Monmohini Dasi sold the house now in dispute to Juggoo Lall Dobey, husband of the Appellant, and the purchaser obtained possession thereof. On the 26th February, 1896, the said Monmohini Dasi died.

The present suit was instituted on the 5th February, 1908, against the Defendant (Appellant) for possession of the house in dispute with mesne profits and costs.

The Defendant filed a written statement and pleaded that the said Monmohini Dasi conveyed to her (Defendant's) husband an absolute interest in the house in dispute, inasmuch as she did so for legal necessity under the Hindu Law.

Mr. Justice Stephen, who tried the suit, recorded oral and documentary evidence produced by the parties, and delivered judgment on the 30th March, 1909. He held that the Defendant's oral evidence gave "very little basis for the Defendant's case that Monmohini sold this property from necessity." The learned Judge admitted in evidence an affidavit, dated the 15th September, 1873, made by the mothers and the fathers of the present Plaintiffs, relied on a statement contained therein to the effect that the said Ram Bulluv Bose died leaving *some* debts due from him.

With regard to the oral evidence in the case Mr. Justice Stephen in his judgment observed :—

"Though the evidence of these witnesses (Kedar Nath and Ananda) as to the existence of the debt that the Defendant wishes to prove is thus of the most shadowy possible kind they do a little to enlighten as to some other aspects of the case

. . . . .

"The evidence of a payment to Shama Charan (one of the alleged creditors of Rambullav) is vague; but that of a payment to Sabitri (the other alleged creditor) is vaguer still"

. . . . .

"On the whole this evidence (oral) gives very little basis for the Defendant's case that Monmohini sold the property from necessity."

Regarding the documentary evidence Mr. Justice Stephen observed :—

We have accounts filed by Jadunath Mitter on 31st April 1859, as also the grant of administration to him and the petition on which it was made No traces of the alleged debts appear here and this may tell in the Plaintiffs' favour though I find it hard to draw any decided conclusion from the omission. The conveyance itself seems to have been quite regularly drawn and was prepared by one of the then leading attorneys of this Court. The recital of the existence of the debts is of course not evidence though it goes to enforce the evidence of Kedarnath and Ananda. According to Kedarnath's evidence, however, Dwarkanath was present at the registration of the conveyance and he certainly identified Monmohini on that occasion. Another document to which I attach a good deal of weight is an affidavit made in a suit brought by one Chunamull against Monmohini. The affidavit is signed by Kadambini, Lukhimoni, Dwarkanath Mitter and Nittyagopal. It is there stated than in order to pay off debts due from Rambullav, Monmohini executed a mortgage of certain premises not including those now in suit, and that Nittyagopal and Dwarkanath joined in it with a view of protecting the reversionary interests of their sons the present plaintiffs, and

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were anxious to prevent the sale of the mortgaged premises in a suit brought by the mortgagees. It is argued that this is not evidence against the plaintiffs as they do not claim through their parents but as heirs to Lokenath. I admitted the affidavit, however, regarding the parents as the guardians of the plaintiffs and so capable of making admissions against their interests on their behalf. And I take the affidavit as showing that Rambullav did leave debts which were not liquidated in 1871, the date of the mortgage to Chunamull. This goes to show that Rambullav left some debts that had to be met by the widow selling a part of his estate and there may very well have been more.

In conclusion the learned Judge observed as follows :—

Taking all this evidence together I consider that the Defendant has made out a kind of case in favour of her contention. It is undeniably a weak one; but in considering whether it is too weak for me to rely on it I must consider the circumstances under which it is brought. A remarkable feature of the plaintiffs' case is that he has brought it only three weeks before the expiration of the time when the Statute of Limitation would have applied. The fathers of the plaintiffs who would probably have had some knowledge of the circumstances under which the Conveyance was made are both dead, and their mothers are not called. The two fathers Dwarkanath and Nittya seem to have died before Monmohini, but Pulin Behari the Plaintiff, who gave evidence, admits that he did not know of the property in question or that he could claim any interest in it before 1897 when he became aware of it in the course of another suit. He alleges poverty as a reason for not asserting his rights at an earlier period but there seems no particular reason for supposing that he was in worse circumstances in 1897 than he was when this suit was brought. The facts on which the Plaintiffs rely are not disputed and the onus of proving her case therefore lies on the Defendant. At the same time the plaintiffs' delay and his inability to produce more cogent evidence than he has justified me in accepting a weaker proof of the Defendant's case than I should require in other circumstances. I therefore hold that the Defendant has proved that Monmohini sold to her predecessor in title for necessity and that her predecessor was *justified in believing* that she did so. I accordingly give judgment for the Defendant with costs on Scale No. 2.

Against the said decree the Plaintiffs appealed to the said High Court in its Appellate jurisdiction, and the appeal was heard by Sir Lawrence Jenkins. C. J. and Woodroffe, J. The learned Chief Justice delivered his Judgment (in which Woodroffe, J. concurred) on the 4th February, 1910.

After stating the facts Jenkins, C. J., in his Judgment observed :—

"Though oral evidence was adduced the learned Judge placed no reliance on it, for he held that it gave "very little basis for the Defendant's case that Monmohini sold this property from necessity," and he therefore directed his attention to the documentary evidence on which alone his conclusion rests. I accept the learned Judge's appreciation of the oral evidence, and I therefore will, as he did, consider whether the documentary evidence suffices to establish the defendant's case. What principally impressed the learned Judge was an affidavit made in a suit brought by one Chunamull against Monmohini which he admitted, notwithstanding the plaintiff's objection, as an admission, "regarding the parents as the guardians of the plaintiffs and so capable of making admissions against their interests in their behalf." But the relevance of an admission must be determind by reference to the terms of the Evidence Act, and I can find nothing in that Act which supports the view of the learned Judge.

The present Plaintiffs in no sense derive their interest in the subject-matter of the suit from their parents nor can their parents be regarded as having been expressly or impliedly authorised by them to make the admission. I therefore hold that the affidavit is not admissible in evidence against the plaintiffs.

Then what else is there in the case on

which to rest the Defendant's claim? There is no proof of an entry in any family books of account, for none are produced. The absence of these books might, if unexplained, excite a certain amount of suspicion against the plaintiffs, but the suggestion made by Pulin Behari, one of the plaintiffs, in explanation of their disappearance evidently impressed Stephen, J. favourably and I see no reason for not accepting it.

In the conveyance to Juggoo Lal the existence of two debts is no doubt asserted but the authorities show that this is not proof, and beyond this there is no other document on which reliance has been placed either by Stephen, J., or by counsel before us.

Nor is the meagreness of the evidence adduced on her behalf, the only difficulty in the defendant's way.

In 1857 Jadu Nath Mitter presented a petition to the Court for the grant to him of Letters-of-Administration to the estate and effects of Ram Bullav Bose during the minority of his cousin, Loke Nath, and in that petition it is alleged that Ram Bullav left Company's paper belonging to him. But neither in this petition nor in the accounts filed by Jadu Nath Mitter as administrator is there any trace of this debt.

Then again the petition for a certificate of guardianship to her son Loke Nath presented by Monmohini in 1866 shows that Ram Bullav left property including two money-lending businesses, one in Calcutta and the other at Sonamoyi, and this agrees with the evidence of the defendant's own witnesses, Kedar Nath Mozumdar and Anundo Chunder Chatterjee, that Ram Bullav when he died was a man of some means.

Then the sale was after the death of Loke Nath, and more than 10 years after the death of Ram Bullav and the purchase money was only Rs. 2,500.

It is true that in the conveyance Monmohini is said to have been identified by her sons-in-law, but the suggestion on the part of the Plaintiff is that it was the extravagance of one of them Dwarkanath that led to the sale, and it was elicited in the cross-examination of Kedar Nath that he was very extravagant and was constantly going to Monmohini for money, and it is further shown that Dwarkanath had something to do with the handling of the purchase-money.

It is true that there has been considerable delay in the institution of this suit, and this delay appears the greater because of the length of time that elapsed before the reversion fell in. But it is not usual for a reversioner to sue during the lifetime of the widow and in fact this suit is within time. The delay that has occurred since the widow's death has been reasonably explained as attributable to the pendency of another suit and the lack of means to meet the expenses of the litigation.

The conclusion then to which I come is that the defendant has failed to prove the existence of legal necessity, nor has it been shown that the purchaser used reasonable care to ascertain the existence of such legal necessity or acted in good faith. The appeal therefore should in my opinion be allowed and a decree passed that the defendan[illegible] document to which [illegible]
possession of th[illegible]eight is an affidavit made
ne Chunamull against Mon-
Hence this[illegible]it is signed by Kadambini,
Mr. Upjo[illegible]anath Mitter and Nittyagopal.
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that the [illegible]Monmohini executed a mortgage
widow [illegible]ises not including those now in
Nittyagopal and Dwarkanath joined
charg[illegible] a view of protecting the reversionary
h[illegible]s of their sons the present plaintiffs, and

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were some evidence of the existence of actual pressure on her estate and the existence of the debts which were discharged. The Appellate Court was not quite correct in thinking that Stephen, J, had disbelieved the oral evidence. That evidence consisted of very old men and at this distance of time it was difficult to produce better evidence. The Respondent did not produce the accounts which would have shewn that there were debts due from the estate. Further, the affidavit was admissible in evidence. It was made by the fathers of the plaintiffs, who were their natural guardians. They made it in order to safeguard the interests of the plaintiffs and it was binding upon them. In any case the purchaser paid full consideration and acted in good faith and after using reasonable care to ascertain the existence of pressure on her estate and necessity for the sale. Section 38 of the Transfer of Property Act, 1882, applied, and it must be presumed that there was necessity for the sale. A Hindu widow's powers resemble those of a manager. Reference was made to *Hanooman Prasad* v. *Munraj* (1). *The Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (2).

Mr. L. DeGruyther, K. C. and *Mr. Bhugwandin Dube* for the Respondents, were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ... Their Lordships have ... of the Appellant ... before them, ... been called to ... at the trial, ... High Court ... They are ... ut, from ... Plaint

[Overprinted fragments from another page: "...ring her Defendant. At the same tim... and his inability to produce mo... than he has justified me in act... proof of the Defendant's case than ... in other circumstances. I therefore ... Defendant has proved that Monmo... predecessor in title for necessity ... predecessor was *justified in believi*... did so. I accordingly give judgmen... Defendant with costs on Scale No. 2."]

Against the said decree the Plaint...

which this appeal is brought, is a judgment based upon proper principles and upon a due appreciation of the evidence in the case, and they can see no reason for differing from it. They will therefore humbly advise His Majesty that the appeal ought to be dismissed, and the Appellant must pay the costs.

Solicitors: *Messrs. Watkins* and *Hunter* for the Appellant.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

B. D. *Appeal dismissed.*

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

STEPHEN, J. 1914, 2, April.	EMPEROR *v.* NIRMAL KANTA ROY.

Criminal Procedure Code (Act V of 1898), sec. 403—Autrefois acquit—"*Any other offence with which he might have been charged,*" *meaning and effect of—Acquittal on charge of murder if bar to trial on charge of culpable homicide where culpable homicide was charged in the previous trial—Acquittal on charge under sec.* $\frac{302}{34}$, *I. P. C., if bar to trial on charge under sec.* $\frac{302}{114}$, *or* $\frac{302}{109}$, *Indian Penal Code (Act XLV of 1860)—Discharge of jury under sec. 305, Cr. P. C., and trial before a fresh jury under direction of Court if a continuation of the first trial on the original plea—Plea of accused if necessary again in second trial—Pleading not guilty and* autrefois acquit *at one and the same time, if proper—English law of criminal pleading, bearing of, on Indian criminal procedure—Plea of Not Guilty not a plea recognised by the Indian Code of Criminal Procedure.*

The accused was indicted in the Calcutta Court of Criminal sessions under five counts which were, firstly, the murder of one N under sec. $\frac{302}{34}$, *I. P. C, secondly, murder of the same man under sec.* $\frac{302}{114}$, *I. P. C., thirdly, abetting the murder of the same man under sec.* $\frac{302}{109}$, *I. P. C., fourthly, the murder of one A, fifthly, culpable homicide of A. The accused pleaded not guilty to all*

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the charges. The jury unanimously acquitted the accused of the first and the fourth charges and differed as to the other counts, there being not as many as six who agreed in opinion. The Judge discharged the jury under sec. 305, Cr. P. C., and directed a retrial. On the retrial of the accused before a fresh jury on the remaining counts of the indictment the accused pleaded not guilty as also autrefois acquit *and it was urged in defence (1) that as the accused had been acquitted of the charge of murder of A he could not be tried again for committing culpable homicide on him and (2) that as he had been acquitted of an offence under sec.* $\frac{302}{34}$, *I. P. C., in relation to the murder of N, he could not be convicted of an offence in relation to the same man under sec.* $\frac{302}{109}$ *or* $\frac{302}{114}$, *I. P. C.*

Held—*That sec. 403 protected the accused only against a trial for murder and any other offence for which a different charge from the one made against him "might have been made." But the offence of culpable homicide for which he was tried again was one of the charges actually made against him and on the terms of sec. 403, Cr. P. C., the first objection failed. If the accused had been charged with murder alone a verdict of not guilty would have protected him from another trial for culpable homicide and were he acquitted of culpable homicide he would be protected from a trial for any offence involving hurt, but where a charge was made the case fell outside the provisions of the law dealing with cases where it might have been made.*

That for the purposes of sec. 403, the accused was not being tried again but was being tried on the original indictment and on his first plea of not guilty. Sec. 308, Cr. P. C, did not effect the construction of sec. 403.

That sec. 403 should not be construed with reference to the English law relating to criminal pleading. Secs. 271 and 272, Cr. P. C., contain all that is necessary as to pleading and there is no need to supplement their contents by a reference to any other system of judicature.

That the plea of Not Guilty was one not recognised by the Code of Criminal Procedure and it was not open to the accused to make any answer to an indictment except guilty or a claim to be tried.

Sec. 403 has nothing to do with pleading, but is in terms of a limitation on the jurisdiction of the Court. A defence under that section may be set up at any time before verdict in any form.

That even assuming the case to be governed by the English law of pleading, autrefois acquit *was not properly pleaded.*

That the accused had already pleaded Not Guilty in the first trial and that plea was still awaiting adjudication and the second plea was therefore unnecessary and of no effect.

That even if the principles of English law were to be applied to the present case the acquittal for murder was no bar to the retrial for culpable homicide.

That the killing being, according to the evidence, done by one person who was not the accused and not by several persons, sec. 34 did not apply to the case and the finding of Not Guilty by the jury on the charge under sec. $\frac{302}{34}$, *I. P. C, under the direction of the Judge for an acquittal decided nothing and could not be taken as negativing the common intention of the accused and the man who in fact killed N.*

That there is no reason for saying that a man must be absent in order to abet under sec. 109, I. P. C.

That instigating the unknown murderer

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by accompanying him to the place and by aiding him in his flight afterwards, which the accused on the evidence did, might have taken place though the accused was not present at the murder but on the evidence he being so present sec. 114 applied to the case.

The facts of this case necessary for the purposes of this report are as follows. On the night of the 19th January 1914 at about 8 P. M. one Nripendra Nath Ghosh, an Inspector of Police, was shot dead by a revolver. It was alleged that two persons took part in the murder, but the shots from the revolver of only one of them had taken effect. The accused Nirmal Kanto Roy, was alleged to have been one of the two persons who fired at the Inspector, but did not actually hit him. The prosecution also alleged that both the assailants were thereupon pursued, the other escaped, and the accused on being further pursued was caught hold of by his *chadar* by a little boy named Ananto Teli. Thereupon, it was alleged, the accused fired and killed Ananto Teli, and continued running on till he has captured.

The case was committed to the High Court Sessions and tried before a Special jury. The charge contained five counts and was as follows :—

1. That he the said Nirmal Kanto Roy on or about the 19th day of January 1914 in Calcutta aforesaid in conjunction with another person in furtherence of the common intention of himself and of that other person did commit murder by intentionally or knowingly causing the death of one Nripendra Nath Ghose and thereby he the said Nirmal Kanta Roy committed an offence punishable under sec. 302 read with sec. 34 of the Indian Penal Code :

2. That some person unknown at or atout the time and in the place aforesaid committed murder by causing the death of the said Nripendra Nath Ghose and he the said Nirmal Kanto Roy, who if absent would have been punishable as an abettor of such offence in consequence of such abetment, was present when such offence was committed and thereby he the said Nirmal Kanto Roy committed an offence punishable under secs. 114 and 302 of the Indian Penal Code.

3. That he the said Nirmal Kanto Roy at or about the time and in the place aforesaid abetted some person unknown in committing the offence in the first charge mentioned which offence was committed in consequence of such abetment, and thereby the said Nirmal Kanto Roy committed an offence punishable under secs. 109 and 302 of the Indian Penal Code.

4. That he the said Nirmal Kanto Roy at or about the time and in the place aforesaid committed murder by causing the death of one Ananto Teli otherwise called Antu Teli and thereby he the said Nirmal Kanto Roy committed an offence punishable under sec. 302 of the Indian Penal Code.

5. That he the said Nirmal Kanto Roy at or about the time and in the place aforesaid and in course of the said transaction committed culpable homicide not amounting to murder by causing the death of the said Ananto Teli otherwise called Antu Teli and thereby the said Nirmal Kanto Roy committed an offence punishable under sec. 304 of the Indian Penal Code.

At the close of the evidence, the learned Judge said that he was of opinion that sec. 34, I. P. C, did not apply to the facts of this case and directed the jury to bring in a verdict of not guilty on the first count and they did so. After retiring, the jury brought in a unanimous verdict

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of not guilty on the fourth count, *viz.*, that of murdering Ananto Teli, but were divided in the proportion of 5 to 4 on the other counts. The Judge thereupon took the verdict of acquittal on the first and fourth counts, and discharged the jury and ordered a retrial on the three counts as to which the jury were not agreed.

The retrial came on before the same Judge and another special jury. But before the new jury was empanelled or the indictment read, the accused through his counsel took the preliminary plea of *autrefois acquit.*

Mr. Norton (with *Messrs. C. R. Das*, *J. N. Ray*, *L. Palit*, *W. Sen-Gupta* and *S. N Roy*) for the Accused.—Before the charge is read, I want to take the plea of *autre fois acquit.*

Mr. S. P. Sinha (with *Mr. B. C. Mitter*, *Standing Council*, and *Mr. E. P. Ghosh*) for the Crown.—It ought to be taken after the charges are read.

[STEPHEN, J.—We are not so technical.]

Mr. Norton.—My first point is that my client has been acquitted of the murder of Ananto Teli. The jury could have convicted him of culpable homicide. But they have not done so. No man is to be tried for an offence twice. Your Lordship did not sum up or explain the charge of culpable homicide. You charged them only for murder. My client was acquitted of that. The jury could have convicted him of the lesser offence of culpable homicide, but they did not. Refers to Archbold (last Ed.) p. 177. *R.* v. *Grimwood* (4). This principle is incorporated in sec. 403 of Criminal Procedure Code. The test is "was I in jeopardy of being convicted." The point is not what the jury did, but what the jury could have done. Your Lordship not having directed the jury about culpable homicide the jury was bound in law to bring in a verdict of Not Guilty on that minor count. Refers to *Reg* v. *Elrington* (5), *Reg* v. *Thos Morris* (6), Archbold p. 235.

My next objection relates to the two counts of abetment of the murder of the Inspector. On the last trial, there were three charges regarding this, *viz.*, (1) under sec. 302, I. P. C. read with sec. 34, (2) sec. 302 read with sec. 109, (3) sec. 302 read with sec. 114. Your Lordship directed the jury to acquit my client under sec. 302 read with sec. 34. That necessarily is a bar to a trial under sec. 302 read with sec. 109 or sec. 302 read with sec. 114. Abetment is defined in sec. 107. *Firstly*, there is no possible evidence of instigation in this case. *Secondly*, it requires common intention. That is covered by sec. 34.

[STEPHEN, J.—I don't think so. There was no evidence of an illegal act being done by the accused as is contemplated by sec. 34.]

Mr. Norton.—Sec. 34 relates to cases where one person is present in furtherance of the common intention and another does the act, they are both equally guilty. The jury have acquitted my client under sec. 302 read with sec. 34, therefore they have negatived common intention and conspiracy. Therefore there cannot be abetment. See sec. 109 and sec. 114. Some of these cases fall under sec. 34. Therefore an acquittal under sec. 34 would bar a subsequent trial

(4) 60 J. P. 809 (1894).

(5) 9 Cox. Cr. C. 86, 89 : s. c. 1 B. and S. 688 (1861.)

(6) 10 Cox. Cr. C. 480 : s. c. 1 Cr. C. R. 90 (1867).

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under sec. 109. As regards sec. 114, a person merely by being present does not make himself liable under this section; he must have been liable for abetment even if he were absent. See *Queen* v. *Dwarkanath* (7), *Abhi Misser* v. *Luchmi Narain* (8), follows *Queen* v. *Dwarkanath* (7), *Keshvar* v. *Girish* (9).

Mr. C. R. Das.—follows:—The principle of sec. 305, Cr. P. Code, is that the verdict must be one entire verdict. Your Lordship has accepted a verdict, and it must cover all the charges. See *Krishna Dhan* v. *Queen-Empress* (10). This shows that the word verdict in sec. 423, Cr. P. C, means one entire verdict. See also, *Queen-Empress* v. *Croft* (11), (where the offences were distinct), *Kaptan* v. *Smith* (12), *Ram Sabak* v. *Emperor* (13), *Sharbekhan* v. *Emperor* (14), *Queen-Empress* v. *Subadar Krishnappa* (15), *Queen-Empress* v. *Erramreddi* (16). These cases show that there must be one entire verdict. *See* also Kenny's Criminal Law pp. 470, 471. If two charges are substantially the same, acquittal on one bars a trial on the other, *e. g.*, acquittal on common assault bars a trial on grievous hurt. Your Lordship need not have accepted the verdict under sec. 302, as it was not one entire verdict. But as my client was once placed in jeopardy of a conviction, he cannot be tried again. The same bundle of facts have been adjudicated upon, and there cannot be a trial on the same facts. *See* Russel on Crimes (7th Ed.) p. 1982; Archbold p. 235; Harris' Criminal Law p. 379.

Your Lordship's direction to the jury amounted in law to this that if the jury believed those facts, it was murder and nothing less than murder. The jury have found it was not murder. Therefore, in law, they must be taken to have negatived anything which falls short of murder.

As regards the charges of abetment of the murder of the Inspector the case for the prosecution is that both the accused and the other man fired, and the result was that the shots of the other man hit the Inspector and he died. Under these circumstances, the offence clearly is under sec. 34 read with sec. 302. I will not enter into the discussion whether sec. 34 and sec. 114 are mutually exclusive. The jury under your Lordship's direction has acquitted me of sec. 34. It is not open to the prosecution to try me again under sec. 114. The language of sec. 114 is so clear that the facts on which the Crown relies cannot come under sec. 114. This section applies only to cases where the accused is already an abetter before he is present at the transaction itself. Under sec. 34, it is not necessay that all of them must do something. Common design is all that is necessary. See *Queen* v. *Gora Chand* (17).

Mr. Sinha.—I am bound to point out that this plea of *autrefois acquit* has not been taken at the proper time. See Roscoe's Criminal Procedure (8th Ed.) p. 169; 9 Vol. Halsbury, p. 355. There must be formal proof of acquittal, identity of accused, &c. This can be done by formally tendering in evidence the original indictment and the minutes of the Court, &c.

(7) 7 W. R. Cr. 15 (1867).
(8) I. L. R. 27 Cal. 569 (1900).
(9) I. L. R. 29 Cal. 496 (1902).
(10) I. L. R. 22 Cal. 377 at p. 382, 383 (1894).
(11) I. L. R. 23 Cal. 174 (1895).
(12) 16 W. R. Cr. 3 (1871)
(13) 14 C. W. N. 839 (1910).
(14) 10 C. W. N. 518 (1905).
(15) 1 Bom. L. R. 15 (1899).
(16) I. L. R. 8 Mad. 296 (1885).
(17) 5 W. R. Cr. 45, 48 (1866)

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[STEPHEN, J.—The Court can refer to its own notes.]

Mr. Sinha.—Of the five charges on which the accused was tried on the first trial, there is no verdict before the Court on three of those charges, *viz.*, culpable homicide of Antoo Teli, and two charges of abetment of the murder of the Inspector. Therefore the accused is being retried on these three charges. It has been contended by the other side that the accused was once in jeopardy of being convicted, and therefore he cannot be retried again. This principle of jeopardy, as stated, is too broad. If this principle were correct, then in every case where a jury disagrees, there cannot be a retrial. See sec. 403, Cr. P. C. The words are 'might have been.' The true principle is stated in *O'Connell* v. *Queen* (18). Each count in an indictment is a separate indictment. See Archbold, p. 82. Therefore there must be separate verdicts on each count. The contention that the verdict must be one entire verdict on all the charges is absurd. For instance, if two persons are jointly indicted and one of them is let off, but there is disagreement with regard to the other, is it to be said that if the second is to be retried, the man who has been let off should be tried again? Suppose again, a man is charged with murder, culpable homicide, grievous hurt, and simple hurt. The jury are unanimous with regard to the graver offences that the man is not guilty but are not agreed as to simple hurt. If he is tried again, must he be tried again for the offences of which he was acquitted, because "there must be one entire verdict" for the whole lot? That would be absurd. According to the practice of this Court also, re-trials have taken place under circumstances similar to this. From the Court minutes in the Crown Office it would appear that in 1906, a man was tried for culpable homicide, grievous hurt and simple hurt. The jury unanimously acquitted the accused of the graver charges but was divided in the proportion of 5 to 4 as regards hurt. A re-trial was ordered. In 1904, in another case a man was tried for forgery for the purposes of cheating and also using as genuine a forged document. The jury unanimously acquitted the accused of the first charge and were divided, 5 to 4, on the second charge. A re-trial was ordered.

In *Krishna Dhan* v. *Queen-Empress* (10), there was a trial in the mofussil for murder and grievous hurt. There was no charge of culpable homicide. The jury were unanimous for acquittal with regard to one charge but were not agreed with regard to the other. The High Court set aside the verdict under sec. 423, Cr. P. Code, and it was held that it must be taken to have set aside everything, namely, even the verdict of Not Guilty. This case therefore does not help the other side.

The doctrine underlying these pleas is set forth in *Queen* v. *Miles* (19). The principle is analogous to that of *res judicata*. It applies only "where a criminal charge has been adjudicated upon." See *Queen* v. *Miles* (19). Where the substratum of a charge is taken away, the more aggravated offence cannot be tried In this case the jury only negatived the murder of Antoo Teli. But they did not negative culpable homicide. They expressly said so. They could not arrive at a conclusion. The case in *R.* v. *Grim-*

(18) 11 Clarke & Finnelly p. 155 at p. 295 (1844).

(10) I. L. R. 22 Cal. 377 (1894).

(19) 24 Q. B. D. 423, at p. 430 (1890).

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wood (4), is a case similar to *Queen* v. *Miles* (19). The cases may be put thus. If there is a charge of a minor offence and there is an acquittal, you cannot try him on a graver charge. If there is conviction on the minor offence, you cannot try him on the major offence, because that would mean punishing him twice over. But does it follow from this that where a man has been acquitted of the major offence, the minor charge is necessarily negatived? I submit not.

As regards the charges of abetment, the other side says that there being an acquittal on sec. 34, there cannot be any trial on sec. 114 or sec. 109. But abetment is a substantive offence. It is not a minor offence. A man cannot be convicted of abetment, if there is no such specific charge. Each charge being a separate indictment must be adjudicated upon separately.

Mr. C. R. Das, in reply. See Archbold p. 189, the doctrine of *res judicata* does not apply. But I don't say that the question of adjudication is not to be considered. *Krishna Dhan* v. *Queen-Empress* (10), is a direct authority that "verdict" means one entire verdict. See Archbold, p. 82. Where the offences are distinct offences, I don't say that my argument will apply. But where the offences are not different you cannot retry. If there are different offences, the verdict may be a different verdict for each offence. See *Latham* v. *Queen* (3), where there were different offences.

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—The accused in this case has been indicted under five counts. These are, firstly, the murder of Nripendra Nath Ghose under secs. 302 and 34 of the I. P. C.: secondly, murder of the same man under secs. 114 and 302, I. P. C.: thirdly, abetting the murder of the same man under secs. 109 and 302, I. P. C.: fourthly, the murder of Ananto Teli: fifthly, culpable homicide of Ananto Teli. To these charges he pleaded Not Guilty. I told the jury that there was no evidence of an offence under the first count and they acquitted him accordingly. The jury differed as to his guilt under the second and third charges and there were not as many as six who agreed in opinion. The jury unanimously acquitted him of murder under the fourth charge, and differed as to the fifth charge, without six agreeing in opinion. I accordingly discharged the jury under sec. 305, Cr. P. Code.

The accused was then tried again in accordance with sec. 308 of the Code: and as he wished to raise a defence under sec. 403 I allowed him to be charged and to plead again though I doubted if this were necessary or had any legal effect.

To every remaining charge of the indictment, that is to the second, third and fifth, he pleaded Not Guilty and that he had been previously acquitted: care being taken that he should make the two pleas at the same time.

The points that have been argued on his behalf are that as he was acquitted of the charge of murder of Ananto, he cannot be tried again for committing culpable homicide on him; that as he has been acquitted of an offence under sec. 302 read with sec. 34 in relation to the murder of Nripendra he cannot be convicted of an offence in relation to the same man under sec. 302 read with sec.

(3) 5 B. & S. 635 (1864)
(4) 60 J. P. 809 (1894).
(10) I. L. R. 22 Cal. 377 (1894).
(19) 24 Q. B. D. 423 (1890).

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109 or sec. 114: that, as I told the jury, that if they believed the facts related as to the killing of Ananto I did not see how they could convict the accused of any offence less than murder, the jurors had no right to convict him of any less offence, and consequently those of the jurors who considered him guilty of culpable homicide ought to have found him Not Guilty in which case there would have been a unanimous verdict of Not Guilty.

For reasons I shall state in a moment I do not consider that it is necessary to refer this matter in any way to the jury: but in case my opinion as to this should be dissented from hereafter, I propose to take a verdict on the plea relating to a previous acquittal though as there are no facts for them to decide, I shall tell them that as a matter of law they are bound to return a verdict that the plea is not made out.

The first point depends, and in my opinion, depends solely on the construction to be put on sec. 403, Cr P. C. This provides that a person who has "once been tried . . for an offence" and acquitted "shall not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sec. 236, or for which he might have been convicted under sec 237."

By sec. 236 "if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." By sec. 237 "if in the case mentioned in sec. 236, the accused is charged with one offence and it appears in evidence that he committed a different offence, for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." I am of opinion that sec. 235 dealing with acts in a series so connected together as to form one transaction has no application to the present case; consequently neither sub-sec. (2) nor any of the other sub-sections need be immediately considered. In this case the evidence discloses only one illegal act as far as Ananto is concerned, and the accused has been charged in the alternative with having committed murder or culpable homicide of Ananto, a procedure the correctness of which has not been disputed. Sec 403, however, protects him only against a trial for murder and "any other offence for which a different charge from the one made against him" might have been made. But the offence of culpable homicide for which it is now proposed to try him is the same charge that was made against him, and on the terms of the section therefore this defence must fail. If he had been charged with murder alone, no doubt a verdict of Not Guilty would protect him from another trial for culpable homicide: and should he be acquitted of culpable homicide he will be protected from a trial for any offence involving hurt: but where a charge was made, the case falls outside the provisions of the law dealing with cases where it might have been made. Then the procedure relating to the discharge of the jury seems to me to be wholly inconsistent with the possibility of a verdict on one charge acting as a deci-

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sion of another. By sec. 303 (1) of the Code the jury are to return a verdict on all the charges on which the accused is tried. They have returned a verdict on two; there remain three that have to be dealt with by another jury under sec. 308 This procedure seems to me as obvious as it is reasonable.

Also, for the purposes of sec. 403 I do not consider that the accused is being tried again. He is being tried on the original indictment, and I consider that he is being tried on his first plea of Not Guilty. The duty of the Court is to continue the trial of the accused before another jury: and the process may continue till a verdict is passed on all the counts without the accused being "tried again" under sec. 403. I am aware that sec. 308 refers to the accused being retried, but this does not affect the construction of sec 403.

It is however, if I have rightly understood the argument for the accused, contended that sec 403 must be construed with reference to the English Law relating to criminal pleading. I think this is an erroneous view, and that for the following reasons.

Secs. 271 and 272 of the Criminal Procedure Code contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature. The accused can plead Guilty under sec. 271, he can claim to be tried, or he can refuse to plead which is taken to be the same as claiming to be tried. The plea of Not Guilty is thus one not recognised by the Code and this has been the law since 1872 at least: and I suppose that this is intentional, and is designed to get rid of a great mass of English Law relating to criminal pleading which for more than half a century has been discredited, and is in fact falling into an oblivion which for practical purposes it well deserves.

I consider, therefore, that it is not open to the accused to make any answer to an indictment except guilty or a claim to be tried. If an accused claims to be tried I am of opinion that, subject to special provisions, he can take any objection to his trial or conviction at any time, before verdict at any rate, and in any form, that the Court sees fit to allow. In particular I conceive that sec. 403 has nothing to do with pleading but is in terms of a limitation on the jurisdiction of the Court; for if a man is not liable to be tried, the Court has no jurisdiction to try him. I consequently think that a defence under that section may be set up at any time before verdict, in any form; and that it is to be decided on the terms of sec. 403 which seem to me to decide clearly and reasonably all the questions that have, as far as I know, arisen in England as to the effect of the pleas of *autrefois acquit* or *autrefois convict*, several of which still remain undecided for practical purposes.

Under these circumstances I hold that the question whether the accused can now be tried for culpable homicide is a question of law to be decided by me without reference to the jury: and I decide accordingly that he is, can, and indeed must, be so tried.

With a view, however, to what may happen hereafter I propose to put the matter to the jury in the way I have mentioned.

Although I have thus decided this matter without reference to English law, I have been referred to a considerable number of English authorities on various points.

But, in the first place, supposing the

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acquittal of the accused to have been properly made the subject of a plea, the accused is met by difficulty as to the form in which he has pleaded which seems to me fatal to his contention. For though he pleaded Not Gulity at the time that he pleaded *autrefois acquit* and thus brought himself within the rule laid down in Archbold's Criminal Pleading, page 181, which is of authority in such matters, he had already pleaded Not Guilty in the previous trial, and that plea is still awaiting adjudication. The second plea was therefore unnecessary and of no effect. The case falls therefore within the decision of Alverstone L C J., in *R.* v. *Banks* (1) where, after saying that the point before him is an extremely technical one (though not more technical than the present one) and may therefore be met with a technical answer, lays down that "a defendant having pleaded Not Guilty to an indictment is not entitled, while that plea is standing, to have a plea of *autrefois acquit* put on the record. The accused in fact seems to have pleaded double in circumstances in which that course is not allowed by law. Assuming this case therefore to be governed by the English Law of pleading, I hold that *autrefois acquit* has not been properly pleaded.

It would seem from the same authority and the cases there quoted that the proper course to have followed according to English Law would havs been to take a verdict from the jury at once, if indeed one is needed, when all the facts to be ascertained are on the record. It is said however that a jury that is already empanelled may decide issue, Russel on Crimes 17th Ed., p. 1996, and *R.* v. *Parry* (2).

(1) [1911] L. R. 2 K. B. p. 1095.
(2) 7 C. and P. 836 (1837)

The English law applicable to an indictment for manslaughter after an acquittal for murder on the same facts is beyond doubt, as an indictment for the major puts the accused in jeopardy of a conviction for the minor offence, Russell p. 1963; but I have searched Russell and the article "Criminal Law and Procedure" in Halsbury's Laws of England in vain for any decision or any rule as to the effect of a verdict on one count on the decision on another. All the numerous cases that I have been able to verify refer to indictments following acquittals or convictions or previous indictments or informations, and in most of the cases it is decided in terms that the indictment is good or bad as the case may be. This follows from the fact that in England an indictment is a highly formal document, and the finding of a fresh indictment is the criterion of the institution of a new trial. But in this case there is no question of the indictment being unimpeachable. Each count in an indictment is for the purposes of evidence and judgment a separate indictment. *Latham* v. *Queen* (3), see Archbold p. 82, and also Stephen's Digest of Criminal Procedure. . . . . The one reported case where a conviction on one count was held to support a plea of *autrefois convict* on a subsequent trial on another count is *R.* v. *Grimwood* (4), to which I have been referred. Here, on an indictment for causing grievous bodily harm and other offences involving assault and for common assault, the jury disagreed as to the major charge and convicted of assault. The Recorder sent the indictment to Assizes for the re-trial on the major counts and Pollock B. held that the prisoner was

(3) 5 B. & S. 635 (1864).
(4) 60 J. P. 809 1894).

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autrefois convict and could not be tried again. The same result would, one may assume, have followed had the first verdict been one of acquittal, though in that case the basis for the major charges would have been negatived. But I cannot regard this case as of any high authority. It was decided on circuit without further consideration. It is, as far as I am aware, only reported in *R.* v. *Grimwood* (4). It is referred to in Archbold at p. 235, but is not referred to in the far more authoritative Russell, though the 17th Ed. of that work is edited by Mr. Crails, the very learned editor of the 24th Ed. of Archbold. The silence of other works of authority on the matter is significant and I cannot regard the report in *R.* v. *Grimwood* (4), as showing more than that the very experinced Judge who tried the case considered it inexpedient that the case should proceed further. I consider therefore that there is no English authority for the contention that a verdict on one count can in the case of re-trial after disagreement of the jury affect the trial on another count. And on principle I can see no reason why a verdict on one count should have an effect in a re-trial on the same indictment that it would not have at the original trial. I therefore hold that even if the principles of English law are to be applied to the present case the acquittal for murder is no bar to the re-trial for culpable homicide. But in finding that the acquittal for murder is no such bar I rely on my finding that the case is to be decided solely on the effect of sec. 403, Criminal Procedure Code.

The second point depends on the terms of sec. 34. This provides that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." In this case the killing of Nripendra was, according to the evidence, done by one person who was not the accused. It was therefore not done by several persons and I do not see how the section can apply. I directed an acquittal. The finding of the Jury, therefore, decided nothing, and cannot be taken as negativing the common intention of the accused and the man who in fact killed Nripendra.

The accused now stands charged with abetting the murder of Nripendra by force of sec. 109 and sec. 114.

Abetting is defined by sec. 107, and the evidence to my mind, if relied on, shows that the accused instigated and aided whoever it was that committed the murder, and there is therefore a case made out under sec. 108, for there is no reason for saying that a man must be absent in order to abet under sec. 109. The instigating the unknown murderer by accompanying him to the place, and by aiding him in his flight afterwards, which the accused on the evidence did, might have taken place though the accused was not present at the murder. But on the evidence he was so present, and sec. 114 therefore applies to the case. The cases that have been quoted to me in this matter are decided on the sections in question but seem to me to have no bearing on the case.

I may have misapprehended the third point, at any rate I do not understand it. I expressed my opinion that if the facts given in evidence were believed, the accused was guilty of murder: but the question was one of fact, and if the Jury disagreed with me in point of fact they had a right to do so. I cannot understand

(4) 60 J. P. 609 (1896).

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their decision: but I had no power to overrule it.

The Public Prosecutor for the Crown.

Mr. H N. Dutt, Solicitor for the Accused.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No 3085 OF 1911.

COXE, J. RAY, J. 1913, Heard, 12 and 13, May. Judgment, 23, May.	SYED ALI and others, Defendants, Appellants, *v.* SARJAN ALI and others, Plaintiffs, Respondents.

Right of pasturage, suit for declaration of, and for injunction—Mere thirty years' uninterrupted user if enough—Presumption of right.

In a suit for declaration that the Plaintiffs who were cultivating tenants had a right of pasturage over certain lands and for an injunction on the landlord to remove fences, etc. therefrom, the finding of the lower Appellate Court in decreeing the suit was: "The land has been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful, without interruption and should be in the circumstances of this case presumed to be as of right also":

Held—*That this finding was not sufficient to establish the Plaintiffs' right of pasturage over the land in suit.*

It being a customary right, it must be reasonable, and it would be unreasonable to hold that no land over which cattle had grazed should ever be brought under the plough.

This was an Appeal preferred on the 20th of November 1911 against a decree of Babu Debendra Mohan Sen, Subordinate Judge of Zillah Tipperah, dated the 27th of June 1911, reversing that of Babu Bokulal Biswas, Munsif at Brahmanbaria, dated the 23rd of July 1910.

The Plaintiff-Appellants who were all agricultural tenants and residents of village Ulchapara instituted the present suit for the declaration of their right and that of other tenants of the village to graze their cattle on certain pieces of waste land and for an injunction restraining the Defendants who were some of them the landlords of the village and the rest cultivators with whom portions of the waste land had been settled by the landlords from ploughing up the lands in suit and erecting fences thereon and from otherwise rendering the land unfit for grazing cattle. The Defendants denied that the Plaintiffs had the right alleged by them and also pleaded limitation. The Munsif found that other pieces of waste land had been encroached upon more than 3 years previously and that therefore the suit was barred by limitation. He further held on the evidence that the tenants grazed their cattle on the land by the landlord's permission. In this view he dismissed the suit.

On appeal, the Subordinate Judge was of opinion that the Munsif was wrong in relying on the evidence as to encroachment upon other pieces of waste land for his finding on the question of limitation, and that the pieces in suit had been cultivated within two years.

On the merits, he held that the Plaintiffs had grazed their cattle on the lands in suit more than 30 years, openly and peaceably and without objection on the part of the *maliks* and without permission taken from the Plaintiffs, "that the land had been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peace-

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ful, without interruption and should be in the circumstances of the case presumed to be as of right also." In the result he held that the Plaintiffs and their co-villagers had a right of pasturage over the land in suit both by prescription as well as by grant presumable from immemorial user. In the ordering portion of his judgment he recorded that Plaintiffs' right of pasturage and that of the villagers of Ulchapara be declared and that they do recover possession of it by removing the fences and other obstructions raised by the Defendants and that the Defendants be enjoined from ploughing up the land or otherwise obstructing the right of pasturage declared.

The Defendants preferred this Second Appeal.

Babus Dwarka Nath Chuckerbutty and *Upendra Kumar Roy* for the Appellants.

Babus Jogesh Chandra Roy and *Sasadhar Roy* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal arises out of a suit by certain cultivating tenants for a declaration that they have a right of pasturage over the land in suit and for consequential relief. The lower Appellate Court has decreed the suit and the Defendants appeal.

The first point taken is that of limitation but in the view that we take of the case, no question of limitation really arises.

The learned Subordinate Judge says: "The land has been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful without interruption and should be in the circumstances of this case presumed to be as of right also." In our opinion these findings are hardly sufficient to dispose of the suit. We believe that throughout Bengal, where land is left waste or jungle, the cattle of the villagers graze over it and probably in most cases have done so from time immemorial No one is interested in stopping them and the user is therefore open, peaceful and uninterrupted. But it would be impossible to hold that therefore no landlord is entitled to bring any waste or jungle land under the plough. A right of pasturage arising from immemorial user of this kind resembles a right based upon custom. This has been laid down in Madras and Bombay, sec. 18, Easement Act, 1882, and *Secretary of State* v. *Mathurabahi* (1) and the view is in accordance with common sense. Now a custom must be reasonable and it would be wholly unreasonable that no land over which cattle had hitherto grazed should ever be brought under the plough. We may refer in this connection to the case of *Leechmutput Singh* v. *Sadaulla* (2). Nor is this view inconsistent with the decision in *Bholanath* v. *Midnapur Zemindary Co.* (3). Their Lordships' judgment clearly proceeded on the supposition that the landlords were entitled to plough waste land if only sufficient pasturage were left, and the judgment certainly does not go so far as to lay down that immemorial grazing without more makes waste land inviolable. Their Lordships observe :—" It was certainly not the intention of the Subordinate Judge or the Munsif, that the decrees should prevent the Defendants improving their property. And, indeed, the Munsif expressly states that the Plaintiffs admitted the right of the Defendants to improve their property,

(1) I. L. R. 14 Bom. 213 (1889).
(2) I. L. R. 9 Cal. 698 (1882).
(3) I. L. R. 31 Cal. 503 (1904).

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provided sufficient pasturage were left." And they thought it advisable to add a specific provision to that effect to the decree. We think, therefore, that the lower Appellate Court must find more than that the village cattle have always grazed on this land before he can decree the suit. It may be the case, for instance, that the land in suit has been reserved in some particular manner for pasturage, or that the circumstances of the locality mark it out as suitable for pasture. It may be an island of waste amid a great expanse of cultivated land so that if it is cultivated the cattle of the villagers may have to be driven to an unreasonable distance in order to obtain pasture. Or it may be that the amount of waste remaining in the village is only sufficient for the needs of the cattle. In any of these cases the lower Appellate Court might be justified in holding that the custom underlying the right was reasonable in decreeing the suit. But if there is nothing to show that the land in suit differs in any respect from other waste and if there is plenty of pasturage left in the village the Plaintiffs are not entitled to relief. The Appeal is accordingly allowed and the case will go back to the Court below for rehearing with reference to these observations. It will be open to that Court to allow fresh evidence to be taken either by himself or by the first Court. Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL
No. 150 OF 1911.

JENKINS, C. J.
MOOKERJEE, J.
1913,
28, May.

SREEMUTTY MAHAMAYA KAR, Plaintiff, Appellant,
v.
KISHORE CHUNG, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 29—Occupancy raiyat—Enhancement of rent by contract—Stipulation in original kabuliyat—Colourable evasion of statute.

Where a kabuliyat executed by an occupancy raiyat contained a statement that the rent for the holding was Rs. 57-4 in all, but that out of this the sum of Rs. 17-2 was remitted and the rent was fixed at Rs. 40-2 for the period of the kabuliyat, and it was further stipulated that at the end of the term the tenant "shall take a settlement at the rate of Rs. 57-4 and if he does not the landlord shall be entitled to realise that rent by suit"; and the lower Appellate Court found that the rent really settled was Rs 40-2, and that the reference to Rs. 57 4 was merely a device to evade the provisions of sec. 29 of the Bengal Tenancy Act:

Held—*That sec. 29 was a bar to the recovery of the rent by the landlord at Rs. 57 4.*

This was an Appeal preferred on the 28th of July 1911 against the decree of Mr. Justice Coxe, dated the 22nd May 1911, in Appeal from Appellate Decree No. 975 of 1909, which had been preferred on the 17th May 1909 against a decree of A. H. Cumming, Esq., District Judge of Zilah Tipperah, dated the 8th of February [illegible] reversing that of Babu J. N. Mukherjee, Munsif of that place, dated the 12th of March 1908.

THE

Calcutta Weekly Notes.

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Contents

NOTES

Bengal Tenancy Act, sec. 65, if available to any but the landlord for the time being.

The judgment of the Privy Council (delivered by the Right Hon'ble Mr. Ameer Ali) in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh*, reported at p. 747 of this issue settles a somewhat vexed question of the interpretation of a section of the Bengal Tenancy Act, *viz*, sec 65, which authorises a landlord to sell a tenure or holding for its own arrears and proceeds to make the arrears a first charge on the tenancy. The Act as a whole, as also in its details, has for its object the determination of the rights and obligations of landlords and tenants as such and by sec. 148 (*h*) the Legislature specifically provides that an assignee of a decree for arrears of rents obtained by the landlord cannot execute it unless the landlord's interest also in the land has vested in him. From these and other data, their Lordships of the Judicial Committee drew the conclusion—by no means an unreasonable one—that no sale of a tenure or holding can be permitted to take place in order to realise the arrears of rent due on it except at the instance of the landlord for the time being, in other words, that a decree for arrears of rent cannot be executed by a stranger to the land by a sale under sec. 65 although the severance of the arrears from the interest of the landlord may have taken place otherwise that in circumstances specially referred to in sec. 148, cl. (*h*).

We think there is considerable force in the arguments adduced by the Right Hon'ble Mr. Ameer Ali in support of this view, and we also consider it to be our duty to point out that this judgment rehabilitates the decision in *Hemchunder* v. *Monmohini*, 3 C. W. N. 605, which is supposed to have been overruled by a Full Bench of the Calcutta High Court in *Khetra Pal Singh* v. *Kritartha Moyi*, 10 C. W. N. 547. This Full Bench decision is in terms "distinguished" but the reasons of their Lordships' decision obviously cut away the ground from underneath the Full Bench decision, and we venture to submit that by this judgment of the Privy Council the Full Bench decision stands overruled.

Hem Chunder's case, we may note in passing, was decided by O'Kinealy, J., sitting with Ameer Ali, J., and in the case of *Chhatraput Singh* v. *Gopi Chand Bothra*, 4 C. W. N. 446, in which a contrary view is supposed to have been taken, the Judges were Macpherson and Ameer Ali, JJ. In this latter judgment Ameer Ali, J., had observed —"After Dhanpat transferred the property to Bhagwanbati Chowdhrain, he obtained decrees for these rents. The sale of these tenures in execution of money decrees could not release the tenures from the lien which had already attached to them." This apparently is contrary to what has been now laid down by the Privy Council, and one therefore need not be surprised to find Sir Robert Finlay relying on *Chattrapat's* case for the Respondent, while Mr. DeGruyther relied on *Hem Chunder's* case for the Appellant. The war of authorities has however, we believe, been finally set at rest by the present judgment with, so far as we can infer, the following consequences:—*Hem Chunder* v. *Mon Mohini*, 3 C. W. N. 604, is affirmed. *Chattraput* v. *Gopi Chand Boltera*, 4 C. W. N. 446: s. c. I. L. R. 26 Cal 750, is disapproved, if not overruled. *Khetrapal Singh* v. *Kritartha Moyi*, 10 C. W. N. 547: s. c. 33 Cal. 566, though ostensibly distinguished, is overruled.

The Criminal Procedure Amendment Bill.

Very great changes have been made in sec. 195 (Sanction for prosecution for offences against public justice). So far as the curtailment of the period within which action must be taken in pursuance of the sanction from six to two months is concerned, we agree that if a prosecution is intended it must be instituted promptly and the provision that no sanction should be given or complaint made under sec. 211, I. P. C., until the proceedings in respect of which the offence is alleged to have been committed has been finally disposed of and until the person whom it is sought to prosecute has had

an opportunity of showing cause, is in consonance with the view repeatedly expressed by the High Courts, especially the High Court of Calcutta. The change however to which we take the strongest exception is that by which it is proposed that orders passed under sec. 195, Cr. P. C., shall no longer be subject to revision by the High Court under its ordinary powers under secs. 435, 439 of the Code. We always view with apprehension any attempt to curtail the powers of the High Court to revise orders passed by the lower Courts and so far as orders granting sanctions are concerned we feel no hesitation in saying that these orders should on no account be exempted from revision by the High Court. True, an order granting sanction is not an order whereby a man is convicted of any offence, but all the same it exposes him to the risk of loss of liberty and leaves no remedy open to him for redress against infructuous prosecutions. Another change which strikes us as unwarranted is that sanction may be given notwithstanding the fact that an appeal is pending against the sentence, judgment or order of the Court in which the offence was committed. It has been almost the uniform practice of the High Courts not to allow proceedings taken on sanction granted by Courts to go on pending an appeal in the matter giving rise to the sanction, and the Legislature should not, we think overrule the numerous judicial pronouncements establishing a wholesome practice.

Cl. 126 of the Bill amends sec. 526 of the Code. The Legislature wants to make it clear that the powers of the High Court under the section extend to the transfer of miscellaneous proceedings under the Code, *e.g.*, proceedings under Chaps. X, XI, XII, etc. and with this end in view, the word 'criminal' has been dropped before the word 'case' in cls. II and III of sub-sec. 1 of sec. 526. This amendment makes the powers of the High Court quite clear. A similar alteration has been made in sec. 527 which gives power to the Governor-General in Council to transfer Criminal Cases and Appeals from a Court subordinate to the jurisdiction of one High Court to that within the jurisdiction of another High Court. This change does not seem to us to be at all called for. There is a world of difference between sec. 526 and sec. 527 in practical application. We can hardly imagine a case in which it may be necessary for the Governor-General in Council to transfer, say, a proceeding under sec. 107 of the Code calling upon a person to execute a bond to keep the peace or a proceeding under sec. 133 calling upon an individual to remove an alleged obstruction on a public thoroughfare.

The further change in sec. 526 is in cl. (8). By a redistribution of words an attempt has been made to make it clear that on an application under this clause being filed the Magistrate is bound to stay his hands only before an accused is called upon to enter on his defence. Cl. (8) as drafted in the bill surely requires further alteration necessitated by the amendment of cls. II and III of sub-sec. 1 making the section applicable to miscellaneous proceedings under the case. The glaring inconsistency between cl. (8) and the previous part of the section as drafted in the Bill has apparently been overlooked. Under cl. (8) as in the Bill an application for adjournment can only be made, as under the existing Code, by the "Public Prosecutor, the complainant or the accused" but if miscellaneous proceedings under the code are expressly included within the purview of the section it seems to follow as a matter of course that the parties thereto who do not come within the category of "the Public Prosecutor, the complainant or the accused" should be given the right to apply to the Court to have the proceedings stayed. We hope that the necessary alteration will be made.

One other amendment we miss in cl. (8) as drafted in the Bill. The expression "before the commencement of the hearing" has very often given rise to difficulties. The point of time when the hearing of a case is said to commence under the Code is nowhere defined and the Legislature should supply this defect now that the Code is going to be thoroughly recast. The observations of the late Chief Justice Sir Francis Maclean in *Gomir Sarda*, 2 C. W. N. 465, may be of use in this connection. His Lordship held that a trial is said to commence when a case is called on, with the Magistrate on the bench, the accused in the dock, and the representatives of the prosecution and the defence, if the accused is defended, are present in Court for the hearing of the case. The proviso added to cl. (8) dealing with Sessions cases makes it obligatory on an accused person to give 7 days' notice in writing to the Sessions Judge of his intention to make an application under the section. We desire to point out that the duration of the notice is too long and it seems to us that the effect of this proviso will make it a practical impossibility for an accused to get a Sessions case transferred from one Court to another. We are fully alive to the fact that the Calendars of Sessions Courts are liable to be upset by the postponement of cases to the inconvenience of jurors, assessors and parties. But still we think that the balance of expediency is in favour of reducing the extent of the inconvenience of an accused person to the possible minimum.

We notice that a new sec. 539A is to be added in order to discourage the making of false and scandalous statements in peti-

tions filed before the Courts, if such petitions seek to impugn the action of subordinate authorities. A Court is empowered, if it thinks fit, to order that evidence of the facts alleged in such application be given by affidavit but no accused person shall be called upon to make any affidavit himself under the section. Courts are further authorised to order any scandalous or unnecessary matter in an affidavit to be struck out or amended and to direct the appearence of any person making an affidavit under the section for cross-examination by the Courts.

It is proposed in the Bill to repeal cl. (2) of sec. 192 and to alter sec. 528 so as to authorise Chief Presidency Magistrates and District Magistrates to empower any subordinate Magistrate to transfer a case. We think sec. 528 should be amended on the same lines as sec. 526 so as to make it clear that miscellaneous proceedings are liable to be transferred under the section. The difficulty arises out of the words "any case of which (the Magistrate ordering the transfer) has taken cognizance." 'Taking cognizance' has a special meaning in the Code of Criminal Procedure and it cannot apply to proceedings under sec. 144, 145 or other miscellaneous proceedings. We hope the section will be so altered as to obviate this difficulty.

CURRENT INDIAN CASES.

(CIVIL.)

Civil Procedure Code, Or. 41, r. 3—Memorandum of appeal—Insufficiently stamped.

ACHUT RAM CHAND PAI *v.* NAGAPPA I. L. R. 38 Bom. 41.

On the last day allowed by the law of limitation the Appellants filed their appeal in the District Court. The memorandum of appeal was however insufficiently stamped and the Appellants' pleader on being questioned as to this replied that he had no funds with which to pay the requisite stamp and requested the Court to grant him time to make the necessary payment. The Court rejected the memorandum of appeal.

Held—That Or. 41, r. 3 provides for the rejection of a memorandum of appeal in certain cases but those cases are limited by the preceding rules to cases where the memorandum of appeal is defective in point of form or in respect of the grounds which it must contain and this rule cannot be interpreted as covering a case where the memorandum of appeal is rejected by reason of insufficiency of stamp.

That the lower Court should have granted time to supply the necessary stamp.

Limitation—Step in aid of execution.

BACHARAJ *v.* BEHAJI, I. L. R. 38 Bom. 47.

On the 3rd July 1900, the Plaintiff obtained a decree in the terms of an award whereby he was required to pay a certain sum by annual instalments and to reduce the mortgaged property. It was further provided in the decree that if the Plaintiff failed to pay any two instalments to the Defendant in time his right to redeem should for ever be foreclosed. Subsequent to the decree two instalments in full and one instalment in part were paid by the Plaintiff to the Defendant. No other instalment was paid thereafter. An application was made on the 20th July 1905 to the Court for certifying those payments in satisfaction of the decree. This application was signed by the Plaintiff and was consented to by the Defendant. On the 14th December 1907, an application was made for an order of foreclosure in terms of the decree but that application was dismissed for non-prosecution. On the 29th March 1909 a similar application was again made.

Held—That the application was not time barred. The application of 20th July 1905, was sufficient to give a fresh starting point to limitation.

Intention to defraud but no fraud actually committed—Mortgage.

GIRDHARI LAL *v.* YASHODA BAI, I. L. R. 38 Bom. 10.

The Plaintiff sued to recover the amount due upon a mortgage. The defence was that the mortgage deed was passed in order to protect the property from the Defendant's creditor R. The Defendant stated in his evidence that the consideration for the deed was received in the Registration Office and repaid to the mortgagees outside the office The properties were attached by the creditor R and the mortgagee then made claims on the basis of the deeds for release of the property from attachment. The mortgagor admitted the claims and the Court ordered that the property should be sold subject to the mortgage above mentioned. The properties were however not sold because the Defendant paid off the creditor before the order for the sale was carried into effect.

Held—No fraud being actually effectuated there was no reason why the Court should punish intention of the Defendant by making an order against him. The present case was distinguishable from the cases where it was held that the Defendant could not be allowed to defeat the Plaintiff's claim by pleading his own fraud. The distinction lay in the fact that in the present case the creditor was not defrauded.

Reviews.

THE LAW OF BENAMI TRANSACTIONS. *By C. S. Somanatha Sastri and P. Ramanatha Iyer. Published by the Proprietors of the Law Printing House, Madras and the Lawyer's Companion office, Trichinopoley and Madras. 1913. Price Rs. 4.*

The Benamdar when he crossed the view of Anglo Indian Judges did not receive a warm welcome. However, he came to stay and room had to be made for him, however unwillingly. He was the nearest approach in Indian law to the English trustee, without however his obligations of honesty, imposed by a jealous Court of Chancery. The Judges however went to work on the institution and by dint of judicial trimming, a fair body of rules tending on the whole to secure a passable amount of justice and fair dealing have been

brought into shape. This book is an ably prepared summary and critique of these rules, fairly exhaustive and logically pieced together. It will save the lawyer any amount of unsystematic search for authorities through the mazes of "Digests" and "Indexes of Cases"—and we shall not be surprised if it does more, *viz.*, by aiding in shaping the law itself on lines more in conformity with notions of justice and fair dealing. We give this work a hearty welcome—far heartier indeed than the Judges were inclined to give to its subject, the Benamdar.

THE PROVINCIAL SMALL CAUSE COURTS ACT, IX of 1887, with notes. *By Moulvi Nazir Ahmad, B.A., LL. B., Judge, Court of Small Causes, Srinagar (Kashmir State). 1913. Printed at the Law Publishing Press. Lahore. Price Rs. 2.*

This is quite an exhaustive treatment of the subject by one having to administer the law thereon in the capacity of a Judge. The notes are admirable and up-to-date. In an appendix are reproduced the repealed Acts beginning from Act XLII of 1860, the statement of the Objects and Reasons of the Bill which passed into the present Act, the Report of the Select Committee thereon and an abstract of the Proceedings of Council which led up to its enactment.

DESAI'S POINT NOTED INDEX OF CASES JUDICIALLY noticed. 1811—1912. *By Balwantrai R. Desai, Fourth Edition. Baroda. Printed by M. V. Shah in his Vidya Vilas Printing Press. 1914. Price Rs. 12.*

Mr. Desai's Index proved itself indispensable from the very moment of its publication, and that it has since held the field is due in no small measure to the unceasing efforts of the compiler to improve its usefulness as a book of reference. In the present edition the most notable change is the analysis of the cases reported in the I. L. R. Series in which more than one point has been decided into their component elements and the separate citation of later cases in which the earlier case has been noticed with reference to those special points. It will add to the utility of the work if in citing the cases in which a previous case has been judicially noticed care is taken to show that the references to two or more reports of the same judgment are really not independent references. The book, useful as it is, still admits of further improvement and the compiler will, we are sure, not spare any trouble which will add to its usefulness.

NOTES ON MAINE'S ANCIENT LAW. *By Protap Chandra Sen Gupta, M. A. B. L. Rai M. C. Sarkar Bahadur and Sons. Law Publishers and Book Sellers. 75, Harrison Road, Calcutta. 1913.*

This is a carefully prepared abstract of Maine's classical work intended for use by students preparing for law examinations. Maine's treatment of the subject is somewhat diffuse—though considering the nature of the subject by no means unnecessarily so—and an abstract like the present should prove of great assistance to the beginner in mastering ideas which to him must appear to be both abstruse and unfamiliar.

AN INTRODUCTION TO THE INDIAN LAW OF TRANSFER INTERVIVOS. *By Satya Ranjan Sen B. L. Chakraburtty Chatterjee & Co., 15 College Square, Calcutta. 1913. Re. 1.*

This is another students' book and written with insight into the principles underlying the provisions of the Transfer of Property Act and knowledge of the needs of students. There is a large field of work as yet only inadequately exploited for writers of books for law students *viz.*, the adaptation of the provisions of the Indian Codes to the needs of students of law and the exposition of the principles upon which they are based for their benefit. Mr. Mulla's books on the Civil Procedure Code, Hindu Law and Mahomedan Law may serve as models. The Transfer of Property Act and related statutes certainly afford scope for a real text-book prepared on a more ambitious plan than the present note-book and we would very much like to see it undertaken by the author or others engaged in a similar class of work.

ANALYSIS OF THE LAW ON CONTRACTS AND TORTS for the use of students. *By A. M. Wilshere M. A. LL. B., and Douglas Robb. B. A., London: Sweet and Maxwell Limited. 3 Chancery Lane, W. C. Toronto. Canada: The Carswell Company. Ld. 1914. Price 6s.*

This is another students' book founded on the corresponding portions of Dr. Blake Odgers' "The Common Law of England." These subjects are not dealt with exhaustively in the original work, the object of which is to give students a good grounding in the principles rather than the details of law, and the present authors by epitomising it (at the instance, be it noted, of the Publishers of the original work) have sought to furnish students with fingerposts to guide and direct them in their appreciation of the original work. Part I deals with contracts in general; part II with Torts, part III deals with special contracts, such as contracts for sale of goods, negotiable instruments, contracts of agency, contracts between master and servant and contracts of bailment and carriage, and contracts by persons under disability.

SRIMUTTY MANOKARANI DEBI v. HARIPADA MITTER.

were anxious to prevent the sale of the mortgaged premises in a suit brought by the mortgagees. It is argued that this is not evidence against the Plaintiffs as they do not claim through their parents but as heirs to Lokenath. I admitted the affidavit, however, regarding the parents as the guardians of the Plaintiffs and so capable of making admissions against their interests on their behalf. And I take the affidavit as showing that Rambullav did leave debts which were not liquidated in 1871, the date of the mortgage to Chunamull. This goes to show that Rambullav left some debts that had to be met by the widow selling a part of his estate and there may very well have been more.

In conclusion the learned Judge observed as follows:—

Taking all this evidence together I consider that the Defendant has made out a kind of case in favour of her contention. It is undeniably weak one; but in considering whether it is too weak for me to rely on it I must consider the circumstances under which it is brought. A remarkable feature of the Plaintiff's case is that he has brought it only three weeks before the expiration of the time when the Statute of Limitation would have applied. The fathers of the Plaintiffs who would probably have had some knowledge of the circumstances under which the Conveyance was made are both dead, and their mothers are not called. The two fathers Dwarkanath and Nittya seem to have died before Monmohini, but Pulin Behari the Plaintiff, who gave evidence, admits that he did not know of the property in question or that he could claim any interest in it before 1897 when he became aware of it in the course of another suit. He alleges poverty as a reason for not asserting his rights at an earlier period but there seems no particular reason for supposing that he was in worse circumstances in 1897 than he was when this suit was brought. The facts on which the Plaintiffs rely are not disputed and the onus of proving her case therefore lies on the Defendant. At the same time the Plaintiffs' delay and his inability to produce more cogent evidence than he has justified me in accepting a weaker proof of the Defendant's case than I should require in other circumstances. I therefore hold that the Defendant has proved that Monmohini sold to her predecessor in title for necessity and that her predecessor was *justified in believing* that she did so I accordingly give judgment for the Defendant with costs on Scale No. 2.

Against the said decree the Plaintiffs appealed to the said High Court in its Appellate jurisdiction, and the Appeal was heard by Sir Lawrence Jenkins, C. J. and Woodroffe, J. The learned Chief Justice delivered his Judgment (in which Woodroffe, J. concurred) on the 4th February, 1910.

After stating the facts Jenkins, C. J. in his Judgment observed:—

"Though oral evidence was adduced the learned Judge placed no reliance on it, for he held that it gave "very little basis for the Defendant's case that Monmohini sold this property from necessity," and he therefore directed his attention to the documentary evidence on which alone his conclusion rests. I accept the learned Judge's appreciation of the oral evidence, and I therefore will, as he did, consider whether the documentary evidence suffices to establish the Defendant's case. What principally impressed the learned Judge was an affidavit made in a suit brought by one Chunamull against Monmohini which he admitted, notwithstanding the Plaintiff's objection, as an admission, "regarding the parents as the guardians of the Plaintiffs and so capable of making admissions against their interests in their behalf." But the relevance of an admission must be determind by reference to the terms of the Evidence Act, and I can find nothing in that Act which supports the view of the learned Judge.

The present Plaintiffs in no sense derive their interest in the subject-matter of the suit from their parents nor can their parents be regarded as having been expressly or impliedly authorised by them to make the admission. I therefore hold that the affidavit is not admissible in evidence against the Plaintiffs.

Then what else is there in the case on

which to rest the Defendant's claim? There is no proof of an entry in any family books of account, for none are produced. The absence of these books might, if unexplained, excite a certain amount of suspicion against the Plaintiffs, but the suggestion made by Pulin Behari, one of the Plaintiffs, in explanation of their disappearance evidently impressed Stephen, J. favourably and I see no reason for not accepting it.

In the conveyance to Juggoo Lal the existence of two debts is no doubt asserted but the authorities show that this is not proof, and beyond this there is no other document on which reliance has been placed either by Stephen, J., or by counsel before us.

Nor is the meagreness of the evidence adduced on her behalf, the only difficulty in the Defendant's way.

In 1857 Jadu Nath Mitter presented a petition to the Court for the grant to him of Letters of-Administration to the estate and effects of Ram Bullav Bose during the minority of his cousin, Loke Nath, and in that petition it is alleged that Ram Bullav left Company's paper belonging to him. But neither in this petition nor in the accounts filed by Jadu Nath Mitter as administrator is there any trace of this debt.

Then again the peti ion for a certificate of guardianship to her son Loke Nath presented by Monmohini in 1866 shows that Ram Bullav left property including two money lending businesses, one in Calcutta and the other at Sonamoyi, and this agrees with the evidence of the Defendant's own witnesses, Kedar Nath Mozumdar and Anundo Chunder Chatterjee, that Ram Bullav when he died was a man of some means. Then the sale was after the death of Loke Nath, and more than 10 years after the death of Ram Bullav and the purchase money was only Rs. 2,500.

It is true that in the conveyance Monmohini is said to have been identified by her sons-in-law, but the suggestion on the part of the Plaintiff is that it was the extravagance of one of them Dwarkanath that led to the sale and it was elicited in the cross-examination of Kedar Nath that he was very extravagant and was constantly going to Monmohini for money, and it is further shown that Dwarkanath had something to do with the handling of the purchase-money.

It is true that there has been considerable delay in the institution of this suit, and this delay appears the greater because of the length of time that elapsed before the reversion fell in. But it is not usual for a reversioner to sue during the lifetime of the widow and in fact this suit is within time. The delay that has occured since the widow's death has been reasonably explained as atributable to the pendency of another suit and the lack of means to meet the expenses of the litigation.

The conclusion then to which I come is that the Defendant has failed to prove the existence of legal necessity, nor has it been shown that the purchaser used reasonable care to ascertain the existence of such legal necessity or acted in good faith. The appeal therefore should, in my opinion, be allowed and a decree passed that the Defendant do put the Plaintiff in possession of the property."

Hence this appeal.

Mr. Upjohn, K. C. and *Mr. Dunne* for the Appellant submitted that it was proved that the conveyance was made by the widow for legal necessity, namely, for discharging the debts due from her deceased husband. The recitals in the conveyance

were some evidence of the existence of actual pressure on her estate and the existence of the debts which were discharged. The Appellate Court was not quite correct in thinking that Stephen, J., had disbelieved the oral evidence. That evidence consisted of very old men and at this distance of time it was difficult to produce better evidence. The Respondent did not produce the accounts which would have shewn that there were debts due from the estate. Further, the affidavit was admissible in evidence. It was made by the fathers of the Plaintiffs, who were their natural guardians. They made it in order to safeguard the interests of the Plaintiffs and it was binding upon them. In any case the purchaser paid full consideration and acted in good faith and after using reasonable care to ascertain the existence of pressure on her estate and necessity for the sale. Sec. 38 of the Transfer of Property Act, 1882, applied, and it must be presumed that there was necessity for the sale. A Hindu widow's powers resemble those of a manager. Reference was made to *Hanooman Prasad* v. *Muntaj* (1). *The Collector of Masulipatan* v. *Cavaly Vencata Narainapah* (2).

Mr. L. DeGruyther, K. C. and Mr. Bhugwandin Dubé for the Respondents, were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—Their Lordships have had the case on behalf of the Appellant very fully and forcibly put before them, and their attention has been called to the judgment of the Judge at the trial, and to the judgment of the High Court in its Appellate jurisdiction. They are of opinion that the latter judgment, from which this Appeal is brought, is a judgment based upon proper principles and upon a due appreciation of the evidence in the case, and they can see no reason for differing from it. They will therefore humbly advise His Majesty that the Appeal ought to be dismissed, and the Appellant must pay the costs.

(1) 6 Moo I. A. 393, 419, 423 (1856).
(2) 8 Moo I. A. 529, 500 (1861).

Solicitors: *Messrs. Watkins* and *Hunter* for the Appellant.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

B. D. *Appeal dismissed.*

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

STEPHEN, J. 1914, 1 and 8, April. } EMPEROR *v.* NIRMAL KANTA ROY.

Criminal Procedure Code (Act V of 1898), sec. 403—Autrefois acquit—"*Any other offence with which he might have been charged,*" *meaning and effect of—Acquittal on charge of murder if bar to trial on charge of culpable homicide where culpable homicide was charged in the previous trial—Acquittal on charge under sec.* $\frac{302}{34}$, *I. P. C., if bar to trial on charge under sec.* $\frac{302}{114}$, *or* $\frac{302}{109}$—*Indian Penal Code (Act XLV of 1860), sec. 34, meaning of—Discharge of jury under sec. 305, Cr. P. C., and trial before a fresh jury under direction of Court if a continuation of the first trial on the original plea—Plea of accused if necessary again in second trial—Pleading Not Guilty and* autrefois acquit *at one and the same time, if proper—English law of criminal pleading, bearing of. on Indian criminal procedure—Plea of Not Guilty not a plea recognised by the Indian Code of Criminal Procedure.*

The accused was indicted in the Calcutta Court of Criminal Sessions under five counts which were, firstly, the murder of one N under sec. $\frac{302}{34}$, *I. P. C., secondly, murder of the same man under sec.* $\frac{302}{114}$, *I. P. C., thirdly, abetting the murder of the same man under sec.* $\frac{302}{109}$, *I. P. C., fourthly, the*

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murder of one A, fifthly, culpable homicide of A. The accused pleaded Not Guilty to all the charges. The jury unanimously acquitted the accused of the first and the fourth charges and differed as to the other counts, there being not as many as six who agreed in opinion. The Judge discharged the jury under sec. 305, Cr. P. C., and directed a retrial. On the retrial of the accused before a fresh jury on the remaining counts of the indictment the accused pleaded Not Guilty as also autrefois acquit, *and it was urged in defence (1) that as the accused had been acquitted of the charge of murder of A, he could not be tried again for committing culpable homicide on him; and (2) that as he had been acquitted of an offence under sec.* $\frac{302}{34}$, *I. P. C, in relation to the murder of N, he could not be convicted of an offence in relation to the same man under sec.* $\frac{302}{109}$ *or* $\frac{302}{114}$, *I. P. C.:*

Held—*That sec. 403, Cr. P. C., protected the accused only against a trial for murder and any other offence for which a different charge from the one made against him "might have been made." But the offence of culpable homicide for which he was tried again was one of the charges actually made against him and on the terms of sec. 403, Cr. P. C., the first objection failed. If the accused had been charged with murder alone, a verdict of Not Guilty would have protected him from another trial for culpable homicide and were he acquitted of culpable homicide he would be protected from a trial for any offence involving hurt; but where a charge was made the case fell outside the provisions of the law dealing with cases where it might have been made.*

That for the purposes of sec. 403, the accused was not being tried again but was being tried on the original indictment and on his first plea of Not Guilty. Sec. 308, Cr. P. C, did not affect the construction of sec. 403.

That sec. 403 should not be construed with reference to the English law relating to criminal pleading. Secs. 271 and 272, Cr. P. C., contain all that is necessary as to pleading and there is no need to supplement their contents by a reference to any other system of judicature.

That the plea of Not Guilty was one not recognised by the Code of Criminal Procedure and it was not open to the accused to make any answer to an indictment except Guilty or a claim to be tried.

Sec. 403 has nothing to do with pleading, but is in terms of a limitation on the jurisdiction of the Court. A defence under that section may be set up at any time before verdict in any form.

That even assuming the case to be governed by the English law of pleading, autrefois acquit *was not properly pleaded.*

That the accused had already pleaded Not Guilty in the first trial and that plea was still awaiting adjudication and the second plea was therefore unnecessary and of no effect.

That even if the principles of English law were to be applied to the present case the acquittal for murder was no bar to the retrial for culpable homicide.

Where another person actually killed the deceased, the accused who was stated to have accompanied him and attempted to kill him could not be charged with the murder under sec. 34 of the Indian Penal Code.

Sec. 34 of the Indian Penal Code is to be read according to the meaning of its terms without reference to any doctrines derived from the English Common Law.

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The construction put on the section in R. *v.* MAHABIR TIWARI (5), *and* GOURIDAS NOMASUDRA *v.* THE EMPEROR (6) (*which is summarised in para. 243 of Mayne's Criminal Law*) *is wider than the terms of the section justify.*

The finding of Not Guilty by the jury on the charge under sec. $\frac{302}{34}$, *I. P. C, under the direction of the Judge for an acquittal on legal grounds did not decide any question of fact and could not be taken as negativing the common intention of the accused and the man who in fact killed N.*

That there is no reason for saying that a man must be absent in order to abet under sec. 109, I. P. C.

That by instigating the unknown murderer by accompanying him to the place and by aiding him in his flight afterwards, the accused would be abetting the murder under sec. 109, I. P. C., even if he was not present at the murder; his presence there would make him liable for the murder under sec. 114.

The effect of sec. 109 and sec. 114 of the Penal Code is to supersede all the English law relating to principals of the first and second degrees and accessories before the act.

The facts of this case necessary for the purposes of this report are as follows. On the night of the 19th January 1914 at about 8 P. M. one Nripendra Nath Ghosh, an Inspector of Police, was shot dead by a revolver. It was alleged that two persons took part in the murder, but the shots from the revolver of only one of them had taken effect. The accused Nirmal Kanto Roy was alleged to have been one of the two persons who fired at the Inspector, but did not actually hit him. The prosecution also alleged that both the assailants were thereupon pursued, the other escaped, and the accused on being further pursued was caught hold of by his *chadar* by a little boy named Ananto Teli. Thereupon, it was alleged, the accused fired and killed Ananto Teli, and continued running on till he was captured.

The case was committed to the High Court Sessions and tried before a Special jury. The charge contained five counts and was as follows :—

1. That he the said Nirmal Kanto Roy on or about the 19th day of January 1914 in Calcutta aforesaid in conjunction with another person in furtherence of the common intention of himself and of that other person did commit murder by intentionally or knowingly causing the death of one Nripendra Nath Ghose and thereby he the said Nirmal Kanta Roy committed an offence punishable under sec. 302 read with sec. 34 of the Indian Penal Code :

2. That some person unknown at or atout the time and in the place aforesaid committed murder by causing the death of the said Nripendra Nath Ghose and he the said Nirmal Kanto Roy, who if absent would have been punishable as an abettor of such offence in consequence of such abetment, was present when such offence was committed and thereby he the said Nirmal Kanto Roy committed an offence punishable under secs. 114 and 302 of the Indian Penal Code.

3. That he the said Nirmal Kanto Roy at or about the time and in the place aforesaid abetted some person unknown in committing the offence in the first charge mentioned which offence was committed in consequence of such abetment, and thereby the said Nirmal Kanto Roy committed an offence punishable under

(5) I. L. R. 21 All. 263 (1899).
(6) 13 C. W. N. 680 (1908).

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secs. 109 and 302 of the Indian Penal Code.

4. That he the said Nirmal Kanto Roy at or about the time and in the place aforesaid committed murder by causing the death of one Ananto Teli otherwise called Antu Teli and thereby he the said Nirmal Kanto Roy committed an offence punishable under sec. 302 of the Indian Penal Code.

5. That he the said Nirmal Kanto Roy at or about the time and in the place aforesaid and in course of the said transaction committed culpable homicide not amounting to murder by causing the death of the said Ananto Teli otherwise called Antu Teli and thereby the said Nirmal Kanto Roy committed an offence punishable under sec. 304 of the Indian Penal Code.

At the close of the evidence, the learned Judge said that he was of opinion that sec. 34, I. P. C., did not apply to the facts of this case and directed the jury to bring in a verdict of Not Guilty on the first count and they did so. After retiring, the jury brought in a unanimous verdict of Not Guilty on the fourth count, *viz.*, that of murdering Ananto Teli, but were divided in the proportion of 5 to 4 on the other counts. The Judge thereupon took the verdict of acquittal on the first and fourth counts, and discharged the jury and ordered a re-trial on the three counts as to which the jury were not agreed.

The re-trial came on before the same Judge and another special jury. But before the new jury was empanelled or the indictment read, the accused through his counsel took the preliminary plea of *autrefois acquit.*

Mr. Norton (with *Messrs. C. R. Das, J. N. Ray, L. Palit, W. Sen-Gupta* and *S. N. Roy*) for the Accused.—Before the charge is read, I want to take the plea of *autrefois acquit.*

Mr. S. P. Sinha (with *Mr. B. C. Mitter, Standing Counsel*, and *Mr. E. P. Ghosh*) for the Crown.—It ought to be taken after the charges are read.

[STEPHEN, J.—We are not so technical.]

Mr. Norton.—My first point is that my client has been acquitted of the murder of Ananto Teli. The jury could have convicted him of culpable homicide. But they have not done so. No man is to be tried for an offence twice. Your Lordship did not sum up or explain the charge of culpable homicide. You charged them only for murder. My client was acquitted of that. The jury could have convicted him of the lesser offence of culpable homicide, but they did not. Refers to Archbold (last Ed.) p. 177. *R.* v. *Grimwood* (4). This principle is incorporated in sec. 403 of Criminal Procedure Code. The test is "was I in jeopardy of being convicted." The point is not what the jury did, but what the jury could have done. Your Lordship not having directed the jury about culpable homicide the jury was bound in law to bring in a verdict of Not Guilty on that minor count. Refers to *Reg* v. *Ebrington* (7), *Reg* v. *Thos Morris* (8), Archbold p. 235.

My next objection relates to the two counts of abetment of the murder of the Inspector. On the last trial, there were three charges regarding this, *viz.*, (1) under sec. 302, I. P. C. read with sec. 34, (2) sec. 302 read with sec. 109, (3) sec. 302 read with sec. 114. Your Lordship

(4) 60 J. P. 809 (1894).
(7) 9 Cox. Cr. C. 86, 89 : s. c. 1 B. and S. 688 (1861.)
(8) 10 Cox. Cr. C. 480 : s. c. 1 Cr. C. R. 90 (1867).

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directed the jury to acquit my client under sec. 302 read with sec. 34. That necessarily is a bar to a trial under sec. 302 read with sec. 109 or sec. 302 read with sec. 114. Abetment is defined in sec. 107. *Firstly*, there is no possible evidence of instigation in this case. *Secondly*, it requires common intention. That is covered by sec. 34.

[STEPHEN, J.—I don't think so. There was no evidence of an illegal act being done by the accused as is contemplated by sec. 34.]

Mr. Norton.—Sec. 34 relates to cases where one person is present in furtherance of the common intention and another does the act, they are both equally guilty. The jury have acquitted my client under sec. 302 read with sec. 34, therefore they have negatived common intention and conspiracy. Therefore there cannot be abetment. See sec. 109 and sec. 114. Some of these cases fall under sec. 34 Therefore an acquittal under sec. 34 would bar a subsequent trial under sec. 109. As regards sec. 114, a person merely by being present does not make himself liable under this section; he must have been liable for abetment even if he were absent. See *Queen* v. *Dwarkanath* (9), *Abhi Misser* v. *Luchmi Narain* (10), follows *Queen* v. *Dwarkanath* (9), *Keshvar* v. *Girish* (11).

Mr. C. R. Das follows:—The principle of sec. 305, Cr. P. Code, is that the verdict must be one entire verdict. Your Lordship has accepted a verdict, and it must cover all the charges. See *Krishna Dhan* v. *Queen-Empress* (12). This shows that the word verdict in sec. 423, Cr. P. C., means one entire verdict. See also, *Queen-Empress* v. *Croft* (13), (where the offences were distinct), *Koplan* v. *Smith* (14), *Ram Sabak* v. *Emperor* (15), *Sharbekhan* v. *Emperor* (16), *Queen-Empress* v. *Subadar Krishnappa* (17), *Queen-Empress* v. *Erramreddi* (18). These cases show that there must be one entire verdict. *See* also Kenny's Criminal Law pp. 470, 471. If two charges are substantially the same, acquittal on one bars a trial on the other, *e. g.*, acquittal on common assault bars a trial on grievous hurt. Your Lordship need not have accepted the verdict under sec. 302, as it was not one entire verdict. But as my client was once placed in jeopardy of a conviction, he cannot be tried again. The same bundle of facts have been adjudicated upon, and there cannot be a trial on the same facts. *See* Russel on Crimes (7th Ed.) p. 1982; Archbold p. 235; Harris' Criminal Law p. 379.

Your Lordship's direction to the jury amounted in law to this that if the jury believed those facts, it was murder and nothing less than murder. The jury have found it was not murder. Therefore, in law, they must be taken to have negatived anything which falls short of murder.

As regards the charges of abetment of the murder of the Inspector the case for the prosecution is that both the accused and the other man fired, and the result was that the shots of the other man hit the Inspector and he died. Under these circumstances, the offence clearly is under sec. 34 read with sec. 302. I will not enter into the discussion whether sec. 34

(9) 7 W. R. Cr. 15 (1867).
(10) I. L. R. 27 Cal. 569 (1900).
(11) I. L. R. 29 Cal. 496 (1902).
(12) I. L. R. 22 Cal. 377 at p. 382, 383 (1894).
(13) I. L. R. 23 Cal. 174 (1895).
(14) 16 W. R. Cr. 8 (1871)
(15) 14 C. W. N. 839 (1910).
(16) 10 C. W. N. 518 (1905).
(17) 1 Bom. L. R. 15 (1899).
(18) I. L. R. 8 Mad. 296 (188).

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and sec. 114 are mutually exclusive. The jury under your Lordship's direction has acquitted me of sec. 34. It is not open to the prosecution to try me again under sec. 114. The language of sec. 114 is so clear that the facts on which the Crown relies cannot come under sec. 114. This section applies only to cases where the accused is already an abettor before he is present at the transaction itself. Under sec. 34, it is not necessay that all of them must do something. Common design is all that is necessary. See *Queen* v. *Gora Chand* (19).

Mr. Sinha.—I am bound to point out that this plea of *autrefois acquit* has not been taken at the proper time. See Roscoe's Criminal Procedure (8th Ed.) p. 169; 9 Vol. Halsbury, p. 355. There must be formal proof of acquittal, identity of accused, &c. This can be done by formally tendering in evidence the original indictment and the minutes of the Court, &c.

[STEPHEN, J.—The Court can refer to its own notes.]

Mr. Sinha.—Of the five charges on which the accused was tried on the first trial, there is no verdic before the Court on three of those charges, *viz.*, culpable homicide of Antoo Teli, and two charges of abetment of the murder of the Inspector. Therefore the accused is being retried on these three charges. It has been contended by the other side that the accused was once in jeopardy of being convicted, and therefore he cannot be retried again. This principle of jeopardy, as stated, is too broad. If this principle were correct, then in every case where a jury disagrees, there cannot be a retrial. See sec. 403, Cr. P. C. The words are 'might have been.' The true principle is stated in *O'Connell* v. *Queen* (20). Each count in an indictment is a separate indictment. See Archbold, p. 82. Therefore there must be separate verdicts on each count. The contention that the verdict must be one entire verdict on all the charges is absurd. For instance, if two persons are jointly indicted and one of them is let off, but there is disagreement with regard to the other, is it to be said that if the second is to be re-tried, the man who has been let off should be tried again? Suppose again, a man is charged with murder, culpable homicide, grievous hurt, and simple hurt. The jury are unanimous with regard to the graver offences that the man is Not Guilty but are not agreed as to simple hurt. If he is tried again, must he be tried again for the offences of which he was acquitted, because "there must be one entire verdict" for the whole lot? That would be absurd. According to the practice of this Court also, re-trials have taken place under circumstances similar to this. From the Court minutes in the Crown Office it would appear that in 1906, a man was tried for culpable homicide, grievous hurt and simple hurt. The jury unanimously acquitted the accused of the graver charges but was divided in the proportion of 5 to 4 as regards hurt. A re-trial was ordered. In 1904, in another case a man was tried for forgery for the purposes of cheating and also using as genuine a forged document. The jury unanimously acquitted the accused of the first charge and were divided, 5 to 4, on the second charge. A re-trial was ordered.

In *Krishna Dhan* v. *Queen-Empress* (12), there was a trial in the mofussil for

(19) 5 W. R. Cr. 45, 48 (1866)

(12) I. L. R. 22 Cal. 377 (1894).

(20) 11 Clarke & Finnelly p. 155 at p. 295 (1844).

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murder and grievous hurt. There was no charge of culpable homicide. The jury were unanimous for acquittal with regard to one charge but were not agreed with regard to the other. The High Court set aside the verdict under sec. 423, Cr. P. Code, and it was held that it must be taken to have set aside everything, namely, even the verdict of Not Guilty. This case therefore does not help the other side.

The doctrine underlying these pleas is set forth in *Queen* v. *Miles* (21). The principle is analogous to that of *res judicata*. It applies only "where a criminal charge has been adjudicated upon." See *Queen* v. *Miles* (21). Where the substratum of a charge is taken away, the more aggravated offence cannot be tried. In this case the jury only negatived the murder of Antoo Teli. But they did not negative culpable homicide. They expressly said so. They could not arrive at a conclusion. The case in *R* v. *Grimwood* (4), is a case similar to *Queen* v. *Miles* (21). The cases may be put thus. If there is a charge of a minor offence and there is an acquittal, you cannot try him on a graver charge. If there is conviction on the minor offence, you cannot try him on the major offence, because that would mean punishing him twice over. But does it follow from this that where a man has been acquitted of the major offence, the minor charge is necessarily negatived? I submit not.

As regards the charges of abetment, the other side says that there being an acquittal on sec. 34, there cannot be any trial on sec. 114 or sec. 109. But abetment is a substantive offence. It is not a minor offence. A man cannot be convicted of abetment, if there is no such specific charge.

(4) 60 J. P. 809 (1894).
(21) 24 Q. B. D. 423, at p. 430 (1890).

Each charge being a separate indictment must be adjudicated upon separately.

Mr. C. R. Das, in reply. See Archbold p. 189, the doctrine of *res judicata* does not apply. But I don't say that the question of adjudication is not to be considered. *Krishna Dhan* v. *Queen-Empress* (12), is a direct authority that "verdict" means one entire verdict. See Archbold, p. 82. Where the offences are distinct offences, I don't say that my argument will apply. But where the offences are not different you cannot retry. If there are different offences, the verdict may be a different verdict for each offence. See *Latham* v. *Queen* (3), where there were different offences.

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—The accused in this case has been indicted under five counts. These are, firstly, the murder of Nripendra Nath Ghose under secs. 302 and 34 of the I. P. C.: secondly, murder of the same man under secs. 114 and 302, I. P. C.: thirdly, abetting the murder of the same man under secs. 109 and 302, I. P. C.: fourthly, the murder of Ananto Teli: fifthly, culpable homicide of Ananto Teli. To these charges he pleaded Not Guilty. I told the jury that there was no evidence of an offence under the first count and they acquitted him accordingly. The jury differed as to his guilt under the second and third charges and there were not as many as six who agreed in opinion. The jury unanimously acquitted him of murder under the fourth charge, and differed as to the fifth charge, without six agreeing in opinion. I accordingly discharged the jury under sec. 305, Cr. P. Code.

(3) 5 B. & S. 635 (1864).
(12) I. L. R. 22 Cal. 377 (1895).

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The accused was then tried again in accordance with sec. 308 of the Code: and as he wished to raise a defence under sec. 403 I allowed him to be charged and to plead again though I doubted if this were necessary or had any legal effect.

To every remaining charge of the indictment, that is to the second, third and fifth, he pleaded Not Guilty and that he had been previously acquitted: care being taken that he should make the two pleas at the same time.

The points that have been argued on his behalf are that as he was acquitted of the charge of murder of Ananto, he cannot be tried again for committing culpable homicide on him; that as he has been acquitted of an offence under sec. 302 read with sec. 34 in relation to the murder of Nripendra he cannot be convicted of an offence in relation to the same man under sec. 302 read with sec. 109 or sec. 114: that, as I told the jury, that if they believed the facts related as to the killing of Ananto I did not see how they could convict the accused of any offence less than murder, the jurors had no right to convict him of any less offence, and consequently those of the jurors who considered him guilty of culpable homicide ought to have found him Not Guilty in which case there would have been a unanimous verdict of Not Guilty.

For reasons I shall state in a moment I do not consider that it is necessary to refer this matter in any way to the jury: but in case my opinion as to this should be dissented from hereafter, I propose to take a verdict on the plea relating to a previous acquittal though as there are no facts for them to decide, I shall tell them that as a matter of law they are bound to return a verdict that the plea is not made out.

The first point depends, and in my opinion, depends solely on the construction to be put on sec. 403, Cr. P. C. This provides that a person who has "once been tried . . . for an offence" and acquitted "shall not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sec 236, or for which he might have been convicted under sec 237."

By sec. 236 "if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences" By sec. 237 "if in the case mentioned in sec. 236, the accused is charged with one offence and it appears in evidence that he committed a different offence, for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." I am of opinion that sec. 235 dealing with acts in a series so connected together as to form one transaction has no application to the present case; consequently neither sub-sec. (2) nor any of the other sub-sections need be immediately considered. In this case the evidence discloses only one illegal act as far as Ananto is concerned, and the accused has been charged in the alternative with having committed murder or culpable homicide of Ananto, a procedure the correctness of which has not been disputed. Sec. 403, however, protects

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him only against a trial for murder and "any other offence for which a different charge from the one made against him" might have been made. But the offence of culpable homicide for which it is now proposed to try him is the same charge that was made against him, and on the terms of the section therefore this defence must fail. If he had been charged with murder alone, no doubt a verdict of Not Guilty would protect him from another trial for culpable homicide: and should he be acquitted of culpable homicide he will be protected from a trial for any offence involving hurt: but where a charge was made, the case falls outside the provisions of the law dealing with cases where it might have been made. Then the procedure relating to the discharge of the jury seems to me to be wholly inconsistent with the possibility of a verdict on one charge acting as a decision of another. By sec. 303 (1) of the Code the jury are to return a verdict on all the charges on which the accused is tried. They have returned a verdict on two; there remain three that have to be dealt with by another jury under sec. 308. This procedure seems to me as obvious as it is reasonable.

Also, for the purposes of sec 403 I do not consider that the accused is being tried again. He is being tried on the original indictment, and I consider that he is being tried on his first plea of Not Guilty. The duty of the Court is to continue the trial of the accused before another jury: and the process may continue till a verdict is passed on all the counts without the accused being "tried again" under sec. 403. I am aware that sec. 308 refers to the accused being retried, but this does not affect the construction of sec. 403.

It is however, if I have rightly understood the argument for the accused, contended that sec. 403 must be construed with reference to the English law relating to criminal pleading. I think this is an erroneous view, and that for the following reasons.

Secs. 271 and 272 of the Criminal Procedure Code contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature. The accused can plead Guilty under sec. 271, he can claim to be tried, or he can refuse to plead which is taken to be the same as claiming to be tried. The plea of Not Guilty is thus one not recognised by the Code and this has been the law since 1872 at least: and I suppose that this is intentional, and is designed to get rid of a great mass of English law relating to criminal pleading which for more than half a century has been discredited, and is in fact falling into an oblivion, which for practical purposes it well deserves.

I consider, therefore, that it is not open to the accused to make any answer to an indictment except Guilty or a claim to be tried. If an accused claims to be tried I am of opinion that, subject to special provisions, he can take any objection to his trial or conviction at any time, before verdict at any rate, and in any form, that the Court sees fit to allow. In particular I conceive that sec. 403 has nothing to do with pleading: but is in terms of a limitation on the jurisdiction of the Court; for if a man is not liable to be tried, the Court has no jurisdiction to try him. I consequently think that a defence under that section may be set up at any time before verdict, in any form; and that it is to be decided on the terms of sec. 403 which seem to me to decide clearly

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and reasonably all the questions that have, as far as I know, arisen in England as to the effect of the pleas of *autrefois acquit* or *autrefois convict*, several of which still remain undecided for practical purposes.

Under these circumstances I hold that the question whether the accused can now be tried for culpable homicide is a question of law to be decided by me without reference to the jury: and I decide accordingly that he can, and indeed must, be so tried.

With a view, however, to what may happen hereafter I propose to put the matter to the jury in the way I have mentioned.

Although I have thus decided this matter without reference to English law, I have been referred to a considerable number of English authorities on various points.

But, in the first place, supposing the acquittal of the accused to have been properly made the subject of a plea and supposing the case to be governed by English law the accused is met by difficulty as to the form in which he has pleaded which seems to me fatal to his contention. For though he pleaded Not Guilty at the time that he pleaded *autrefois acquit* and thus brought himself within the rule laid down in Archbold's Criminal Pleading, page 181, which is of authority in such matters, he had already pleaded Not Guilty in the previous trial or rather at the commencement of this trial, and that plea is still awaiting adjudication. The second plea was therefore unnecessary and of no effect. The case falls therefore within the decision of Alverstone L. C. J., in *R.* v. *Banks* (1) where, after saying that the point before him is an extremely technical one (though not more technical than the present one) and may therefore be met with a technical answer, he lays down that "a Defendant having pleaded Not Guilty to an indictment is not entitled, while that plea is standing, to have a plea of *autrefois acquit* put on the record." The accused in fact seems to have pleaded double in circumstances in which that course is not allowed by law. Assuming this case therefore to be governed by the English law of pleading, I hold that *autrefois acquit* has not been properly pleaded.

It would seem from the same authority and the case there quoted that the proper course to have followed according to English Law would have been to take a verdict from the jury at once, if indeed one is needed, when all the facts to be ascertained are on the record. It is said however that a jury that is already empanelled may decide the issue, Russel on Crimes, 7th Ed., p. 1996, and *R.* v. *Parry* (2).

The English law applicable to an indictment for manslaughter after an acquittal for murder on the same facts is beyond doubt, as an indictment for the major puts the accused in jeopardy of a conviction for the minor offence, Russell p. 1963; but I have searched the modern leading authorities in vain for any decision or any rule as to the effect of a verdict on one count on the decision on another. All the numerous cases that I have been able to verify refer to indictments following acquittals or convictions on previous indictments or informations, and in most of the cases it is decided in terms that the indictment is good or bad as the case may be. This follows from the fact that in England an indictment is a highly formal document, and the finding of a

(1) [1911] L. R. 2 K. B. p. 1095.

(2) 7 C. and P. 836 (1837)

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fresh indictment is the criterion of the institution of a new trial. But in this case there is no question of the indictment being in any way defective. Each count in an indictment is for the purposes of evidence and judgment a separate indictment, *Latham* v *R* (3), see Archbold p. 82, and also Stephen's Digest of Criminal Procedure, Art. 236, and would seem to stand or fall independently of one another. The one reported case where a conviction on one count was held to support a plea of *autrefois convict* on a subsequent trial on another count is *R.* v. *Grimwood* (4). Here, on an indictment for causing grievous bodily harm and other offences involving assault and for common assault, the jury disagreed as to the major charges and convicted of assault. The Recorder sent the indictment to Assizes for the re trial on the major counts and Pollock B. held that the prisoner was *autrefois convict* and could not be tried again. The same result would, one may assume, have followed had the first verdict been one of acquittal, though in that case the basis for the major charges would have been negatived. But I cannot regard this case as of any high authority It was decided on circuit without further consideration. It is, as far as I am aware, only reported in J. P It is referred to in Archbold 24th Ed. at p. 235, but is not referred to in the far more authoritative Russell, though the 17th Ed of that work is edited by Mr. Craies, the very learned editor of the 24th Ed of Archbold The silence of other works of authority on the matter is significant, and I cannot regard the report in the Justice of the Peace as showing more than that the very experienced Judge who tried the case considered it inexpedient that it should proceed further. I consider therefore that there is no English authority for the contention that a verdict on one count can in the case of a re-trial after disagreement of the jury affect the trial on another count. And on principle I can see no reason why a verdict on one count should have an effect in a re-trial on the same indictment that it would not have at the original trial. I therefore hold that even if the principles of English law are to be applied to the present case the acquittal for murder is no bar to the re-trial for culpable homicide. But in finding that the acquittal for murder is no such bar I rely on my finding that the case is to be decided solely on the effect of sec. 403, Criminal Procedure Code.

The second point depends on the terms of sec 34 This provides that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." In this case the killing of Nripendra was, according to the evidence, done by one person who was not the accused. It was therefore not done by several persons and I do not see how the section can apply.

The only act that the accused can be liable for under the section is one done by several persons of whom he was one, that is, by the man who escaped and himself. They may have committed many criminal acts together: but they did not both kill Nripendra The difference between the acts of the two men is that the one actually killed the Inspector, and the other, the accused, merely attempted to kill him. In order to make the accused liable for murder under sec 34 it would be necessary to say that an offence and

(3) 5 B & S. 635 (1861).
(4) 60 J. P. 809 1891.

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an attempt to commit it are the same "act," which seems to me not to be the case. I am aware that a wider construction has been placed on the section in *R.* v. *Mahabir Tiwari* (5), and see *Gouridas Nomasudra* v. *The Emperor* (6), which is however an essentially different case from the present. The view that is indicated in these cases is plainly stated in Mr. Mayne's comment on this section in para 243 of his well known work. He there paraphrases sec. 34 thus: "When several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed and ignorant of what is actually being done." This is not what the section says as I read it, and I consider the paraphrase is incorrect. The fact is that the learned author has taken the section as embodying the distinction between the principals in the first and second degree recognised by the Common Law, and its practical abolition by the Consolidation Acts of 24 and 25 Vict, (1861) passed subsequently to the enactment of the Penal Code. The present state of the English law on the subject is compendiously stated in Arts. 36, 38, and 45 of Stephen's Digest, the two earlier Articles setting out the Common Law rules, the last the means taken to nullify them: but I cannot suppose that it was intended to reproduce such a complicated system into India, any more than that the words of sec. 34 produce any such result. A justification of this opinion on historical grounds may be found by reference to the draft Penal Code of 1837 (Macaulay's Code), sec. 3 and Chap. IV, "Of Abetment," secs. 85-108, and Chap. IV of the Report thereon in 1846, especially paras. 179, 182, 189, and para 662 in the Postscript. Art. 30 of Stephen's Digest is practically the same as Mr. Mayne's paraphrase; but no provision similar to the rule there stated is to be found in the Penal Code except in sec. 149, where the rule is applied to unlawful assemblies.

Under these circumstances I am of opinion that sec. 34 is to be read according to the meaning of its terms without reference to any doctrines derived from the English Common Law. I hold therefore for the reasons I have given that the section does not apply to the present case.

At the same time I have no doubt that on the case made by the prosecution the accused is within the scope of secs. 109 and 114, under which, read with sec. 302, he is indicted.

Abetting is defined by sec 107, and the evidence to my mind, if relied on, shows that the accused instigated and aided whoever it was that committed the murder, and there is therefore a case made out under sec. 109, for there is no reason for saying that a man must be absent in order to abet under that section. The instigating the unknown murderer by accompanying him to the place, and by aiding him in his flight afterwards, which the accused on the evidence did, might have taken place though the accused was not present at the murder. But on the evidence he was so present, and sec. 114 therefore applies to the case. See sec. 93 of the Code of 1837 and paras. 201 and 202 of the Report of 1846.

In reference to English law it seems to me that the effect of secs. 109 and 114 is to supersede all the English law relating to principals of the first and second

(5) I. L. R. 21 All. 263 (1899).
(6) 13 C. W. N. 680 (1908).

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degree, and accessories before the fact. They are apt for this purpose, and again the provisions of the Code seem to me to cover all the cases provided for by English law, except the rule stated in Art. 30 of Stephen's Digest and to contain the whole law applicable to the subject in India.

It has been suggested that the acquittal under sec. 34 negatived the existence of a common intention which is in fact essential to abetment: but as I directed an acquittal on legal grounds the finding of the jury has not determined any question of fact.

I hold, therefore, that the acquittal under sec. 302 read with sec. 34 has no effect on the charges relating to abetment.

I may have misapprehended the third point, at any rate I do not understand it. I expressed an opinion that if the facts given in evidence were believed, the accused was guilty of murder: but the question was one of fact, and if the Jury disagreed with me in point of fact they had a right to do so. I cannot understand their decision: but I had no power to overrule it.

The jury returned a verdict of Not Guilty by a majority of seven to two. The Judge disagreed with this verdict.

[On the 8th April the accused was brought up before the learned Judge "to be dealt with according to law."

The Advocate-General appeared and entered *nolle prosequi* under sec. 333, Cr. P. C.

Mr. E. Norton for the accused.—May I ask, as a matter of precaution, whether your Lordship holds that this is "a stage of the trial" contemplated by sec. 333, Cr. P. C. Is it not necessary for my client to plead again?

STEPHEN, J.—I rule that the Advocate-General's application is in order. It is not necessary for the accused to plead again. I now direct that the prisoner be discharged.

Mr. E. Norton.—Under the last paragraph of sec. 333 I ask your Lordship to direct that the discharge should amount to an acquittal.

STEPHEN, J.—I make no such order.]

The Public Prosecutor for the Crown.

Mr. H. N. Dutt, Solicitor for the Accused.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3085 OF 1911.

COXE, J.
RAY, J.
1913,
Heard, 12 and 13, May.
Judgment, 23, May.

SYED ALI and others, Defendants, Appellants,
v.
SARJAN ALI and others, Plaintiffs, Respondents.

Right of pasturage, suit for declaration of, and for injunction—Mere thirty years' uninterrupted user if enough—Presumption of right.

In a suit for declaration that the Plaintiffs who were cultivating tenants had a right of pasturage over certain lands and for an injunction on the landlord to remove fences, etc., therefrom, the finding of the lower Appellate Court in decreeing the suit was: "The land has been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful, without interruption and should be, in the circumstances

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o' this case, presumed to be as of right also :"

Held—*That th finding was not suffi-c ent to establish the Plaintiffs' right of pasturage over the land in suit.*

It being a customary right, it must be reasonable, and it would be unreasonable to hold that no land over which cattle had grazed should ever be brought under the plough.

This was an Appeal preferred on the 20th of November 1911 against a decree of Babu Debendra Mohan Sen, Subordinate Judge of Z. lah Tipperah, dated the 27th of June 1911, reversing that of Babu Bokulal Biswas, Munsif at Brahmanbari, dated the 23rd of July 1910.

The Plaintiffs Appellants who were al agricultural tenants and residents of village Ulchapara instituted the present suit for the declaration of their right and that of other tenants of the village to graze their cattle on certain pieces of waste land and for an injunction restraining the Defendants, who were some of them the lanlords of the village and the rest cultivators with whom portions of the waste land had been settled by the landlords, from ploughing up the lands in suit and erecting fences thereon and from otherwise rendering the land unfit for grazing cattle. The Defendants denied that the Plaintiffs had the right alleged by them and also pleaded limitation. The Munsif found that other pieces of waste land had been encroached upon more than 3 years previously and that therefore the suit was barred by limitation. He further held on the evidence that the tenants grazed their cattle on the land by the landlord's permission. In this view he dismissed the suit.

On appeal, the Subordinate Judge was of opinion that the Munsif was wrong in relying on the evidence as to encroachment upon other pieces of waste land for his finding on the question of limitation, and that the pieces in suit had been cultivated within two years.

On the merits, he held that the Plaintiffs had grazed their cattle on the lands in suit more than 30 years, openly and peaceably and without objection on the part of the maliks and without permission taken from the Plaintiffs, "that the land had been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful, without interruption and should be in the circumstances of the case presumed to be as of right also." In the result he held that the Plaintiffs and their co-villagers had a right of pasturage over the land in suit both by prescription as well as by grant presumable from immemorial user. In the ordering portion of his judgment he recorded that Plaintiffs' right of pasturage and that of the villagers of Ulchapara be declared and that they do recover possession of it by removing the fences and other obstructions raised by the Defendants and that the Defendants be enjoined from ploughing up the land or otherwise obstructing the right of pasturage declared.

The Defendants preferred this Second Appeal.

Babus Dwarka Nath Chuckerbutty and *Upendra Kumar Roy* for the Appellants.

Babus Jogesh Chandra Roy and Sasadhar Roy for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal arises out of a suit by certain cultivating tenants for a declara-

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tion that they have a right of pasturage over the land in suit and for consequential relief. The lower Appellate Court has decreed the suit and the Defendants appeal.

The first point taken is that of limitation but in the view that we take of the case, no question of limitation really arises.

The learned Subordinate Judge says: "The land has been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful without interruption and should be in the circumstances of this case presumed to be as of right also." In our opinion these findings are hardly sufficient to dispose of the suit. We believe that throughout Bengal, where land is left waste or jungle, the cattle of the villagers graze over it and probably in most cases have done so from time immemorial. No one is interested in stopping them and the user is therefore open, peaceful and uuinterrupted. But it would be impossible to hold that therefore no landlord is entitled to bring any waste or jungle land under the plough. A right of pasturage arising from immemorial user of this kind resembles a right based upon custom. This has been laid down in Madras and Bombay, sec. 18, Easement Act, 1882, and *Secretary af State* v. *Mathurabahi* (1) and the view is in accordance with common sense. Now a custom must be reasonable and it would be wholly unreasonable that no land over which cattle had hitherto grazed should ever be brought under the plough. We may refer in this connection to the case of *Leechmutput Singh* v. *Sadaulla* (2). Nor is this view inconsistent with the decision in *Bholanath* v. *Midnapur Zemindary Co.* (3). Their Lordships' judgment clearly proceeded on the supposition that the landlords were entitled to plough waste land if only sufficient pasturage were left, and the judgment certainly does not go so far as to lay down that immemorial grazing without more makes waste land inviolable. Their Lordships observe :—" It was certainly not the intention of the Subordinate Judge or the Munsif, that the decrees should prevent the Defendants improving their property. And, indeed, the Munsif expressly states that the Plaintiffs admitted the right of the Defendants to improve their property, provided sufficient pasturage were left." And they thought it advisable to add a specific provision to that effect to the decree. We think, therefore, that the lower Appellate Court must find more than that the village cattle have always grazed on this land before he can decree the suit. It may be the case, for instance, that the land in suit has been reserved in some particular manner for pasturage, or that the circumstances of the locality mark it out as suitable for pasture. It may be an island of waste amid a great expanse of cultivated land so that if it is cultivated the cattle of the villagers may have to be driven to an unreasonable distance in order to obtain pasture. Or it may be that the amount of waste remaining in the village is only sufficient for the needs of the cattle. In any of these cases the lower Appellate Court might be justified in holding that the custom underlying the right was reasonable in decreeing the suit. But if there is nothing to show that the land in suit differs in any respect from other waste and if there is plenty of pasturage left in the village the Plaintiffs are not entitled to

(1) I. L. R. 14 Cal 218 (1889).
(2) I. L. R. 9 Cal 698 (1882)
(3) I. L. R. 31 Cal. 503 (1904).

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relief. The Appeal is accordingly allowed and the case will go back to the Court below for rehearing with reference to these observations It will be open to that Court to allow fresh evidence to be taken either by himself or by the first Court. Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL No. 150 OF 1911.

JENKINS, C. J. MOOKERJEE, J. 1913. 28, May.

SREEMUTTY MAHAMAYA KAR, Plaintiff, Appellant, *v.* KISHORE CHUNG, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 29—Occupancy raiyat—Enhancement of rent by contract—Stipulation in original kabuliyat—Colourable evasion of statute.

Where a kabuliyat executed by an occupancy raiyat contained a statement that the rent for the holding was Rs. 57 4 in all, but that out of this the sum of Rs 17 2 was remitted and the rent was fixed at Rs. 40 2 for the period of the kabuliyat, and it was further stipulated that at the end of the term the tenant "shall take a settlement at the rate of Rs. 57-4 and if he does not the landlord shall be entitled to realise that rent by suit"; and the lower Appellate Court found that the rent really settled was Rs 40 2, and that the reference to Rs. 57-4 was merely a device to evade the provisions of sec. 29 of the Bengal Tenancy Act:

Held—*That sec. 29 was a bar to the recovery of the rent by the landlord at Rs 57 4.*

This was an Appeal preferred on the 28th of July 1911 against the decree of Mr. Justice Coxe, dated the 22nd May 1911, in Appeal from Appellate Decree No. 975 of 1909, which had been preferred on the 17th May 1909 against a decree of A. H. Cumming, Esq., District Judge of Zillah Tipperah, dated the 8th of February, reversing that of Babu J. N. Mukherjee, Munsif of that place, dated the 12th of March 1908.

The facts will appear from the judgment of Coxe, J., which was as follows.

COXE, J.—This appeal arises out of a suit for rent, based on a kabuliyat executed by the Defendant's father in 1303. The kabuliyat was for 7 years; and the only question that is raised in this appeal is whether this kabuliyat contravenes the provisions of sec. 29 of the Bengal Tenancy Act.

The Munsif apparently found that the tenancy of the Defendant's father began with the execution of this kabuliyat and that he was not in occupation of the holding before it. The matter has not been dealt with by the learned District Judge in appeal; and for the purpose of dealing with this appeal it may be assumed that he did not differ from the decision of the Munsif on this point. The kabuliyat begins with a tabular statement, which shows the rent to be Rs. 10 a *kani* amounting to Rs. 57-4 annas in all. Out of this the sum of Rs. 17-2 annas is remitted, for some unexplained reason; and the remaining rent is fixed at Rs. 40-2 annas for the period of the kabuliyat. The kabuliyat, after the tabular statement, goes on to describe the rent as being Rs. 40 2 annas during its term, and contains a stipulation that, at the end of the term the tenant shall take a settlement at the rate of Rs. 57-4 annas and if he does not, the landlord shall be entitled to realise that rent by suit. There is also a provision that land found

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to be in excess of the amount leased will be subject to a rent of Rs. 10 a *kani*.

The learned District Judge regards this kabuliyat as an attempt to evade the provisions of sec. 29 of the Bengal Tenancy Act. He says:—"If this stipulation in his lease were to be held good it would always be within the power of a landlord granting a lease to put in the lease that the rent was, say, Rs. 50 whilst he allowed the tenant to pay only Rs. 30. He would then, when the lease expired, allege that Rs. 50 was the rent and then thus, by this device, he would clearly be able to enhance the tenant's rent by considerably more than 2 annas in the rupee."

With this view of the learned District Judge I am in agreement. No doubt, when the kabuliyat was executed the landlord was perfectly entitled to settle the land at the rate of Rs. 57 4 annas, if he could get a tenant to take it on those terms. It may, at first sight, seem unreasonable that if he could have done this he should not be allowed to settle the rent at the rate of Rs. 40-2 annas for 7 years and afterwards at a higher rate. But a little reflection is sufficient to show that this would be wholly against the policy of the Bengal Tenancy Act. The landlord might find great difficulty in settling this land at the present rate of Rs. 57 but it might not be so difficult for him, considering the notorious improvidence of raiyats, to settle the land for several years at a reasonable rent, with a stipulation that, at some distant period, the raiyat should be bound to pay a higher rent; and it is clear, as the learned District Judge points out, that, by adopting this expedient, the landlord by a carefully drafted lease might contract himself entirely out of the provisions of the Tenancy Act. The words of sec. 29, cl. (*b*) are that "the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat." There can be no doubt whatever that the rent payable during the term of the kabuliyat was Rs. 40-2 annas. The nominal rent might have been recorded as Rs. 57-4 annas; but the kabuliyat itself exempts the raiyat from paying this sum, and the sum payable by him, therefore, was only Rs. 40-2 annas. Accordingly, under this clause at the end of the term, his rent could not be enhanced by contract so as to exceed by more than two annas in the rupee the sum of Rs. 40-2 annas. I do not think, reading the words of the section, that this provision applies only to contracts executed at the time of the enhancement. The words are sufficiently wide to include contracts executed some years before. It cannot be disputed that the practical effect of the kabuliyat now under consideration is that at the end of the term the rent of the raiyat is enhanced so as to exceed by more than two annas in the rupee the sum which has been payable by him during the term. Taking this view, I think that the decision of the learned District Judge is right and that the appeal should be dismissed with costs.

Babu Sasaahur Roy for the Appellant.

Bubu Trailokhya Nath Ghose for *Babu Upendra Lal Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This case does not require citation of any authority. It is clear from sec. 29 of the Bengal Tenancy Act that the rent cannot be enhanced so as to exceed by more than two annas in the rupee, the rent previously payable

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by the raiyat. The lower Appellate Court has found that this rent was Rs. 40 2 annas, and the reference to Rs. 57 was merely a device. That finding is conclusive in this case. We must, therefore, dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
1914.
Heard, 17 and 20, February
Judgment, 11, March.

BATUK NATH, Appellant.
v.
MUSAMMAT MUNNI DEI and others, Respondents.

Limitation Act (XV of 1877, Sch. II, Art 179—Order of Registrar of Privy Council dismissing appeal for non-prosecution, if decree or order of Appellate Court—Limitation.

When a petition of appeal to His Majesty in Council was not lodged by the Appellant, and the Registrar dismissed the appeal for non prosecution under r. V of the Standing Order in Council of the 13th June 1853, and no Order in Council was thereupon made :

Held, *that the Registrar's order dismissing the appeal was not a decree or order of the Appellate Court under Art. 179 of the Limitation Act, 1877, and did not extend the period of limitation therein prescribed.*

This was an Appeal from a judgment and decree, dated the 4th June, 1910, of the High Court of Judicature for the North Western Provinces at Allahabad, which affirmed a judgment and decree of the Court of the Subordinate Judge of Agra made in an execution case on the 8th of September, 1908.

The main question for determination on the present appeal was whether the Appellant decree-holder was barred from executing a decree dated the 29th March 1898, by the law of limitation as well as by reason of non-compliance with the condition specified in the said decree.

The facts of the case are as follows :—

One, Sheo Narain, brought a suit for sale on a mortgage dated the 5th June, 1885, against the mortgagor and transferees from her, the purchasers of the equity of redemption and the prior mortgagees were also made defendants to the suit. The Court of first instance made a decree dated the 29th March, 1898, which, among other things, provided as follows :—

"It is ordered that the Plaintiff do pay Rs. 975 on account of Court fee within a week in respect of Rs. 29,534 claimed by Defendants Nos. 2 to 7 as prior mortgage debt, that the Plaintiff do further pay to Defendants Nos. 2 to 7 or deposit in Court Rs. 29,534 with interest at Rs. 6 per cent. per annum, together with one set of pleader's fees and other costs incurred by Defendants Nos. 2 to 7 within five months from to-day. If the Plaintiff fails to pay the said Court fee or the said prior mortgage debt within the periods allowed, his suit shall stand dismissed with costs, and that if the Plaintiff carry out both the above orders, then it is decreed and hereby declared that on the 29th day of September, 1898, the sum of Rs. 79,668-1-3 with future interest and interest *pendente lite* at Rs. 6 per cent. per annum will be payable to the Plaintiff, namely (here follow details of the last-mentioned sum) ; and it is hereby ordered that upon the Defendants Nos. 1, 8, 15 and 16 to 22 (the mortgagor and the subsequent mortgagees) paying the aforesai

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sum of Rs. 79,668-1-3, * * * * to the Plaintiff or into Court on the 29th day of September, 1898, the Plaintiff shall deliver up to the Defendant, or to such person as he appoints, all documents in his possession or power relating to the property specified below and shall transfer the property to the Defendant free from all incumbrances created by the Plaintiff or any person claiming under him or by those under him or by those under whom he claims. But if such payment be not made, as aforesaid, on or before the 29th day of September, 1898, then it is ordered that the said property, or a sufficient part thereof, be sold, *i.e*, the mortgaged property mentioned in the accompanying list. . . . ."

Defendants Nos. 2 to 7 were the prior mortgagees.

The said Sheo Narain, Decree-holder, appealed to the High Court against that part of the said decree which made its execution conditional upon payment of the sum due to the prior mortgagees, but unsuccessfully. The High Court affirmed the said decree on the 12th February, 1900, and extended the time for payment to the prior mortgagees until the 9th August, 1900. There was a second appeal against the said drcree to His Majesty in Council but it was dismissed for default of prosecution on the 15th December 1904. The Appellant had not lodged any petition of appeal to His Majesty in Council, nor was an Order in Council drawn up dismissing the appeal.

The said Decree-holder deposited the amount of the Court fees required by the said decree, but he failed to fulfil the other condition imposed by the decree, namely, that relating to payment of the sum due to the prior mortgagees. He made several applications for extension of time for payment, and it was extended from time to time until the 28th September, 1901.

On the 26th September, 1901, he sold the said decree to the present Appellant, who also made several applications, one after the other, for extension of time, and the time was thrice extended up to the 20th March, 1902.

Finally, the Court refused to grant any more indulgence to the Appellant, and rejected his petition for a further extension of time by an order dated the 20th March, 1902. The Appellant then applied for review of the said order and that was disallowed on the 7th June, 1902.

On the 2nd October, 1907, he instituted the present application in the Court of the Subordinate Judge of Agra. In his petition he stated that he had paid the amount that was payable to the prior mortgagees under the decree in September 1907 and prayed that a decree absolute under sec. 89 of the Transfer of Property Act (IV of 1882) may be passed and that the properties specified by him may be ordered to be sold in execution of the said decree of the 29th March, 1898.

The purchasers of the equity of redemption who were Defendants filed objections the nature of which would appear from the following issues framed by the Subordinate Judge :—

Whether the execution application, dated 2nd October, 1907, is barred by limitation.

Whether the decree has become null and void owing to the fact that payment to Chuni Lal and others was not made within the specified time ?

By his judgment delivered on the 8th September, 1908, the Subordinate Judge held that the Appellant was not entitled

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to the relief claimed by him. He said :—

"It is contended that the Court executing a decree is bound by the terms of the decree. The order that in the event of failure of payment of the specified amount within the fixed period the suit shall stand dismissed with costs, stands intact, the decree was affirmed both by the Honourable High Court and the Privy Council. It is beyond the province of the Court executing the decree to determine whether the said order was incorrect and illegal ; it was for the Plaintiff to have it cancelled or modified by the Appellate Court. As the order stands intact and the payments were not made either within the original period or extended time, the suit, according to the terms of the decree, stand dismissed."

He held that the application was not barred by limitation as in his opinion, time ran from the 15th December 1904.

He made a decree accordingly.

The Appellant thereupon appealed against the said decree to the High Court of Judicature for the North-Western Provinces at Allahabad, which by its Judgment dated the 4th June, 1910, dismissed the said appeal with costs.

Chamier, J., in the course of his judgment in which Karamat Hosein, J., concurred, said as follows :—

"It is urged that the provision in the decree fixing a time within which the Decree-holder was to pay the amount due to the prior mortgagees was intended for the benefit of the prior mortgagees and does not concern either the mortgagor or the subsequent mortgagees ; also, that when the Court accepted the money deposited by the Decree-holder and paid it out to the prior mortgagees, it must be deemed to have extended the time for payment to the prior mortgagees notwithstanding its refusal to allow any further time in 1902.

"The latter argument may be disposed of very shortly. It is not suggested that the Court when receiving the money in 1907, so much as considered the question whether further time should be allowed. When money is paid into Court in a suit with the request that it may be paid out to another party and there is nothing in the nature of a stop order against or attachment of the money, the money will be paid out as a matter of course. In such a case the action of the Court is partly mechanical. It is more than doubtful whether in view of what occurred in 1902, the Court could have extended the time in 1907, even if the decree had not provided that in the events which happened, the suit should stand dismissed. In my opinion the action of the Court in accepting the money and paying it to the prior mortgagees does not affect the case in any way.

"Nor can I accept the contention that it is only the prior mortgagees who can take advantage of the provision in the decree fixing a time for payment of the money due on the prior mortgage. On the decree as it stands the mortgagor and the puisne mortgagees were entitled to assume when the money was not paid within the time limited or extended by the Court, that the suit stood dismissed as against all the Defendants and that they would not be called upon to pay the large amount due to the Decree-holder in order to save the property from being sold and their respective interests swept away. It appears to me that the rights and liabilities (of) the parties as regards the Decree-holder's mortgage depend upon the decree. It does not in

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the least signify whether the decree was in accordance with the law or not (see *Sri Raja Papamma* v *Sri Vira Pratapa*), (1). As a matter of fact, the decree was in accordance with the Rulings of this Court at the time when it was passed. In requiring the decree-holder to redeem the prior mortgage before bringing the mortgaged property to sale, the decree was in strict accordance with the much discussed and now superseded decision of the Full Bench of this Court in *Mata Din Kasodhan* v. *Kazim Husain* (2). The learned advocate for the Appellant-decree-holder, referred us to the decision of this Court in *Debi Prasad* v. *Jai Karan Singh*, (3). In that case a decree on a mortgage passed under sec. 88 of the Transfer of Property Act, required the Decree-holder to redeem two prior mortgages before bringing the property to sale and fixed a period of two months within which redemption might be effected. Two months after the expiry of that period the Decree-holder paid into Court the amount due on the prior mortgages and the question was whether the Decree-holder could proceed to sell the mortgaged property. It was held that he could do so. The terms of the decree are not set out in the report or in the file of the Appeal to this Court which I have examined. But neither in the report nor in the file is there any suggestion that the decree provided either that the suit should stand dismissed in case the Decree-holder failed to redeem the prior mortgages within the time fixed or that the Decree-holder should be entitled to bring the property to sale, *if he carried out the order for redemption.* There can be little doubt that the decree contained no such provisions. There is therefore, a considerable difference between that case and the case now before us. The case of *Sita Ram* v. *Madho Lal* (4), relied upon by the learned advocate for the Appellants, and the case of *Lachman Sing* v. *Madsudan* (5), relied upon by the learned advocate for the Respondents appear to me to have no bearing upon the present case. Both cases deal with the question whether a second suit for redemption can be maintained when the first suit has terminated in a decree which was irregular in form or did not affect a foreclosure. We are not at present concerned with the question whether the Appellant before us could bring another suit on his mortgage. The question is whether he can cause the mortgaged property to be sold in execution of the decree which he has obtained. It was suggested that the decree being, as it is, a combination of a decree for redemption and a decree for sale should be treated as two separate decrees. I do not think that such a course would improve the Appellant's position. Under secs. 92 and 93 of the Transfer of Property Act, the Plaintiff is not entitled to redeem except within the time originally fixed by the Court or extended under the proviso to sec. 93, and the Courts are not bound to extend the time. In practice Courts are less inclined to extend the time for a Plaintiff seeking to redeem than they are to extend the time for a Defendant in a suit by a mortgagee for foreclosure or sale. The former should be ready with his money when he brings his suit. The latter is or may be taken by surprise. Therefore it is quite clear that the Appellant was not entitled to redeem the prior mortgage on the day on

(1) I. L. R. 19 Mad. 249 P. C. (1896).
(2) I. L. R. 13 All. 432 (1891).
(3) All. W. N. for 1903, p. 125. (1900).
(4) I. L. R., 24 All. 44, (1901).
(5) All. W. N. for 1907, p. 137, (1882).

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which he paid the money into Court. As payment was made to the prior mortgagees after the time limited by the Court and behind the back of the mortgagor and puisne mortgagees, they are not bound by the payment. If the latter part of the decree be treated as a separate decree for sale, it is clear that the Appellant is not entitled to execute it. It begins with the words "if the Plaintiff carry out both the above orders, then it is decreed and ordered * * *". The carrying out of the "above orders" is plainly a condition precedent to the right to sell the property.

"In the last resort it was urged that this Court should take upon itself to extend the time for redemption up to the date on which the Appellant paid the mortgage money into Court and we were referred to secs. 148 and 151 of the present Code of Civil Procedure. On the merits I should refuse to accede to this request, but I may say that in my opinion sec. 148 relates only to proceedings anteceden to the passing of a decree and was not intended to enable the Court to extend the time in pre-emption and redemption cases.

"Special provision for extending time is made by Order XXXIV, Rules 3 and 9. No such provision is made for pre-emption cases. Sec. 151 appears to have no application to the present case.

"The present Appellant purchased the decree some time before October 3rd, 1901 (the exact date does not appear). He seems to have made no serious attempt to execute the decree for about six years. I cannot, therefore, agree with the learned advocate for the Appellant that it is a case of great hardship, nor should any such consideration be allowed to affect the case.

"I would dismiss the appeal."

Hence this Appeal.

Mr. L. DeGruyther, K. C., (with *Mr. J. M. Parikh*) for the Appellant submitted that he was entitled to an order absolute for sale. Both the lower Courts had found that the Appellant had paid the amount due to the prior mortgagees under the decree dated the 29th March 1898. The decree was really one under sec. 93 of the Transfer of Property Act. Under the old Ruling in *Mata Din Kasodhan v. Kazim Husain* (2), the Plaintiff's claim consisted of two parts, namely, first, claim to redeem the prior mortgages, and second, claim to sell the mortgaged property. Under sec. 93 the Decree-holder's right to redeem was not extinguished until and unless the Court made an order to that effect. There was no such order here, and the Appellant was therefore entitled to redeem the prior mortgages. He had actually done so by paying the money. The refusal to extend the time for payment did not by itself operate to extinguish the right, *Rango* v. *Bhomshetti* (3). The Respondents were the purchasers of the equity of redemption, and they benefited by the discharge of the prior mortgages. They were estopped from denying that the decree was really one passed under sec. 93. The actual words of the decree were not essential. The Court ought to construe the real meaning of the decree according to the provisions of the Transfer of Property Act.

Reference was made to *Huranath* v. *Krishna Coomar* (6). *Ram Kirpal* v. *Rupkuari* (7), *Bani Ram* v. *Nanhu Mal* (8). In any case it was a preliminary

(2) I. L. R. 13 All. 432 (1891).
(3) I. L. R. 26 Bom. 121 (1901).
(6) L. R. 13 I. A. 123 (1886).
(7) L. R. 11 I. A. 37 (1883).
(8) L. R. 11 I. A. 181 (1884).

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decree and a decree under sec. 89 was necessary.

Sir Erle Richards, K. C., (with *Mr. Bhugwandin Dube*) for the Respondents submitted that the application for execution was barred by time, under Art 179 of the Limitation Act, 1877. The period of 3 years ought to be reckoned from the 20 h March 1902, and not from the 15 h December 1904 There was no Order in Council of that da e. No petition of appeal was lodged, and the Registrar's Order was only a ministerial one. It was not a judicial determination—not a decree or order of the Appellate Court within the meaning of Art. 179 Further, the decision of the Courts below was right. The decree must be enforced as its terms stood. It was affirmed by the High Court. It is now too late to say that it was not a decree according to the provisions of the Transfer of Property Act. *Sri Raja Papamma* v. *Sri Vira Pratappa* (9).

Mr. L. DeGruyther in reply: It was the order of the Registrar that put an end to the app al. It was immaterial who made the order whether it was made by the Registrar under an Order in Council or by His Majesty in Council. Until the determination of the appeal the Appellant was carrying on his cause. Order dismissing the appeal need not be judicial. The determining factor was whether the Appellant did lodge a petition of appeal to His Majesty in Council.

[No such petition of appeal was produced nor was there an Order in Council dismissing the appeal.]

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 4th June 1910, of the High Court of Judicature at Allahabad, which dismissed an appeal by the Appellant here from a decree of the Subordinate Judge of Agra, dated the 8th September 1908, dismissing an application which had been made on the 2nd October 1907 to the Court of the Subordinate Judge by Babu Batuk Nath for the execution of a decree of the 29th March 1898.

The decree of the 29th March 1898 had been made by the then Subordinate Judge of Agra in favour of one Sheo Narain in a suit which had been brought by him under the Transfer of Property Act, 1882, for sale of certain immoveable property. By that decree it was ordered that if Sheo Narain should fail to pay a prior mortgage debt within five months from the 29th March 1898 his suit should stand dismissed with costs. From that decree of the 29th March 1898 an appeal was brought to the High Court of Judicature at Allahabad. Tha appeal was dismissed by the High Cou t by its decree of the 12th February 1900, but in dismissing the appeal the High Court extended the time for payment of the prior mortgage debt to the 9th August 1900. It has not been alleged or proved that any certified copy of the decree of the 29th March 1898 was registered wi hin the meaning of Art. 179 of the Second Schedule of the Indian Limitation Act, 1877. From the decree of the 12th February 1900 of the High Court an appeal to His Majesty in Council was brought. On the 15th December 1904 the appeal to His Majesty in Council stood dismissed for non-prosecu ion under r. V of the Order in Council of the 13th June 1853 without further order.

On the 26th September 1901, Sheo Narain had assigned his decree of the 29th

(9) L. R. 23 I A. 32, 35 (1896).

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March 1898 to Babu Batuk Nath. During the pendency of the appeal to His Majesty in Council some orders had been made by the Court of the Subordinate Judge of Agra extending the time for the payment of the prior mortgage debt, but the last application for an extension of time for the payment of the prior mortgage debt which was made to his Court was dismissed by the then Subordinate Judge of Agra by his order of the 20th March 1902, and on the 7th June 1902 the Subordinate Judge dismissed an application for a review of his order of the 20th March 1902.

In making his decree of the 8th September 1908 dismissing the application of the 2nd October 1907, the Subordinate Judge held that the period of limitation which was applicable to the case ran from the dismissal for want of prosecution of the appeal to His Majesty in Council, that is to say, from the 15th December 1904, and consequently that the application for execution had been made within time; he doubtless was under the impression that the appeal had been dismissed by an order of His Majesty in Council made in the appeal. The Subordinate Judge dismissed the application on the ground that the terms as to the payment of the prior mortgage debt imposed by the decree of the 29th March 1898, not having been complied with within the extended time, the suit by the terms of that decree had stood dismissed. The attention of the learned Judges of the High Court does not appear to have been drawn to the question of limitation; they dismissed the appeal to their Court on the ground upon which the application had been dismissed by the Subordinate Judge.

It appears to their Lordships that the application of the 2nd October 1907, was made after the period of limitation prescribed for such an application by Art. 179 of the Second Schedule of the Indian Limitation Act, 1877, had expired, and that the application should, in accordance with sec. 4 of that Act, have been dismissed unless the dismissal of the 15th December 1904 for want of prosecution of the appeal to His Majesty in Council was by a final decree or order of His Majesty in Council made in the appeal. There was, however, no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under r V of the Order in Council of the 13th June 1853, the Appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order.

As their Lordships hold that the application of the 2nd October 1907 was barred by limitation, and should on that ground have been dismissed, they do not consider it necessary to express any opinion on the grounds upon which the High Court made the decree which is under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The Appellant must pay the costs of this appeal.

Solicitor: *Edward Dalgado* for the Appellant.

Solicitors: *Barrow, Rogers and Nevill* for the Respondents.

B. D. *Appeal dismissed with costs.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
LORD MOULTON.
MR. AMEER ALI.
1913,
Heard, 3 and 4, December.
1914,
Judgment, 4, March.

ARTHUR HENRY FORBES, Appellant,
v.
MAHARAJ BAHADUR SINGH and others, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 65 66, 148 (h), 195—Sale of putni*—Suit by vendor for back rents not assigned—*Putni *if may be sold free of* darputni *in execution of decree made—"First charge," stranger to land if may claim—*Darputnidar, *deposit of* putni *rent by, in proceeding under Putni Regulation (VIII of 1819), sec. 13—*Darputnidar's *lien, priority of—"Salvage lien," statutory—Scope of the Act and the Regulation.*

The right to bring a tenure or holding to sale under sec. 65 of the Bengal Tenancy Act, exists so long as the relationship of landlord and tenant exists.

The right to bring a tenure or holding to sale under sec. 65 being thus exclusively in the landlord, a person to whom certain rents are due and who obtains a decree therefor after he has parted with the property in which the tenancy is situate has no such right.

The view that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes ipso facto *hypothecated for the debt is untenable upon a proper construction of sec. 65. A stranger to the property cannot avail himself of the special remedy given by that section to the landlord to recover arrears attached to the tenure or holding*

KHETRA PAL SINGH *v.* KRITHEKTHAMOYI DASSI (1) *distinguished.*

The special lien which a subordinate tenure-holder acquires under sec. 13 of Reg. VIII of 1819 by depositing the putni *rents in arrears for which the* putni *has been advertised for sale by the zemindar under that Regulation is not affected by proceeding taken in respect of the* putni *under the Bengal Tenancy Act, the Putni Regulation being a self-contained Act specially excluded from the operation of the Bengal Tenancy Act by sec 195 of that Act.*

Where a landlord, after he has sold his property, sues for the back rents which he has not assigned to his vendee, and obtains a decree, and his vendee also sues for rents which accrued due subsequently to his purchase, the latter only can execute the decree against the tenure or holding. His vendor can execute his decree against his debtor as a money decree only.

This was an Appeal from the Calcutta High Court. The facts of the case sufficiently appear from their Lordships' judgment and from the judgment of the Calcutta High Court (Rampini and Sharfuddin, JJ.) reported in *Maharaja Bahadur Singh* v. *Forbes* (2).

Mr. L. DeGruyther, K. C., and *Mr. Dunne* for the Appellant submitted that the decree dated the 10th July 1895 was not a decree for rent within the meaning of sec. 65 of the Bengal Tenancy Act and that it did not constitute a charge upon the *putni.* Dhanpat Singh after transferring the zemindari on the 27th June 1893 ceased to be the landlord within the meaning of the Act. His decree was only a decree for money and his remedies as a landlord came to an end. Sec. 65 contemplates that the landlord taking action under it must be actually subsisting as a landlord at the time. The test was to see if the landlord could eject for arrears of rent. An owner cannot sue for rent unless he is a registered proprietor, *Ram*

(1) I. L. R. 33 Cal. 566: S. C. 10 C. W. N. 547 (1906).

(2) I. L. R. 35 Cal. 737 (1908).

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Kristo Das v. *Sheikh Harain* (3). Sec. 60 also deals with a registered proprietor. Sec. 65 ought to be read with sec. 66 in order to ascertain the remedies which a landlord has, and sec. 66 could have only one meaning and that was that it referred to a landlord exis ing as such at the time., Secs. 90 and 121, 129, 161a, 162, 195c support the same view. If a decree is assigned the effect of it under sec. 148(h) is that the assignee cannot execute it unless the landlord's interest in the land has become vested in him. The landlord had transferred all his interest in the land and the assignee of the decree could not therefore have that interest. The view in *Chhatrapat Singh* v. *Gopi Chand* (4) that the word "assignee" in sec. 148(h) does not include a trustee is erroneous. The word "assignee" is wide enough to cover all cases of transfer. The decree of the 10th July 1890 was not a decree for rent and was not a first charge on the *putni*. Reliance was placed on *Hem Chandra* v. *Mon Mohini* (5), *Srimant* v. *Mahadeo* (6). The case of *Khetrapal* v. *Krithartthamoyi* (1) is distinguishable. The decree there was made before the sale. The view of Rampini and Pratt, JJ., in *Nogendra* v. *Bhuban Mohan* (7) was right. The special remedy given by sec. 65 could not be availed of by a landlord who has parted with all his interest in the land by virtue of which the right and the remedy were provided for him. The relationship of landlord and tenant must be subsisting at the time when the remedy provided by sec. 65 is enforced. The Appellant has a statutory charge under Reg. VIII of 1819 which was not affected by the Bengal Tenancy Act, see sec. 195. Reference was also made to *Soshi Bhusan* v. *Gogan Chunder* (8), *Faez Rahman* v. *Ramsukh* (9).

Sir Robert Finlay, *K. C.*, and *Mr. Ross*, *K. C*, for the Respondents, submitted that the relationship of landlord and tenant admittedly existed when the rents became due. The decree was one for rent and by virtue of sec. 65 it became a first charge on the *putni*. Sec. 65 differed from sec. 66. The words of sec. 65 were quite clear, it did not provide that the landlord must be an existing landlord, whereas in sec. 66 it is specifically so provided. The meaning of sec. 65 is that the decree becomes a first charge from the date of the decree and not before. The Appellant got his lien in 1900 and we got it in 1896.

[LORD MOULTON.—Referring to the definition of rent in sec. 3, does it not remain rent only so long as the relationship of landlord and tenant lasts?]

I submit not. It was in fact rent and it did not cease to be rent because the landlord had transferred his land. There was nothing in the preamble to the Act which showed that the Act did not apply to the case of an ex landlord.

[LORD MOULTON.—You say that it would be a first charge only from the date of the decree. Why from the date of the decree? Sec. 65 does not say so.]

I submit that that is the reasonable construction. It becomes a charge not merely because the rent is due but because the decree is obtained.

There are certain sections in the Act that apply to ex-landlords, *e.g.*, secs. 66

(1) I. L. R. 33 Cal. 566: s. c. 10 C. W N. 547 (1906).
(3) I. L. R. 9 Cal. 517, 519 (1882).
(4) I. L. R. 26 Cal. 7?0 (1899).
(5) 3 C. W. N. 604 (1894).
(6) I. L. R. 31 Cal. 550 (1904).
(7) 6 C. W. N. 91 (1901)
(8) I. L. R. 22 Cal. 364, 374 (1894).
(9) I. L. R. 21 Cal. 169 (1893).

and 67. We applied for execution of the decree in December 1896 and we are entitled to be paid in priority to the Appellants. A trustee is not included in the word "assignee" as used in sec. 148 (*h*). *Chatrapat Singh* v. *Gopi Chand* (4) was rightly decided.

Mr. L. DeGruyther in reply: the Respondent is not entitled to get rid of *darputni* and of the statutory charge. The *putni* tenures are to be governed by the Regulations, and the other tenures by the Tenancy Act. Even if the view taken by the Respondent of sec. 65 were correct, they are not entitled to set aside any statutory charge created under the Regulation.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This Appeal, which is from a Judgment and Decree of the High Court of Calcutta, dated the 8th of April 1908, raises certain questions of particular importance under the Rent Law of Bengal, for the proper apprehension of which it is necessary to set out in some detail the facts of the case.

The zemindari of Lot Saifganj, situated in the district of Purneah, was owned at one time by a rich zemindar of the name of Roy Dhanpat Singh, since deceased. The estate, however, was settled in *putni*, and has been held for some years past by the Defendant Chatrapat Singh as the *putni* Talookdar; Chatrapat, on his side, has settled the *putni* tenure in several parcels with subordinate tenure-holders called *dar-putnidars*. Two of these *dar-putnis* are held by the Plaintiff Appellant. These tenures are special to Bengal, the Sonthal Pergunas and certain parts of Chota-Nagpur, and their incidents are governed by Reg. VIII of 1819, commonly called the Putni Regulation. To some of these incidents reference will be made in the course of this Judgment.

But it may be conveniently premised here that a *putni* Talook is a permanent, heritable and transferable tenure, which the zemindar may create over the whole or part of his estate, whilst the *putni* Talookdar has a similar right to let the entire property held by him in *putni* or in parcels to subordinate Talookdars called *dar-putnidars*. And this process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the zemindar has a right to apply to the Collector to put up the *putni* Talook to sale for arrears of rent, and the sale has the effect of cancelling all under-tenures; but the subordinate tenure holders have the right to deposit in the Collector's Court the arrears of rent, and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the zemindar possesses for the realisation of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession.

On the 27th of June 1893, Dhanpat Singh transferred the zemindari, subject of course to Chatrapat's *putni*, to a Hindu lady, Bhagwanbati Chowdhrain, who has unquestionably been in possession of the estate since her purchase.

It appears that certain arrears of rent in respect of the *putni* had become due before the sale to Bhagwanbati Chowdhrain. For these arrears Dhanpat Singh brought a suit in the Civil Court on the 21st September 1893. The final Decree in this action was passed by the High

(4) I. L. R. 26 Cal. 750 (1899).

Court on the 10th of July 1896. Nine days after, Dhanpat Singh executed a Deed of Trust by which he assigned to the Defendants 2 to 4 in trust for the Defendant Maharaj among other properties the Decree for arrears of rent.

Dhanpat Singh died shortly after, leaving Maharaj his only son and heir.

In 1897 the Trustees proceeded to execute the decree against Chatrapat but were met with various objections on his part which were finally overruled by the High Court in 1899.

In the meantime Chatrapat had fallen into arrears in respect of the *putni* rent payable to the Chowdhrain; and that lady had instituted in the Court of the Collector of Purneah the special proceedings under Reg. VIII of 1819 for the realisation of her dues The defaulting tenure was accordingly advertised for sale on the 14th of May 1901. The Plaintiff-Appellant thereupon deposited the amount of the arrears in the Collector's Court and was put by him in possession of the *putni* Talook. Since then he has been and still is in possession of the superior tenure paying rent to the zemindar and realising the rents due to the *putni* Talookdar from the subordinate holders

The Trustee Defendants, having obtained the decision of the High Court that they were entitled to execute Dhanpat Singh's decree, applied for the sale of the *putni* talook under sec. 163 of the Bengal Tenancy Act. It is to be observed that a sale held under this section does not give power to the Decree-holder to annul "notified and registered incumbrances." The Plaintiff thereupon preferred a claim under sec. 278 of the Civil Procedure Code of 1882, which, however, after some protracted proceedings, was withdrawn. Apparently a sale under sec. 163 was held, but it did not fetch a sum sufficient to liquidate the arrears and costs, and the Defendants then applied for a sale under sec. 165 under which the Decree holder has the power to annul all incumbrances including under-tenures. On this application the 6th of August 1906 was fixed for the sale of the *putni*. The present suit was then brought by the Plaintiff on the 9th of July in the Court of the Subordinate Judge of Purneah to restrain the Defendants from proceeding with the sale.

It should be noted here that there exist many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of Reg. VIII of 1819, and which have no relation to *patni* talooks. The incidents of these tenures are governed by the Bengal Tenancy Act passed in 1885, to regulate, subject to certain exceptions to which attention will be drawn, the relations in general between landlord and tenant.

The Bengal Tenancy Act of 1885, whilst it protected the permanent tenure-holder and other tenants having similar permanent interests against ejectment for arrears of rent, gave to the landlords certain rights which they either did not possess before or possessed only in a qualified form. One was the right to bring to sale the tenure or holding in execution of a decree for arrears of rent. Sec. 65, which declares this liability of the defaulting tenure, also declares that "the rent shall be a first charge thereon." It is round these words that the controversy between the parties is mainly centred. Their Lordships say mainly, because there is another question of vital importance in this case which relates to the applicability of the provisions of the Bengal Tenancy Act to *putni* tenures.

The Defendants in their endeavours

to bring Chatrapat's *putni* taluk under the provisions of sec. 165 of the Tenancy Act contend that as the relationship of landlord and tenant existed between Dhanpat Singh and Chatrapat when the rents became due, the decree obtained by him became by virtue of sec. 65 a first charge on the tenure. The Plaintiff's contention, on the other hand, is that as Dhanpat Singh had parted with his interest in the zemindari before the institution of his suit for arrears, the decree of which execution was sought was not a rent decree within the meaning of sec. 65.

The Subordinate Judge has upheld the Plaintiff's contention, and granted him an injunction restraining Maharaj Bahadur and the trustee Defendants, who are called in the suit "first party Defendants," from executing their decree of the 10th of July 1896 against the *putni* under the provisions of the Bengal Tenancy Act. His decision has been reversed by the High Court on appeal and the Plaintiff's suit been dismissed with costs. The learned Judges considered that the decree being for rent the mere fact that the zemindar had sold the estate after it became due does not affect his right to "a first charge." At least that is what their Lordships understand to be the meaning of the learned Judges in the following passage of their judgment :—

"The decree of the 10th July 1896 is a decree for rent. Rai Dhanpat Singh was the landlord at the time when the rent he sued for accrued due His claim for rent when found due, became a 'first charge' on the *putni*. There is nothing in the law which disentitles him to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zemindari."

This conception is further developed at a later stage of their Judgment, where they say as follows :—

"Now, no doubt, the decision of this Full Bench does not deal with a case such as the present in which the landlord had parted with his interest before he instituted his suit for rent, but it would seem to follow that if he can execute a decree for arrears of rent as a rent decree after he has parted with his interest as landlord, he can also do so when he obtained his decree for rent, even after he had parted with his interest in the property. The character of the decree a suitor obtains, depends on the nature of the claim and of his right to the relief sought for, and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue."

Their Lordships cannot help observing that the learned Judges have fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. In the Full Bench case of *Khatra Pal Singh* v. *Kritarthamoyi Dassi* (1), the landlord did not part with the property and put an end to the relationship of landlord and tenant until after the decree in his suit for rent; whereas in the present case he transferred his interest to Bhagwanbati Chowdhrain before his suit for the arrears. The broad question, however, for determination in this appeal is whether the special right created in favour of the landlord under sec. 65 can be claimed also by one who has parted with the property which gives this right and to which it is attached.

There is no doubt that there is a divergence of opinion among the Judges of the High Court of Calcutta with regard to the construction of sec. 65. The section itself runs as follows :—

"Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall

(1) I. L. R. 33 Cal. 566 : s. c. 10 C. W. N. 547 (1906).

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be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

It is not a happily worded section, and the words "and the rent shall be a first charge thereon," seem, from their collocation, to have been inserted as an afterthought without sufficient consideration of their applicability to the rest of the provisions contained in the section. They give no indication as to when it becomes a "first charge." Does it become a first charge from the nature of the claim, as some of the learned Judges seem to imagine, or does it become a first charge after it has been ascertained and made the subject of a decree? Again the section does not sufficiently indicate at whose instance the tenure or holding shall be liable to sale in execution of a decree for rent thereof, though from the reason of the thing it is obvious that it must be at the instance of the landlord.

These questions cannot, therefore, be answered by a reference to the mere section itself; to understand its meaning, their Lordships apprehend, the general scope of the statute as well as of the chapter in which it occurs, must be taken into consideration. The Act, as stated in the preamble, was designed "to amend and consolidate certain enactments relating to the law of landlord and tenant." The words "tenant," "landlord," and "rent," are carefully defined. "Landlord" is declared to mean "a person immediately under whom a tenant holds, and includes the Government," whilst "rent" is declared to mean "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant." Chapter VIII. embodies the "general provisions as to rent." After dealing with "rules and presumptions as to amount of rent," "the alteration of rent," "the payment of rent," "receipts and accounts," "deposit of rent" in Court when the landlord refuses to receive payment, it treats of "arrears of rent." The governing idea throughout the multifarious provisions contained in Chapter VIII. to regulat the respective rights and obligations of landlords and tenants, is the subsistence of the relationship that gives rise to those rights and obligations

Sec. 65 declares that a certain class of tenants shall not be liable to ejectment for "arrears of rent," but that their tenure or holding "shall be liable to sale in execution of a decree for the rent thereof." Sec. 66 provides that in the case of other tenants not coming within the purview of sec. 65, the landlord "may institute a suit to eject" the defaulting tenant. The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependant on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. A reference to sec. 148, cl. (*h*), clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the Decree-holder *qua* landlord It declares that "notwithstanding anything contained in sec. 232 of the Civil Procedure Code an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him."

The prohibition contained in this

THE

Calcutta Weekly Notes.

Vol. XVIII.] MONDAY, MAY 11, 1914. [No. 26.

Contents.

NOTES

Filing of plaint in the Original Side of the High Court.

We invite attention of the legal profession to a letter from the Registrar on the Original Side to the Secretary of the Incorporated Law Society of Calcutta inviting attention to the not very uncommon practice of filing plaints without stating therein when and at what place the cause of action arose. The former is essential as it should appear on the face of the plaint that the suit is not barred by the law of limitation. Or. VII, r. 1(e) requires that the time when the cause of action arose should be stated in the plaint. That this should be done with a fair amount of accuracy is not merely a matter of form but is an essential part of the pleading, as would appear clearly from subsequent provisions such as Or. VII, r. 6, which says that the ground of exemption from the law of limitation should be specifically pleaded in the plaint. Then again Or. VII, r. 11(d) says that when a suit appears to be barred by any law from the statement in the plaint the plaint shall be rejected.

In the absence of any statement as to when the cause of action arose, how is a Court to judge whether the provision with regard to r. 6 has been complied with or not? It would be a waste of the Court's time if it has to determine this after proceeding to hearing. For the same reason the place where the cause of action arose must be stated with some degree of precision so that the Court may determine at the outset whether it has jurisdiction or not. Of course we must say that it may not always be possible to state with absolute precision the time when and the place where the cause of action arose. For, it may at times involve questions of law of considerable difficulty to determine as to which particular act in a transaction gave rise to the cause of action. But all that is needed in such cases is that the time and place should be stated with such a degree of definiteness as would enable the Court to judge at the very outset that there is no palpable bar to the suit being entertained on the ground of limitation or jurisdiction.

The Criminal Procedure Amendment Bill.

We next propose to consider the suggested amendment to secs. 488 and 545 (cls. 112 and 133 of the Bill). We approve of the amendment of sec. 488 which deprives an adulterous wife of her right to claim maintenance from her husband whatever the point of time when the adultery was committed, whether prior or subsequent to the making of the order under the section by the Magistrate but we object to the raising of the maximum of the amount of maintainance under the section from Rs. 50 to Rs. 100. Cases seldom come before Criminal Courts in which the ends of justice require an order for the payment of more than Rs. 50 a month to the claimant. A proceeding under sec. 488 is of a *quasi*-civil nature and the object of giving the Criminal Court power in this respect is to provide for an order for a subsistence allowance being made in a summary way without the necessity of going through the lengthy formalities of a Civil Court to which however must be left the ultimate decision of all civil liabilities. We think that experience in the actual working of the Code has not shown that this change is necessary.

Sec. 545 is to be amended so as to legalise the payment of compensation to any person by whom such compensation may in the opinion of the Court be recoverable in a Civil Court. This amendment is in accord with the view expressed in the case of *E.* v. *Corporal Morgan*, I. L. R 36 Cal. 302: s. c. 13 C. W. N. 362 in which it was held that compensation can be paid to the wife, husband, child or like relation of the injured person. We think that the section as drafted in the Bill if passed will land Criminal Courts in a discussion of intricate questions as to the right to sue and cause of action, and we suggest that the compensation should be made payable "to any person who in the opinion of the Court may be

entitled to a substantial compensation for any loss or injury caused by the offence."

It is proposed in cl. 21 of the Bill to amend sec. 145 of the Code so as to make it optional with a Magistrate to proceed either under sec. 107 or sec. 145 of the Code. This is in accordance with the decision of a Full Bench of the Calcutta High Court, *Abbas*, 16 C. W. N. 83. It is also proposed to empower a Magistrate to restore to possession a party forcibly and wrongfully dispossessed within two months next before the date of the proceeding. A proceeding under sec. 145 partakes more or less of a proceeding in a Civil Court and we approve of the Legislature providing for the substitution of the legal representatives of a deceased party on the record.

Sec. 147 is proposed to be re-enacted so as to avoid the difficulties which have been created by decisions raising doubts as to the applicability of the section to rights not resembling easements or to rights acquired by contract. It is also proposed to empower a Presidency Magistrate to take action under the section. This is as it ought to be especially after the recasting of the section in the new form.

Cl. 24 of the bill makes an important change inasmuch as it amends sec. 155 of the Code so as to empower a police officer to send a report to a Magistrate in a noncognizable case. This amendment is intended to make it clear that the words "police report" in sec. 190 cl. (b) include reports in non-cognizable cases. It was held as far back as in *Reg* v. *Jaffar*, 8 Bom. H. C. R. 113, that a police report on which a Magistrate can take cognizance is a report under sec. 173 in a cognizable case and not any other report submitted by a police officer. This view was accepted in *K.* v. *Sada*, I. L. R. 26 Bom. 150, *E.* v. *Lee*, 14 C. W. N. 304. The Legislature now overrules these decisions.

Sec. 202 which deals with the postponement of the issue of process on receipt of a complaint has been redrafted (cl. 42 of the bill) and the following are the principal changes introduced. Third class Magistrates have been given power to make preliminary enquiries personally. Secondly, authority to make a preliminary enquiry has been given in any case in which the Magistrate thinks fit for reasons to be recorded in writing. The only ground contemplated by the present section is that the Magistrate is not satisfied as to the truth of the complaint. This the Legislature thinks to be undesirably narrow. Thirdly, the words "enquiry or investigation" have been substituted for the expression "previous local investigation" which at present the Magistrate is empowered to order, and power is given to take evidence on oath at such a preliminary enquiry. Fourthly, Presidency Magistrates are enabled to act under the section without special authorisation. The question of local investigation by Magistrates was discussed in detail in these columns (see 16 C. W. N. 186N.)

We find that it is proposed to add a new sec. 539 B. (cl. 130 of the Bill) to the following effect: Any Judge or Magistrate may at any stage of any enquiry or trial visit and inspect any place in which an offence is alleged to have been committed or any other place which it is in his opinion necessary to view for the purpose of such enquiry or trial and shall record forthwith a memorandum of any facts observed at such inspection and shall furnish the accused, if he so desires, a copy of such memorandum without cost. Too much power is, we apprehend, being given to Courts to decide cases on the results of local inspection the effect of which will be practically to supersede to a great extent our judicial system which allows the determination of cases on evidence and evidence alone.

Cl. 57 of the bill makes it obligatory on an accused to state whether he wishes to cross-examine any witnesses for the prosecution immediately after a refusal or omission to plead or a claim to be tried. The object of the amendment is to require the accused to exercise his right at once. It is evident that the Legislature disapproves of the view taken of sec. 256 of the Code in *In the matter of Inder Rai*, 14 C. W. N. 280 which decision the Legislature proposes to overrule.

Cls. 50 and 51 of the Bill remove cl. 2 of sec. 237 to sec. 238 and re-enact it with the addition that a conviction for an abetment of an offence is also permissible although the abetment is not separately charged. Cl. 52 of the bill enlarges the scope of sec. 239 and re-enacts it in the following terms.

The following persons may be charged and tried together namely:—

(*a*) persons accused of the same offence;

(*b*) persons accused of an offence and persons accused of an abetment or an attempt to commit such offence;

(*c*) persons accused of more than one offence of the same kind within the meaning of sec. 234 committed by them together within the period of twelve months.

(*d*) persons accused of different offences committed in the same transaction.

(*e*) persons accused of offences which include theft extortion or criminal misappropriation and persons accused of receiving or retaining or assisting in the disposal or concealment of property posses-

sion of which has been transferred by the said offences of abetment of or attempting to commit any of the last named offences ; and

(f) persons accused of any offence under Chap. XII of the Indian Penal Code relating to counterfit coin and persons accused of any other offence under the said chapter relating to the same coin or of abetment of or attempting to commit any offence.

Another noticeable change is the amendment of sec. 309 of the Code to the effect that the Judge shall ascertain the opinions of assessors by questions and answers. The present section lays down that the "Judge shall require each of the assessors to state his opinion orally and shall record such opinion." It is proposed to enact that the Judge shall record the opinion of each assessor and "for the purpose of ascertaining such opinion shall ask each assessor such questions as he thinks necessary; such questions and answers thereto shall be recorded." This is exactly what has been repeatedly condemned and we believe that the system of subjecting assessors to a cross-examination should on no account receive the sanction of the Legislature. In the very recent case of *Romesh Chandra Banerjee* v. *King-Emperor*, 18 C. W. N. 498 Mr. Justice Woodroffe disapproved of such a practice in unequivocal language and we hope this amendment will not find a place in the statute book.

Correspondence.

Dated, 1st May 1914.

FROM

MAURICE REMFRY, ESQ.,
Offg. Registrar, High Court, Calcutta, Original Jurisdiction.

To

F. M. LESLIE, ESQ.,
Honorary Secretary, Incorporated Law Society.

SIR,

It having been brought to the notice of the Hon'ble Chief Justice that a practice has grown up to omit in plaints the particulars required by clauses (e) and (f) of r. 1 of Or. VII of the C. P. C., I am directed by His Lordship to state that no plaints will be admitted unless there be a distinct tatement.

(i) as to when the cause of action arose,

(ii) as to where that portion of the cause of action on which reliance is placed as giving jurisdiction arose.

In this connection I am desired to refer you to Appendix A, Plaints Form No. 1, para 4 of the C. P. C.

If you could see your way to inform the members of your Society as to these requirements, it would be of great assistance.

I have the honour to be,
Sir,
Your most obedient Servant,
Sd. MAURICE REMFRY,
Offg. Registrar.

TO THE EDITOR, "THE CALCUTTA WEEKLY NOTES."

COMMISSION FOR EXAMINATION OF WITNESSES IN CRIMINAL CASES.

The provisions in the Criminial Procedure Code regarding the examination of witnesses in criminal cases by commission is contained in Chap. X.L. of the Code. But there is absolutely no provision in that Code for examination of parties in that way as there is in the Code of Civil Procedure. Sec. 503 gives descretionary powers to a PresidencyMagistrate, District Magistrate, a Court of Session and the High Court to issue Commissions for the examination of witnesses only when their attendance "cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable and such a commission can only be issued to a District Magistrate or a Magistrate of the first class. Sec. 506 of the Code deals with the procedure to be adopted by Provincial Subordinate Magistrates for such commissions. The grounds, as set forth in both these secs., on which a commision may issue, are therefore threefold only, to wit, delay, expense and inconvenience and there is no other ground on which a commission may be obtained. Thus a respectable lady who never appears in public and can never do so without compromising herself and her family in the eyes of the Indian community if cited as a witness is placed in a very awkward position. Either she must expose herself to public view at the sacrifice of her social position or she must subject herself to all the legal consequences for contempt of Court's process, though most undeservedly. The social rules in this country are unusually stringent and it could not be said that the Legislature in enacting the law on the subject could have overlooked such an important point. But the letter of the law, as it stands, would seem not to favour any such construction of the law as would entitle a *purdanashin* female witness to demand examination on commission. The case-law on this point is also not very clear.* In the matter of the petition of *Din Tarini Debi* reported in I. L. R. 15 Cal. at p. 775, (see cases referred to in *Hem Kumari* v. *Queen-Empress* 1 C W. N. 333) the decision was couched in such a language as to make that a special case on its own merits and we are not aware of any other clear case on the point. Magistrates are slow to look beyond the letter of the law in matters like this and Provincial Subordinate Magistrates are loth to move the District Magistrates to save time and trouble. The absence of any salutory provision in this respect often operates as a grave hardship on Hindu Society and on the repectable Mahommadan Community and not in a few cases in the hands of designing men serves to rescue the offender from the hands of justice. Cases are not infrequent in private disputes specially, when a real culprit, to evade just punishment, would not hesitate to cite a *purdanashin* lady from the family of his adversary as witness and then force the opposite

* [Refer to our article in 16 C. W. N. 232N. ED.]

party to withdraw from the case or come to a settlement to save his honour and position. But if there were any provision for the examination of such *purdanashin* ladies by commission, as in Civil cases, the trick could not have been played and just punishment evaded. Examination by commission in the way that obtains in Civil Courts is not likely to stand in the way of justice being done and we are at a loss to comprehend why the Legislature has not thought it fit to extend this satutory provision of law to the trial of criminial cases. The little concession that has been made in this behalf is more theoretical than practical and the effect has been nullified by its circumlocutory process. District Magistrates as a rule, have scarcely any time to try cases and consequently they are made over for trial from the very beginning to subordinate Magistrates who have no authority to issue commissions without the sanction of the District Magistrate and obtaining such sanction would mean an ammount of delay and trouble which could scarcely be realised by the Legislature. We fail to see the reason of such restrictions, for Magistrates who can be entrusted with the trial of cases may be safely vested with discretionary powers to issue such commisions in cases under trial and we think that the trying Judge would be the fittest person to decide such matters. If in civil cases even prostitutes can claim, as of right, exemption from appearance in Court, we see no reason why respectable ladies and *purdanashin* women should not have that right in Criminial Courts.

The next question that would arise in this connection is the character and status of the person to be appointed a commissioner The duty of a commissioner would be to take down deposition only in the presence of the parties and thus it is not such a duty as could not be performed by a member of the legal profession. An Indian female would hesitate long before she could be pursuaded to appear before a Magistrate and give her deposition in an audible voice and if the Magistrate happened to be an European it would be very difficult to make a female speak out in his presence. So it is deemed that some consideration is necessary here also. In Civil cases pleaders are, as a rule, appointed commissioners and this system answers the purpose well. So it would not be pressing the point too for if we were to suggest the adoption of the same system in criminal cases as well

As regards the examination of parties in criminial cases the adoption of such a system is not always practicable, especially in the case of the accused. But as regards female complainants the subject may very well be taken into consideration by the Legislature to obviate certain difficulties that arise now and then.

BONGAON. The 20th April 1914. } BHABASANKAR BHUTTACHERJEE. *Pleader.*

Reviews.

A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS. *By W, W. Kerr. Fifth Edition by J. M. Peterson, M. A. L. L. M. Published by Messrs. Sweet & Maxwell. 3, Chancery Lane, W. C. 1914. Price £1-1-0.*

This standard treatise on the law of Injunction was badly in need of being brought up-to-date. Since the publication of the fourth edition in 1903, a large number of very important decisions have been delivered which required incorporation. Besides this, since the new Copy-right Act came into operation, the chapter on copyright in this work, which contained a masterly summary of the subject, became obsolete in certain respects. We are glad to find that the provisions of the new Statute, which has been adopted in India with but little variation, have been very faithfully summarised in the new edition and the cases which would throw light on them given in the foot notes. Opinions and inferences upon the interpretation of the old Statute as based on decisions passed thereon have also been modified in respect of some very material particulars in view of the new law and more recent decisions. No less care and labour have been bestowed in the revision of the other chapters. Looking through the introductory chapters also we find that propositions which, in the former editions, were a little two broadly stated have been stated with greater precision. For instance it was stated in the former edition (p. 8) that "the Court will not interfere by injunction to prevent criminal proceedings being taken by plaintiff against the defendant in a pending action notwithstanding that the criminal proceedings and the action are based on the same wrongful act." This statement has been modified in the present edition by the addition of the words "unless the objects are identical" and we think very properly. Similarly with regard to the doctrine that injunction operates *in personam* we notice the addition of some useful illustrations. We find also that decisions so recent as *Adams* v. *Ursell*, (1913), 1 Ch. 269, have been incorporated in the body of the book in the chapter on Nuisance, p. 202. More recent decisions are given in the addenda and corrigenda. We congratulate both the editor and publishers in bringing this valuable work quite up-to-date.

THE CURRENT STATUTES. 1913. *Compiled by C. S. Somanatha Sastri, B. A., B. L., and P. Ramanatha Iyer, B. A., B. L., at the Lawyer's Companion Office, Trichinopoly. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. Law Printing House, Madras.*

This compilation is very well conceived, and the only thing needed to secure for it its proper place in the estimation of legal practitioners is that it should appear with reasonable regularity. In the present issue which is the second since it was started and which represents the second quarter of the year 1913, we find collected several more of the Parliamentary enactments and Orders in Council and Acts passed by the Provincial Legislatures in India and Notifications, Rules, Orders, &c., made under them. There is no Imperial Act in this volume and the Bombay Acts, it is announced, will appear in the next quarterly number. The Public Demands Recovery Act, III of 1913, is the most important of the Bengal Acts published in this number.

ARTHUR HENRY FORBES *v.* MAHARAJ BAHADUR SINGH.

section refers to decrees obtained by the landlord under sec. 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists.

It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under sec. 65 appertains exclusively to the landlord; and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A zemindar to whom certain arrears are due, as in the present case, may sell his property, without assigning, for purposes of his own, the back-rents as he is entitled to do; he may then sue for those back rents; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. For whose decree and on whose application is the tenure to be sold? The question admits of only one answer—that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself.

The learned Judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt; and that consequently the person to whom the debt is due, although he has ceased to be the landlord, and is to all intents and purposes so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the charge created by sec. 65 is clearly in favour of the landlord.

There is another equally fatal objection to the application of the contesting Defendants to bring to sale the *putni* tenure in execution of Dhanpat Singh's decree.

The Putni Regulation is a self-contained Statute. It lays down certain well-defined rules for the realisation by the zemindar of arrears of rent from a tenure-holder; it makes the tenure primarily liable, and it gives to the zemindar the right of applying to the Collector for the periodical sale of defaulting taluks.

Sec 8 provides for the manner in which the zemindar, that is "the proprietor under direct engagement to Government," shall be entitled to apply for the sale of these tenures.

Sec. 11 declares that—

"any taluk or saleable tenure that may be disposed of at a public sale, under the rules of this Regulation, for arrears of rent due on account of it, i sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor his representatives, or assignees."

It is unnecessary to refer to the rest of this section for the purposes of this judgment.

Sec. 13 provides the method by which the "holder of a taluk of the second

degree" may save his tenure "from the ruin that must attend" the sale of the superior tenure.

Sub-sec. 2 declares—

"When even the tenure of a talukdar of the first degree may be advertised for sale in the manner required by the second and third clauses of sec 8 of this Regulation, for arrears of rent due to the zemindar, the talukdars of the second degree, or any number of them, shall be entitled to stay the final sale, by paying into Court the amount of balance that may be declared due by the person attending on the part of the zemindar on the day appointed for sale in like manner they shall be entitled to lodge money antecedently for the purpose of eventually answering any demand that may remain due on the day fixed for the sale, and, should the amount lodged be sufficient, the sale shall not proceed, but, after making good to the zemindar the amount of his demand, any excess shall be paid back to the person or persons who may have lodged it"

And sub-sec. 4 after referring to certain conditions which it is unnecessary to consider here, declares that "such deposit shall not be carried to credit in, or set against, future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon, in the same manner as if the loan had been made upon mortgage: and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto."

It will be seen, therefore, that the Appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Chowdhrain zemindar, acquired the special lien expressly created by the Regulation which may well be called a statutory salvage lien arising not from any implication of the law but under the express directions and declarations of the Act.

Reg VIII of 1819 being thus, as already observed, a self contained Act embodying the rules relative to the rights of zemindars and *putni* talukdars, the Legislature in enacting Act VIII of 1885 excluded in express terms from the operation of the Tenancy Act the special legislation relating to *putni* tenures. Sec. 195 of Act VIII of 1885 declares (omitting the the immaterial portions) that "nothing in this Act shall affect . . . . any enactment relating to *putni* tenures, so far as it relates to those tenures."

The Plaintiff's right to hold the *putni* taluk exempt from any proceeding under the Tenancy Act, is founded on steps taken by him under the Putni Regulation.

For these considerations their Lordships are of opinion that the judgment and decree of the High Court should be set aside, and the decree of the Subordinate Judge restored. The first party Defendants, the contesting Respondents, must pay the costs of this appeal and of the appeal to the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Downer* and *Johnson* for the Respondents.

B. D. *Appeal allowed with costs.*

PRIVY COUNCIL.

[Appeal from Oudh.]

Lord Sumner.
Lord Parmoor.
Sir John Edge.
Mr. Ameer Ali.
1914,
Heard, 5 and 9, March
Judgment, 27, March.

Musammat Amir Begam, Appellant,
v.
Khwaja Saiyed Badr-ud din Husain and others, Respondents.

Arbitrator's award—Misconduct—Irregularity of procedure precluding proper inquiry—Corruption and partiality—Proof—Onus—Partition of property—Arbitrator, not assisted by parties, seeking information as to valuation from outsider—Failure to keep notes of proceedings, not objected to, till after award—Examination of arbitrator as witness—Statements obtained as bearing on charge of corruption if admissible to question award on the merits—Arbitrator holding property claimed to be exclusive, as joint—Decision if binds owner—Error in such decision if vitiates award—Property subject to mortgage, allotment of, to one with direction that all co sharers should pay proportionately—Decision if vitiates award, apart from corrupt motive.

When a separable portion of an award is bad, the remainder, if good, can be maintained.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, that would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator.

The burden of proving that there had been no proper enquiry by the arbitrator is on the person who alleges it.

It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied.

An arbitrator selected by the parties comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or impartiality is made, any relevant evidence which he can give is properly admissible. But evidence so admitted as relevant on a charge of dishonesty or partiality cannot be used to scrutinize the decision of the arbitrator on matters within his jurisdiction and on which his decision is final, e.g., *to criticise methods adopted by him in determining the quantum of his valuations, for purposes of partition—a matter within his descretion.*

Buccleuch v The Metropolitan Board of Works (1) *followed.*

Apart from examining its bearing on the charge of corruption, it is beyond the competency of the Court to scrutinise the estimate of value appearing on the face of the award.

An arbitrator appointed by the parties to partition their joint estate decided that a house claimed by one of the parties to be exclusively hers was in fact joint and allotted it to one of the other parties

Held—*That this decision whether right or wrong did not in this case support the inference that he was actuated by dishonest motive. If he was wrong, the allottee would suffer as the award could have no effect whatever in defeating the title of the true owner.*

The arbitrator allotted to one of the parties properties subject to a heavy charge, but at the same time provided that the mortgage debt and interest should be a charge on the entire property and each co-sharer

(1) L R. 5 H. L. 418 (1872).

was to be liable to pay in proportion to his share and should pay that share to the mortgagee as soon as possible :

Held—*That it was not within the province of the Court to decide whether this provision gave full protection to the allottee. The matter having been considered by the arbitrator his decision could not be questioned by the Court unless the charge of corruption or misconduct was established.*

In this case the Appellant urged that the award of an arbitrator should not be made a decree of Court. The circumstances under which the reference to arbitration was made, and the terms of the reference as well as the other facts of the case fully appear from their Lordships' judgment and from the judgment of the Judicial Commissioners (Mr. B. Lindsay and Mr. Mohammad Rafique) which was as follows :—

"Before proceeding to examine the various allegations of misconduct made against the arbitrator we think it our duty to make some general observations on the course which the proceedings took in the Court below. In the first place it would appear from the tenor of the judgment that the learned Subordinate Judge has misconceived the nature of the duties and powers of an arbitrator. And in the second place he would seem to have misunderstood the nature of his own functions as a Judge entertaining an application for the filing of an award made out of Court. He seems to have assumed the attitude of a Court of Appeal dealing with the decision of an inferior Court and to have found fault with the award because the various findings of the arbitrator were not such as he would have come to himself had he been dealing with the matters in dispute as a Court of first instance.

"Now as regards the powers and duties of an arbitrator no fixed rules can be laid down. The extent of the powers and the nature of the duties are to be ascertained from the terms of the agreement to refer by which he is appointed. In the present case the language of the agreement is of the widest possible description. The parties after declaring the existence between them of disputes regarding the estate of the deceased Farid-ud-din and the will left by him agree to appoint Sakhawat Ali as their arbitrator to settle these disputes. They empower him to decide their differences 'in any way he might deem proper' (*jistariqa se munasib samjhenge*) and they undertook to be bound by his decision. Clearly, therefore, it was the intention of the parties to arm the arbitrator with most extensive powers, in fact they gave him authority to act in any manner he pleased, provided, of course, that he dealt fairly with all parties concerned. As for his duties they were well understood. He was to decide whether the deceased had executed the will and he was to determine how the estate was to be distributed between the persons who had any claims as heirs of Farid-ud-din.

"Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit so long as he acts in accordance with the principles of justice, equity and good conscience. He is not fettered by rules of practice which Courts of law adopt for general convenience. He is not bound, for example (as the lower Court appears to think he was) to record statements or admissions of the parties, to take the

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depositions of witnesses, to mark and file documents and to behave in other respects as if he were the Judge of a Civil Court bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it. He is not under any obligation to make notes of his proceedings, though it may be advisable for him to do so: and if he does elect to keep such notes they are his own property and he cannot be compelled to produce them in Court. He is not bound to observe the rules relating to evidence to be found in the Indian Evidence Act (*cf.* sec. 3 of the Act). In short he has greater latitude than the Courts of law in order to do complete justice between the parties and may in forming his judgment act upon merely moral considerations of which a Court of law could not take cognizance (*cf.* Russell on Arbitration, 9th edition, at page 98). Again as the parties select the arbitrator to be the judge of their disputes they cannot, where the award is good on the face of it, object to his decision either upon law or fact and the Courts will not ordinarily review his discretion provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment on any mere ground of mistake. He should hear all evidence material to the questions before him which the parties choose to produce but all evidence must be tendered otherwise no objection will lie. And lastly while he may be called as a witness to give evidence respecting his proceedings in the arbitration, there are certain limits beyond which he cannot properly be questioned. On this point the law was laid down in the cases of *Duke of Buccleuch* v. *Metropolitan Board of Works* (1) and is summarised as follows at page 303 of Russell on Arbitration, 9th Edition:

"'It was decided in the House of Lords that an arbitrator called as a witness, in an action on an award, might be examined as to every matter of fact, with reference to the making of the award, what claims were made and what admitted, so as to put the Court in possession of the history of the litigation up to the time of his proceeding to make the award, and whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. And it was laid down plainly that the Defendants had no right to go further and question the arbitrator as to the elements which he took into his consideration in determining the quantum of compensation, or to scrutinize the exercise by the arbitrator of his discretionary power to award compensation.'

"Such are the principles which are accepted in the English law for regulating the conduct of arbitrators and we are not aware of any provisions in the law of India which render them inapplicable to arbitration proceedings held in this country. Nor is there any reason to suppose that the powers of the Courts in India to review the proceedings of arbitrators are any more extensive than they are in England. Those powers are defined in paragraphs 14 and 15 of the Second Schedule to the Code of Civil Procedure, and speaking broadly the Courts are authorized to interfere with the award on grounds personal to the arbitrator only when he is shown to have been guilty of corruption or misconduct or when he has acted after his jurisdiction has been withdrawn or when the award

(1) L. R. 5 H. L. 418 (1872).

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is on the face of it illegal, incomplete or indefinite.

* * * * *

"There remains only another point to be discussed and that is whether the arbitrator exceeded his powers by dividing up the shares in Rasulabad. He has prepared lists of fields in that village and has assigned certain specified plots to each of the Defendants Nos. 1 to 5. No doubt he was anxious to remove all ground for future dispute by so doing, but we think it is clear that this action on his part was in excess of his powers. Amir Begam was a co-tenant with Farid ud-din in this village. She had a share of her own held jointly with Farid-ud din. There was no division by metes and bounds The result of the partition effected by the arbitrator is that in assigning specified plots to the parties he has divided off Amir Begam's own share as well and we do not think that the terms of the agreement to refer empowered him to deal with any property other than that which belonged to Farid-ud-din. This portion of his award is separable from the rest and should be set aside."

The Judicial Commissioners allowed the appeal subject to the above modification.

Hence this Appeal.

Mr. L. DeGruyther, *K. C*, and *Mr. Bhugwandin Dube* for the Appellant submitted that the award was bad for several reasons, and ought not to be made a decree of Court. The arbitrator did not decide but assumed the execution and validity of the Will in question and the legal position of Musammat Dhuman Jan. The pleadings shewed that the arbitrator had to determine those questions, but instead of deciding them in a judicial manner he decided them on his own personal knowledge. That vitiated the award. The Appellant had no knowledge of the fact that the arbitrator was an attesting witness to the Will. That fact ought to have been disclosed. *Kali Prosunno* v. *Rajani Kant* (2). The arbitrator did not hold any judicial inquiry in the presence of the parties—he made what inquiry he liked behind the backs of the parties, and gave the Appellant no opportunity to controvert the allegations of the other side. He kept no notes of the inquiry except the valuation of the properties. Although an arbitrator is not bound to follow the rules of procedure and evidence in the same way as a Court of law, nevertheless an arbitrator must proceed in a judicial manner consistently with the principles of natural justice. His decision, if arbitrary, cannot stand. *Dayi Kishan* v. *Dharam Das* (3), *In re Enoch & Zaretzky Bock & Co.* (4). The Subordinate Judge was right in his findings as to the misconduct of the arbitrator. He heard his evidence. In practically all instances of valuation and allotment the arbitrator was partial to the Respondent, and the cumulative effect thereof pointed to nothing less than his dishonest partiality. In any case the arbitrator had no jurisdiction to over-ride the provisions of the Will, and allot the encumbered properties to the Appellant. The Court below was wrong in holding that the award relating to the partition of Rasulabad lands was separable. It was not and the calculations shewed that the Appellant was in a much worse position now under the modified award than under the award itself. The award in favour of the Appellant was practically illusory and ought not to be allowed to stand.

(2) I. L. R. 25 Cal. 141 (1897).
(3) 4 All. L. J. 159 (1890).
(4) [1910] 1 K. B. 327 (1909).

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Mr. Upjohn, *K. C.*, and *Mr. Lowndes* for the Respondent, Badruddin Husain submitted that the decision of the Court below was right. The terms of the reference indicated that the arbitrator was to decide the matters in controversy to the best of his knowledge and judgment. He has done that. The criticism now made, namely, that he omitted to decide as to the execution of the Will and the claim of Dhuman Jan does not appear to have been pressed before both the lower Courts. The arbitrator was a trusted friend of the family, and was given full powers to hold such inquiry as he thought proper and necessary. The arbitrator does not seem to have had much assistance from the parties in deciding the matters in dispute. But he honestly did his best and decided justly, and there was no suggestion made in the written statement that he acted dishonestly. The finding of the Subordinate Judge was not warranted by the evidence and the conduct of the parties. The arbitrator's evidence, given in much detail, was trustworthy. Mohammad Fasih pleader and son-in law of the Appellant, also looked after the interests of the Appellant during the arbitrator's inquiry. He was not called to contradict the statements made by the arbitrator. The judgment of the Subordinate Judge was based on an erroneous appreciation of the function and powers of an arbitrator. If the arbitrator was not proved guilty of misconduct, moral or judicial, his award must stand, even if it could be shewn that he was wrong in arriving at his decision. Here the decision was quite right and it was in conformity with the Mahomedan Law. The debts were made a charge over the entire estate of the executor. The valuation and allotments were fair, and if anything more favourable to the Appellant She was given more than what she was strictly entitled to.

Mr. L. DeGruyther, *K. C.*, replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARMOOR.—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh dated 15th August 1911, reversing a decree of the Subordinate Judge of Lucknow passed by him upon an application by Respondent (1) for the filing of an award.

On the 6th of May 1909, one Khwaja Farid ud-din Husain (hereinafter called the testator) died at Lucknow, leaving considerable property, and had as heirs, according to Mahommedan law, a full sister (the Appellant herein), two step-brothers Respondents (2) and (3), two step-sisters Respondents (4) and (5), and a widow Respondent (6). Shortly before his death, the testator made a will by which he appointed Respondent (1) his executor, and, as he was entitled to do by Mahommedan law, bequeathed him one-third of his property. After the death of the testator disputes arose between the parties interested, and litigation was commenced. On the 6th August 1909, the matters in dispute were referred to the sole arbitration of Munshi Sakhawat Ali under a submission of reference in the following form :—

"Whereas there exists a dispute amongst us, the executants, regarding the estate of Khwaja Farid ud-din, deceased, and the deed of will dated the 30th April 1909, we, the executants, have, of our own accord, appointed Munshi Sakhawat Ali as a referee for the purpose of settling the matters in dispute. We agree and record that the said referee may decide it in whatever way he may deem proper, we, the executants, shall remain bound by the award. Therefore we have executed these few presents by way of a deed of agreement so that they may serve as an authority."

The arbitrator entered upon the reference and published his award on the 16th July 1910. He confirmed the appointment of Respondent (1) as executor, and gave him one-third of the property. The remaining property fell to be divided according to Mahommedan law. The parties were entitled in the following shares:—

The Appellant to a third share, the Respondents (1) and (6) jointly to a moiety, the Respondents (2) and (5) to a sixth share. The arbitrator then proceeded to distribute the property in proportion to the shares to which the respective parties were entitled and for this purpose to make a valuation. The property so valued amounted in the aggregate to 91,042 rupees. There was a further item of 4,000 rupees, which was in no sense an ascertained or settled amount, but was based on a right to claim a rendition of accounts from a certain Ahmad Khan, and this item, for what it was worth, was allotted to the Appellant. The Respondents (1) and (6) in respect of their joint half share were allotted property valued at 45,010 rupees. The Appellant in addition to the above item of 4,000 rupees was allotted property valued at 30,879 rupees, and Respondents (2) and (5) were allotted property valued at 15,153 rupees. On the face of the award the distribution appears to be fairly made. So far as there is any advantage it is in favour of the Appellant. This apparent advantage is referred to and explained by the arbitrator in his award.

At the time of the testator's death there was a considerable mortgage (20,000 rupees) affecting certain portions of his property. The arbitrator recognised that the allottees of the mortgaged property would be under a disadvantage with an apprehension of possible loss. He therefore decided that the debt of 20,000 rupees and its interest should, as among the parties entitled under the will, be a charge on the entire property of the testator, and proportionately on all the co-sharers, and that each co-sharer should be liable to pay in proportion to his share, and that each co-sharer should as soon as possible pay his proportionate share, both capital and interest, to the creditor. Whether this provision in the award did give full protection to the allottees of the mortgaged property, it is not within the province of their Lordships to decide. It is sufficient that the matter was considered by the arbitrator and his decision cannot be questioned unless the charge of corruption or misconduct is established. The award further purported to assign specific lands in the Zemindari of Rasulabad by way of partition, a matter clearly outside the power of the arbitrator and which would render his award invalid, unless this portion of his award is separable from the rest. In the opinion of their Lordships there is no difficulty whatever in separating this portion of the award from the rest. It is well recognised law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. In this respect their Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and it becomes necessary to consider the grounds on which the remainder of the award has been attacked.

On the 10th June 1910 Respondent (1) made an application to the Court of the Subordinate Judge of Lucknow to file the award in Court under paragraph 20 of the Second Schedule of the Code of Civil Procedure Act, 1908. On such an

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application the Court, if satisfied that the matter has been referred to arbitration and that an award has been made thereon, and that no ground such as is mentioned or referred to in paragraphs 14 and 15 is proved, shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 states the grounds on which the Court may remit the award to the reconsideration of the same arbitrator or umpire. Paragraph 15 states the grounds on which alone an award shall be set aside. The first of these grounds is corruption or misconduct of the arbitrator or umpire. It was on this ground that the Subordinate Judge refused to order the filing of the award and disallowed the application of the Respondent (1), who had been treated as Plaintiff in the proceedings.

On the 7th September 1910 issues were framed by the Subordinate Judge. The only material one is: Is the award vitiated by the misconduct of the referee as alleged under the paragraphs 9 to 20 of the first Defendant's (the Appellant's) written statement ?

The misconduct alleged against the referee was twofold :—

(1st) That the referee had acted corruptly and dishonestly in his capacity of Judge.

(2nd) That the proceedings in the reference had been conducted in such a way that the matters in dispute had not been properly tried.

Their Lordships will deal first with the less important point of irregularity of procedure.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. In the present case it was alleged on behalf of the Appellant that there had been no proper inquiry, since the parties had not been properly summoned to appear before the arbitrator, and the Appellant had not had an opportunity of meeting the case set up by the Respondent (1). The burden of proving this allegation was upon the Appellant and other Defendants at the trial before the Subordinate Judge. The only relevant witness called on behalf of the Appellant was Shaban Ali, who admitted in cross examination that he was sent for by the arbitrator on several occasions and questioned in respect of the value of immoveable property. As against this evidence, which in itself is quite insufficient to prove the alleged irregularities, the arbitrator stated on oath that he invited all parties to put in written statements before him, but that they declined to do so; that he was never asked by any of the parties to hear oral evidence and that no oral evidence was tendered at any time, and that he got little or no assistance from any of the parties in making his inquiries. It is, however, unnecessary, in their Lordships' opinion, to further analyse this evidence since they agree with the Court of the Judicial Commissioner of Oudh that the allegations of irregularity in procedure were not proved against the arbitrator, and that there is no justification for the strictures passed by the Subordinate Judge upon the conduct of the arbitrator. Further severe comment was made that the arbitrator did not make and retain any adequate notes of the proceedings. No doubt it is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before

him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied.

The last point, and the most important, is the grave charge that the arbitrator acted dishonestly and with partiality in conducting the inquiry and making his award. This charge was found to be established by the Subordinate Judge. The main evidence relied upon to support this conclusion was that given by the arbitrator himself in cross examination. An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made any relevent evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality, is not used for a different purpose; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case *Buccleuch* v. *The Metropolitan Board of Works*, (1) but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established.

In the opinion of their Lordships, the Subordinate Judge did not take sufficient care in the discrimination of the purpose for which the evidence was admissible, and utilised evidence relevant on the charge of corruption to criticise methods adopted by the arbitrator in determining the quantum of his valuations. The course adopted in the cross-examination of the arbitrator was not satisfactory. There was a prolonged and critical examination into the details of figures, used by the arbitrator, in making his award, but the charge of corruption was not put fairly and squarely to him, so as to enable him to give a direct answer or explanation. It is not surprising that a cross-examination so conducted should lead to a certain amount of confusion and contradiction, but their Lordships cannot find in this respect any warrant for supporting the grave charges of corruption and partiality.

The distribution and valuation of the testator's property amongst the parties entitled are stated without ambiguity on the face of the award. In the first place, the arbitrator sets out the details of the property alloted to Respondent (1) and in each instance his estimation of value. The first property allotted is the entire village of Mohi-ud-dinpur, *alias* Hajiganj and the estimated value is 28,785 rupees. In respect of this allotment and valuation three charges are made against the arbitrator. It is said, first, that Hajiganj was a choice portion of the property of the testator and that its allotment to Respondent (1) showed partiality in his favour to the detriment of the Appellant. The arbitrator's answer is that it was undesirable to divide Hajiganj and that the only way in which division could be avoided was by its allotment in entirety to Respondent (1). This explanation is in itself reasonable and effectively answers the charge.

The second allegation is of undervalua-

(1) L. R 5 H. L. 418 (1872).

tion. The arbitrator is said to have dishonestly assessed this property at a low valuation intending to give an unfair preference to Respondent (1). The evidence adduced in support of this charge is that the valuation was made on the Patwari's figures to the rejection of those appearing in the accounts of the testator, the former figures giving a lower rate of profit income, and thereby diminishing the capitalised value. Their Lordships can see no reason for not accepting the arbitrator's explanation given in cross examination. He considered the Patwari's figures more likely to form an accurate basis for valuation than those in the private accounts, and stated that there were reasons which made him think that the private accounts were not satisfactory. This is just one of the matters on which an arbitrator is bound to exercise his discretion in estimating value, and the evidence is quite insufficient to prove that the arbitrator's choice of materials was influenced by a corrupt motive. Apart from the charge of corruption, it was beyond the competency of the Subordinate Judge to scrutinize the estimate of value appearing on the face of the award. Their Lordships can find no reason for coming to the conclusion that the basis of valuation suggested by the Subordinate Judge is preferable to that of the arbitrator.

The third charge made under the head of Hajiganj is that in the valuation, no account was taken of the Zemindar's office said to be worth 500 rupees. The arbitrator's answer is that it was included as part of the village property, and that in any case it was covered by the addition of 2,000 rupees which he had made to the value of the village as a whole.

The second property allotted to Respondent (1) consists of houses at Lucknow. It was said that the arbitrator had unfairly undervalued this property to the detriment of the Appellant, and that he had included in his valuation a house which belonged to the Appellant and not to the testator. There is no weight in the criticism made by the Subordinate Judge of the valuation of this property when the actual method adopted by the arbitrator is understood. The arbitrator having a difficulty in obtaining any satisfactory basis for fixing a valuation invited the parties to send in tenders, stating the price they would be prepared to pay for each of the houses. The only party who tendered for all the houses was Respondent (1), whose tender in the aggregate amounted to a price of 11,900 rupees. The Appellant sent in a tender for three of the houses at a slightly lower figure under each head, but the difference is so small as to be negligible. The arbitrator fixed the value at 11,800 rupees, reducing the tender price in the case of two houses by the comparatively insignificant sum of 50 rupees. The method of valuation adopted by the arbitrator was within his discretion, and it is impossible to find that the small alteration in the case of the two houses was inconsistent with honesty and impartiality.

It was necessary for the purpose of making his award that the arbitrator should determine whether or not to include in his distribution of property the house at Lucknow claimed by the Appellant. He gave his reasons for the decision at which he arrived. He knew that the house in question had been assigned to the Appellant many years ago under a deed of compromise, but found that the testator had not given up possession, always treating the house as his own and

mentioning it in his will as a portion of his estate. He came to the conclusion that the testator, notwithstanding the deed of compromise, had a good title by adverse possession, and that the Appellant's claim could not be sustained. He may have been right or wrong in the conclusion he arrived at, but their Lordships find no warrant for the inference that he was in any way actuated by a dishonest motive. If he was wrong and the house was not the property of the testator, its inclusion in the award might be detrimental to Respondent (1), but could have no effect whatever in defeating the title of the true owner. In addition to Hajiganj and the house property the arbitrator allotted to Respondent (1) certain properties of comparatively small importance. Having regard to the decision at which their Lordships have arrived on the more important portions of the property allotted to Respondent (1), it is unnecessary to follow under these heads the criticisms of the Subordinate Judge, which denote no more than a difference of opinion from the arbitrator on questions not within the jurisdiction of the Subordinate Judge to determine. No attack was made on the allocation of household furniture, cash and ornaments in Lucknow, or on their estimated value of 4,200 rupees.

Having allotted his share to Respondent (1), the arbitrator next proceeds in his award to allot her share to the Appellant, and to estimate the value of such share. There are three heads. The entire village of Kundri; a share in the village of Rasulabad; and a sum of 4,000 rupees. The testator's share in the village of Rasulabad was at this time subject to a considerable mortgage of 20,000 rupees, and it is alleged on behalf of the Appellant that the arbitrator acted dishonestly in allotting to the Appellant property subject to the disability of the mortgage; that he unfairly overvalued the testator's property in Rasulabad; and that he must have known that the allocation of the sum of 4,000 rupees was practically illusory. In the allotment of the testator's share in the village of Rasulabad, the arbitrator was asked by Respondents (2) to (5) to give them a share in Rasulabad adjoined to their share in Mahal Pachhim which they already possessed. The award shows that he complied with this request. The question, therefore, arises whether there is any evidence of dishonesty in his allotting the remaining share of the testator's property in the village of Rasulabad to the Appellant. The Appellant was already a co-sharer in Mauza Rasulabad, holding a share in co-tenancy with the testator. It was, therefore, quite reasonable that the arbitrator should assign a share to the Appellant of the testator's property in that village. If the allocation under the above circumstances was properly made, the disability attached to the mortgage could not be avoided. It was necessary that some of the parties should be subject to this disability, and the matter was obviously present to the mind of the arbitrator, who in his award provided against an apprehension of loss by deciding that the mortgage debt and its interest should be a charge on the entire property of the testator, and proportionately to all the co-sharers, each co-sharer being liable to pay in proportion to his share, and that each co-sharer should so soon as possible pay his capital and interest to the mortgagee. Their Lordships have already referred to this portion of the award, indicating their opinion

that the arbitrator had dealt with the liability of the mortgaged property, providing what in his opinion appeared to be the best remedy. Under these circumstances their Lordships can find no evidence for the alleged dishonesty in the allotment of a share of the mortgaged property to the Appellant, and agree in the decision of the Court of the Judicial Commissioner.

Their Lordships have found some difficulty in understanding on what ground the Subordinate Judge has based his finding that the Rasulabad property was dishonestly over-valued. In his criticism on the valuation he states that the referee has valued the entire estate of the deceased at 95,042 rupees, but this in itself is an error, since it is clear on the face of the award that the estate was valued for distribution at 91,042 rupees, and that the additional sum of 4,000 rupees was only thrown in as an item which might possibly be recovered on a claim for a rendition of accounts from Ahmad Khan. This intial mistake affects the subsequent inference and their Lordships can find no evidence of dishonesty in the detailed criticism of the arbitrator's figures. The Subordinate Judge places considerable weight on the allotment of 4,000 rupees to the Appellant as an element of misconduct in the arbitrator. It was objected that this was at best a doubtful item and ought not to be estimated in calculating the value of the Appellant's share. The answer to this objection appears on the face of the award. In calculating the value of the Appellant's share of the testator's property, this sum was not taken into account, but thrown in as an additional item after the Appellant had been allotted property estimated at 30,879 rupees, in itself rather more than her third share of the valued property.

Ahmad Khan was a *karinda* in the employ of the testator, and had been collecting his rents. It was alleged before the arbitrator that this man had money in his possession which was owing to the estate, and for which he had not accounted. Some figures were placed before the arbitrator, but there was no reliable evidence either of liability or of amount. Ahmad Khan refused to appear before the arbitrator to give any explanation of his accounts, and he was not called at the trial before the Subordinate Judge. The Respondent No. (1) had given Ahmad Khan acquittance for any sums that might be due to him, and the arbitrator was informed by Mr. Mohammad Fasih, a pleader, and the son-in-law of the Appellant, that he, too, had given Ahmad Khan discharges, as he desired to get Ahmad Khan in his power to support the Appellant's claim for mutation. Under these circumstances, what was the arbitrator to do? If he had made no reference to the matter in his award, no question would have arisen, and, on the face of the award, the Appellant would have had a full one-third share of the valued property. The course he took was evidently intended to be in favour of the Appellant for what it was worth, and the finding of the Subordinate Judge that there was evidence of dishonesty appears to be founded on a misapprehension of the terms of the award in relation to the distribution of this item.

It was argued before their Lordships by counsel for the Appellant that, although in each instance the evidence of dishonesty might not amount to more than a case of suspicion, the aggregate effect would support the charge of corruption, since in every instance the decision was given in favour of Respon-

dent (1), and to the detriment of the Appellant. In their Lordships' view, this is not an accurate summary, but, in any case, there would be no sufficient ground to infer such a grave charge as dishonesty and partiality against an arbitrator unless much stronger evidence was adduced in support of the particular instance relied upon than was forthcoming in the present case. It is just to the arbitrator to say that, in their Lordships' view, the charges of dishonesty and partiality have entirely failed.

Their Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors: *Messrs. Douglas Grant* for the Appellant.*

Solicitors: *Messrs. Watkins* and *Hunter* for the Respondents.

B. D. *Appeal dismissed with costs.*

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE No. 3673 OF 1910.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 13 and 14, February. Judgment, 14, February.

BEPIN BEHARY BERA and others, Defendants, Appellants,

v.

SASI BHUSHAN DATTA and another, Plaintiffs, Respondents.

Public Demands Recovery Act (I of 1895), secs 20, 21—Sale without notice to representatives of a deceased judgment-debtor, if a nullity—Failure of Collector to act under sec. 21, though deposit duly made, if a ground for treating sale a nullity—Irregularity—Sale, voidable only—Proper remedy.

On 14th March 1898, a Court holding a sale under the Public Demands Recovery Act was apprised of the death on 10th March 1898 of one of the judgment-debtors but the property was nevertheless sold without notice to the legal representatives of the deceased judgment-debtor. In a suit by the purchaser brought more than a year after to recover the land:

Held—*That the legal representatives of the deceased judgment debtor could not ask the sale to be treated as a nullity on this ground by way of defence in this suit. It was an irregularity which made the sale voidable by either a proceeding under sec 311 of Act XIV of 1882 or a suit brought within one year as contemplated by Art. 12 (a) of the Limitation Act of 1877.*

Nor could the sale be declared a nullity in such a suit upon proof only of improper rejection by the Collector of an application to set aside the sale, although the amounts mentioned in sec 21 of the Public Demands Recovery Act were duly deposited.

This was an Appeal preferred on the 21st of November 1910 against the decree of Babu Trailokhya Nath Shome, Officiating Subordinate Judge, 2nd Court of Zillah Midnapore, dated the 20th of July 1910, reversing the decree of Babu Prabha Chandra Singh, Munsif, 1st Court at Sudder, dated the 7th of June 1909.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy and *Bidhu Bhushan Ganguly* for the Appellants.

Babus Baidya Nath Dutt and *Mohini Nath Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the defendants in a suit for declaration of title to immoveable property and for recovery of possession thereof. The subject matter of the litigation belonged originally to the predecesso

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in interest of the Appellants. In 1883, the property was sold under the Public Demands Recovery Act and was purchased by Asutosh Chackrabartty. On default of payment of cesses the property was sold again in 1889 and passed into the hands of Bepin Chandra Dutt. Later on, default was again made in the payment of cesses and proceedings were taken under the Public Demands Recovery Act, with the result that at a sale held on the 14th March 1898 Rangalal Bose became the purchaser. The Plaintiffs Respondents took a conveyance from Rangalal Bose on the 15th January 1900, but in the year following, apprehensive that their title might be challenged by the representatives of Bepin Chandra Dutt, they took another conveyance from them. The Plaintiffs now claim to recover possession from the representatives of the original owner. In the Courts below, a question was raised as to the identity of the lands now in dispute with those sold in 1883 and 1889. That question has now been set at rest and it has been finally held by the Subordinate Judge that the subject matter of litigation was sold successively in 1883, 1889 and 1898. The Court of first instance, however, found that the sale of 1898 was illegal and invalid and consequently did not create a title enforceable as against the representatives of the original owners. Upon appeal the Subordinate Judge has reversed the decision of the Court of first instance and made a decree in favour of the Plaintiffs. But he has not expressly decided the question of the legality of the sale of 1898. That sale has been attacked before us on four grounds; namely, first, that as the certificate under sec. 10 of the Public Demands Recovery Act was issued in the name of the original owners, namely, Kalachand Bera and his brother, whose interest had been sold out in 1883 and had successively vested in Asutosh Chakrabarty and Bepin Chandra Dutt, no title vested in Rangalal Bose as the purchaser of the right, title and interest of the persons named as judgment-debtors; secondly, that as no notice under sec. 10 of the Public Demands Recovery Act was ever served, the sale did not affect the interest of the owners; thirdly, that as at the time of the sale, one of the judgment debtors was dead, his interest did not vest in the purchaser; and fourthly, that as the Deputy Collector illegally refused to record an order for cancellation of the sale, although an application was made as contemplated by law and the necessary amount was deposited, the sale must be deemed inoperative and ineffectual.

In so far as the first of these grounds is concerned, it cannot be disputed that, as laid down by their Lordships of the Judicial Commitee in the case of *Mahomed Abdul Hai* v. *Gujraj Sahay* (1), the purchaser at a sale under the Public Demands Recovery Act acquired nothing beyond the right, title and interest of the persons mentioned as the debtors in the certificate drawn up by the Collector. The question thus arises, whether Gora Chand Bera and Kala Chand Bera in whose names the certificate was issued on the 2nd December 1897 had any interest in the property at the time. *Primâ facie*, their interest in the property at the time had been extinguished in 1883, and Asutosh Chakrabartty had become the owner of the property. But it has been found by the Subordinate Judge that notwithstanding the sales of 1883 and 1889, the original owners continued in occupation of the disputed property. Their

(1) I. L. R. 20 Cal. 826 (1893).

possession was undoubtedly adverse to that of the purchasers at the sales under the Public Demands Recovery Act. Consequently in 1895 the original owners re-acquired title in the property by adverse possession. It follows that when in 1897 the certificate was drawn up in the name of Gorachand and Kalachand, they were the persons liable to pay the Government demands, and, consequently the purchaser Rangalal Bose in 1898 acquired their right, title and interest in the property. The first ground upon which the sale is questioned cannot be supported.

In so far as the second ground of attack is concerned, it has been argued that the notice required by sec. 10 of the Public Demands Recovery Act was not served upon the judgment-debtors. It is not disputed that if such a notice was not served, the effect would be to invalidate the sale and would leave it open to the original owners, when dispossessed, to recover possession of the property within 12 years from that date. (*Purna Chandra Chatterjee* v. *Dinabandhu Mukherjee* (2). But the Subordinate Judge has found that the notice was duly served. No doubt, there is no direct proof of the service of notice. But the return of the serving officer has been produced, and it states on the face of it that the notices were delivered to the judgment-debtors who acknowledged receipt of the service. This is *primâ facie* proof of due service of notice, and, so far as we can gather, no effort was made to contradict this evidence. We must take it that notice under sec. 10 was duly served. The second ground also fails.

In so far as the third ground is concerned, it is not disputed that the judgment debtor Kalachand Bera died on the 10th March 1898. At the time of the sale, this fact was brought to the notice of the Court but the Court proceeded to sell the property. On this, it has been argued, that the sale did not operate to affect the interest of Kalachand Bera; and in support of this proposition reliance has been placed upon the cases of *Ramasami* v. *Bagirathi* (3), *Krishnayya* v. *Unnissa Begum* (4), *Groves* v. *Administrator General* (5). These cases, when analysed, do not assist the Appellants. No doubt, the learned Judges who decided these cases observed in their judgments that the sale in question was void and inoperative; but they nevertheless proceeded to set aside the sale. On the other hand, it was laid down by a Full Bench of the Allahabad High Court in the case of *Sheo Prosad* v. *Hira Lal* (6), which was accepted as good law in *Peari Lal Singh* v. *Chandi Charan Singh* (7), that the effect of the omission of the Court to bring on the record the legal representatives of the judgment-debtor who has died after attachment and before sale amounts to irregularity and does not necessarily invalidate the sale, although upon appropriate proceedings taken the sale may be set aside. This view is in accord with that taken by their Lordships of the Judicial Committee in *Malkarjun* v. *Narhari* (8). Their Lordships point out that there can be no question that the omission to serve notice on the legal representatives is a serious irregularity sufficient by itself to entitle

(2) 11 C. W. N. 756: s. c. I. L. R. 34 Cal 811; 5 C. L. J. 696 (1907).

(3) I. L. R. 6 Mad. 180 (1883).
(4) I. L. R. 15 Mad. 399 (1891).
(5) I. L R. 22 Mad. 119 (1898).
(6) I. L. R. 12 All. 440 (1889).
(7) 5 C. L. J. 80 (1906).
(8) 5 C. W. N. 10: s c. I. L R. 25 Bom. 337 (1900).

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the Plaintiffs to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. Their Lordships point out in a subsequent passage that if the sale is a reality at all, it is a reality defensible only in the way pointed out by law; and the case must fall either within sec. 311 of the Code of 1882 or within art. 12 (*a*) of the Limitation Act of 1877, or within both; so that, in any way, there exists a bar by one year's delay. In the case before us, therefore, the sale must be taken to be a voidable sale which could have been avoided by the persons affected, either by a proceeding under sec. 311 of the Code of 1882 or by a suit instituted within the period of one year from the date of sale. No such proceeding has been taken and the time within which appropriate proceedings might have been taken has elapsed. Consequently it is not open to the Defendants to impeach the validity of the sale by way of defence and as we have already explained, it is not open to them to ignore the sale. This is in accord with the principle explained in the case *Ramsona* v. *Somamala* (9). The third ground accordingly fails.

In so far as the fourth ground is concerned, we notice that the Court of first instance proceeded on the apprehension that sec. 310A of the Code of 1882 is applicable to a sale held under the Public Demands Recovery Act. It has not been disputed before us that sec. 310A is not applicable; its operation is expressly excluded by sub-sec. 2 of sec. 19. It was consequently open to the judgment-debtors or their representatives to proceed under sec. 21. Under that section, they are bound to deposit, not merely the amounts stated in certificate as mentioned in cl. (a) and the penalty as mentioned in cl. (*b*), but also the outstanding charges due to Government as mentioned in cl. (*c*).

As far as we can gather, the judgment-debtors failed to deposit the amount mentioned in cl. (*d*). But even if it be assumed for argument that they tendered the full amount contemplated by sec. 21 and that their offer was improperly rejected by the Collector, his order might have been revised by the superior Revenue authorities, or possibly the party prejudiced by the alleged illegal order of the Collector might have obtained his remedy by way of a regular suit, appropriately framed and instituted in the Civil Court. But it is not necessary to decide what steps might have been taken to set right the erroneous order of the Collector. It is sufficient to say that no such steps were taken and it is not open to the representatives of the judgment-debtor now to urge that the sale was a nullity, not at any rate as against the Plaintiffs who are apparently *bonâ fide* purchaser for value from the purchaser at the sale held under the Public Demands Recovery Act. The fourth ground cannot consequently be supported.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

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(9) 13 C. L. J. 404 (1911).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2469 OF 1911.

CHAPMAN, J.
NEWBOULD, J.
1913.
8, April.

UMACHARAN CHATTERJEE, Defendant, Appellant,
v.
HERON MOYEE DEBI, Plaintiff, Respondent.

Limitation Act (IX of 1908), sec. 30, Sch. I, Art. 11—Period of limitation altered by implication—Sec. 30, if applies—Claim petition dismissed for default—Regular suit if must be brought within a year—Civil Procedure Code (Act XIV of 1882), secs 278, 281.

The operation of sec. 30 of the Limitation Act is not limited to cases in which the period of limitation has been expressly altered. It applies also to a case where the period of limitation has been altered as the result of the alteration of the discription of the suit.

Art. 11 of the Limitation Act does not apply where a claim preferred under sec. 278 of Act XIV of 1882 was "dismissed for absence," the order of dismissal not being an order passed under sec. 281 of that Act but under those sections of the Code which enabled a Court to dismiss a miscellaneous case for default.

This was an Appeal preferred on the 4th of September 1911 against the decree of Babu Satya Charan Ganguly, Subordinate Judge of Zillah Faridpore, dated the 14th of July 1911, confirming the decree of Babu Pasupati Bose, Munsif, 1st Court at Madaripore, dated the 31st of May 1910.

The Plaintiff sued to get *khas* possession of the disputed land on establishment of her *jamai* right and alleged that the land formed the raiyati holding of Ajimddi and Kalu Mridha from whom Plaintiff purchased the land in Augrahan 1308 for Rs. 40 by a registered *kobala* and got herself recognised by the landlords, that the Plaintiff's vendors then became Plaintiff's under-raiyats in respect of the land and that their heirs (subsequently) gave up the land in Augrahan 1314 and that the Defendan's dispossessed the Plaintiff in Pous 1314.

Defendants Nos. 1 to 4 pleaded limitation and alleged that Plaintiff's *kobala* was collusive and without consideration, that Plaintiff should have sued within one year of the time when her claim in a proceeding in execution was rejected, that raiyati holdings were not transferable and that Plaintiff's *kobala* was got up to defraud Kalu's creditors of whom Defendant's father was one, that Defendant's father purchased the land at auction and that the Defendants took possession of the land on the strength of their sale certificate.

The first Court found for the Plaintiff and decreed the suit. That decree was affirmed on Appeal by the Subordinate Judge.

Hence this second Appeal.

Dr. Dwarka Nath Mitter, Babu Prokash Chandra Majumdar for the Appellant.

Babus Gunada Charan Sen and *Bimal Chandra Das Gupta* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The first ground taken in Appeal is the ground of limitation. It appears that the Plaintiff instituted a case under sec. 278 of the old Code of Civil Procedure on the 24th January 1902 preferring a claim to the property in dispute. On the 8th February 1902 the case under sec. 278 was "dismissed for" "absence". The present suit was filed on the 4th June 1909. It is contended that article 11 of the Limitation Act applies and that Plaintiff's suit is barred, inasmuch as it

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was not instituted within one year of the date of the order passed under sec. 281 of the Code of Civil Procedure. We are of opinion that the order "dismissed for absence" was an order passed not under sec. 281, C. P. C., but under the secs. of the Code which enabled the Court to dismiss a miscellaneous case for default. We are confirmed in this view by the Ruling of this Court in the case reported in *Sarat Chandra* v. *Tarini Prasad* (1), which settled that Art. 11 of the Limitation Act applies only in respect to orders passed after enquiry. It is true that that case related to proceedings under sec. 335 of the Code. We are unable to distinguish proceedings instituted under sec. 278 and cases under sec. 335 of the Code in this connection. The wording of Art. 11 has been altered in the new Limitation Act of 1908. The result of the alteration of the wording may be an alteration of the law in this matter. But even if we were to hold that the law has been altered we are of opinion that sec. 30 of the new Act is sufficient to save the Plaintiff's suit. We are not prepared to limit the operation of sec. 30 to cases in which the period of limitation has been expressly altered. We are of opinion that the section applies also to a case where the period of limitation has been altered as the result of an alteration of the description of the suit. We are therefore of opinion that the suit was not barred by limitation.

It was then contended that the lower Court should have held that the conveyance to the Plaintiff was vitiated by fraud that is, that it was a conveyance for the purpose of defrauding the creditors. The learned Subordinate Judge went into this question in detail and came to the finding that fraud had not been proved and we are not satisfied that the case of fraud was so strong as to justify our interference with that finding which is a finding of fact.

The next ground taken in appeal is that the plaintiff having purchased an occupancy holding was not rightly held to have obtained any right by her purchase in the absence of proof that the holding was transferable. But the Munsiff had held that the transfer to the Plaintiff had been recognised by the Plaintiff's landlord, and this finding has not been upset by the learned Subordinate Judge.

Reliance in the last resort is placed upon a sentence in the judgment of the learned Subordinate Judge to the effect that what the defendant's father purchased must have been a *Korfa* right, which was an under-raiyati right. This is said to be a finding that there was a valid purchase of an under-raiyati right. This is not the meaning we attach to this sentence which is merely an incidental sentence at the end of the judgment. It was not the Defendant's case that they had acquired an under-raiyati right ; and if it was the finding of the learned Subordinate Judge, it was a finding which could not be supported in the absence of evidence that under-raiyatis are transferable.

The contentions in appeal fail and the appeal is dismissed with costs.

Appeal dismissed.

(1) I. L. R. 34 Cal. 491 (1907).

[CIVIL APPELLATE JURISDICTION.]

ORDER No. 6638 OF 1913.

CARNDUFF, J. RICHARDSON, J. 1913, Heard, 5, December. Judgment, 11, December.	BARHAMDEO SINGH, Defendant No. 11, and others, Petitioners, *v.* HARMANOGE SINGH, Plaintiff and another, Defendant No. 1, Opposite Party.

Civil Procedure Code (Act V of 1908), secs. 151, 152—Decree in apparent conformity with judgment—True intention of Court as to costs awarded to successful party, whether against one or more Defendant, as gathered from whole judgment, if may be given effect to, by way of amendment—Review application, if only remedy.

Where one only of several Defendants contested the suit which was decreed in favour of the Plaintiffs and from the judgment as a whole, it appeared that the Court intended to make Defendant No. 1 alone liable for the costs and not the other Defendants, but in concluding its judgment it said: "the suit be decreed with costs:"

Held—*That this portion of the judgment was elliptical and ambiguous, and the true intention of the Court was to be gathered from the judgment as a whole, and the decree of the Court which following the concluding portion of the judgment awarded costs against all the Defendants was not really in accord with the true intention of the Court.*

That the defect in the decree could be amended under either sec. 151 or sec. 152 of the Civil Procedure Code, and an application for review of judgment was not the only remedy of the other Defendants.

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Such an amendment could be made even after an appeal had been lodged from the decree.

E. *v.* E. (3) *followed.*

This was an application made on the 4th of August 1913 for the amendment of a decree made by this Court in appeal from Original Decree No. 110 of 1909, disposed of on the 19th of March 1913.

The judgment in that appeal, which was passed by Harington and Carnduff, JJ., has been reported in 17 C. W. N. 782.

Defendants Nos. 9, 11 and 12, who did not appear in the appeal, applied to the Court for amendment of the decree passed upon the basis of the said judgment, and which purported to make all the Defendants equally liable to pay the Plaintiff's costs. They contended that the obvious intention of the judgment read as a whole was to make the contesting Defendant No. 1 alone liable for costs and that the decree should be amended accordingly.

Babu Ganesh Dutt Singh for the Petitioners.

Dr. Dwarka Nath Mitter for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

CARNDUFF, J.—This is an application for the amendment of a decree, which has, it is said, erroneously and inadvertently made the applicants liable for the costs of certain litigation.

The Plaintiff sued for the recovery of land occupied by one Ram Gopal Acharia, as *mohanth* under a deed of endowment executed by a Hindu lady. Ram Gopal Acharia was made the first and principal Defendant; but the deed associated with him a number of other persons in the management of the endowment, and these the Plaintiff added

(1) I. L. R. 37 Cal. 649, 659 (1910).
(2) 30 Ch. D. 239 (1885).
(3) L. R. (1903) P 88

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as Defendants Nos. 2 to 14. In the trial Court the suit was contested by Ram Gopal Acharia alone. The Plaintiff obtained a partial decree. He then appealed to this Court, and before us the contest was again solely between him and the first Defendant. In our judgment Mr. Justice Harington, who has since left the Bench, and I ordered that "the appeal should be allowed and the suit decreed with costs." The decree subsequently prepared in the Court's office and, let me say at once, signed by both of us, has given costs against all the Defendants, and the present applicants, who were named as Defendants Nos. 9, 11 and 12 now submit that as it cannot have been really intended to saddle them with costs, it should be amended so as to relieve them of that liability.

The applicants were nominated in the deed as *panchs* authorised to supervise the management of the endowment. They filed written statements protesting against their inclusion in the category of Defendants and disclaiming not only all interest in, and concern with, the endowment, but also all knowledge of their nomination in connection with it. They had never acted as *panches* nor had they ever been asked to do so. The judgment shows that Mr. Justice Harington and I were to a certain extent influenced by these disclaimers in coming to the conclusion that the endowment was of an illusory character; and, had these Defendants entered appearance, they would certainly have been allowed their costs, unless indeed, it would have been possible to disallow them on the ground that they had been unnecessarily incurred. In these circumstances, it cannot be contended--and Dr. Dwarka Nath Mitter does not contend—that it could have been our intention to make them responsible for the costs: but what the learned Vakil does contend is that the decree, in fact, agrees with the judgment, as required by Or. XX, r. 6 of the present Code of Civil Procedure, that the former cannot, therefore be amended, as suggested, and that the only remedy, which the applicants had but have lost through limitation, was for a review of the latter.

No doubt, the decree is not inconsistent with the order in the judgment as to costs, and in this way it may at first sight be said to agree therewith. But the order is elliptical, and, if the judgment as a whole be referred to, it becomes manifest that the order cannot have been meant to affect the applicants. The result is that the decree is not really in accord with the intention of the Court, and that Mr. Justice Harington and I can have passed it only through inadvertence. As pointed out in *Brij Ratan* v. *Jay Narain* (1) and *In re Swire* (2), there cited, a Court has an inherent power to amend or vary a perfected order when it finds that it does not correctly state what it actually decided, and apart from this inherent power to make such orders as may be necessary for the ends of justice, which is expressly recognised by sec. 151 of the Code, sec. 152 provides that errors arising in a decree from any accidental slip or omission may be corrected by the Court either *suo motu* or on application. I hold, therefore, that it is open to us to amend this decree.

There is a further contention that this Court is *functus officio*, an appeal to the Privy Council having been lodged: but sec. 152 expressly contemplates amend-

(1) I. L. R. 37 Cal. 649, 659 (1910).
(2) 30 Ch. D. 239 (1885).

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ment "at any time," and *E.* v. *E.* (3) is a precedent for the amendment of a decree under appeal. This contention, therefore, must I think also fail.

But the success of the applicants at once raises the further question whether the decree for costs should not now be confined by us, acting *ex proprio motu*, as regards the added Defendants other than the applicants, to the first Defendant alone. The consideration of the whole matter was, therefore, adjourned in order to enable Dr. Dwarka Nath Mitter to argue this point, and that he has now done. The learned Vakil admits that all the other Defendants except Nos. 2 and 13, are in practically the same position as the applicants. He also admits that the 8th Defendant, who was impleaded because he was at the moment managing the Devria Indigo Concern and the Manager of that Concern had been nominated by the deed, *ex officio* so to speak, as one of the *panches*, is in a much stronger position both by reason of the representative character he was required to assume, and in view of the fact that he has applied in time for a review of judgment. But Dr. Dwarka Nath Mitter seeks, as I have indicated, to differentiate the cases of Defendants Nos. 2 and 13, one of whom was nominated by the deed as a *pujari* of the endowment and the other as a *panch*. Both filed written statements protesting against their inclusion as Defendants and declaring that they had had nothing to do with the endowment and were not interested in it: but, at the same time, they refused to admit that the deed was invalid, and, indeed, asserted that it was a valid deed of endowment. To this extent, therefore, they may be said to have resisted the Plaintiffs in the first instance, but they did nothing more than file written statements and no complaint of any interference, much less of any tortious act, on their part has been made against them in the pleadings or in the evidence. There is no doubt this slight difference between them and the others, but Mr. Justice Harington and I certainly did not discriminate between the absent Defendants. When we directed that the suit should be "decreed with costs" we can have contemplated only one of two things—costs against all the Defendants or costs against the solitary Defendant who was before us and present to our minds. No third intention can possibly be extracted from the elliptical words we used: but, as I have shown, we cannot have meant to saddle the applicants with the costs and *a fortiori* we cannot have meant to render the present Manager of the Dervia Indigo Concern liable. Therefore, we did not intend to saddle all the Defendants with costs. And, therefore, we must have meant to saddle only the first Defendant with the liability. As Mr. Justice Harington has gone I must here speak for myself: and I have no hesitation in saying that as a matter of fact, it was the first Defendant alone that I had in mind, and, that I had no idea of rendering anybody except Ram Gopal Acharia liable for the costs of the litigation. That being so, it seems to me to be our clear duty, now that the matter has come to our notice, to amend the decree by confining the order to the first Defendant Ram Gopal Acharia and I think that, if we were to shirk that duty, we should be causing needless anxiety, useless trouble and the accumulation of unnecessary costs.

In the result, I would allow this application and going further I would amend

(3) L. R. (1903) P. 88.

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the decree in favour not only of the applicants but of all the Defendants Nos. 2 to 14, making no order as to the costs of the present hearing.

RICHARDSON, J.—I was not a party to the judgment and decree out of which the question before us has arisen and am not in a position, therefore, to speak from personal knowledge as to what was intended or not intended. Upon the materials placed before me, however, it seems to me that the question really comes to this, whether the decree as drawn up correctly represents the judgment according to its true intent.

The language of the judgment in regard to costs is ambiguous, the person or persons against whom costs are given not being specified. The difficulty has been caused by the ambiguity and can only be solved by ascertaining what the judgment means. As to that there can be little doubt. Regard being had to the pleadings and the course which the litigation took and the terms of the judgment as a whole it seems impossible to suppose that the learned Judges intended to give costs against any of the Defendants Respondents except the one who actually came forward to contest the case in the Courts. I am fortified in that view by what has been said by Carnduff, J, who as one of the Judges who heard the appeal can speak with authority on the point.

The result then is that an error has been committed in the Court's offices in drawing up the decree and the error is one which, as it seems to me, it is open to this Court to rectify either under sec. 152 of the Civil Procedure Code or under its inherent powers. It is not necessary to review the judgment which, regard being had to the provisions of Or. XLVII, r. 5, I am not entitled to do. All that we do, as I understand the matter, is to bring the decree into accordance with what the Judges really intended, the judgment being left intact. Under Or. XX, r. 6, the decree is to agree with the judgment and it is to state "the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid." All we are doing is to apply these provisions to the decree before us.

I agree in the order proposed.

Application allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 254 OF 1913.

IMAM, J.
CHAPMAN, J.
1914,
Heard, 17 and 18, February.
Judgment, 9, March.

REAJUDDIN BASUNIA and others, Defendants, Appellants,
v.
JIBAN MOHAN RAY, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), Or. 9, rr. 6, 13, Or. 17, rr. 2 and 3—Failure of Defendant to appear in the course of the hearing after Plaintiff has closed—Court if may proceed to pass judgment on the materials before it—Application to set aside judgment as made ex parte—*"Appearance"—"Default".*

Where in the course of the hearing of a suit, the Plaintiffs having closed their case the defence began and the cross-examination of one of its witnesses not having been finished at the end of a day, it stood adjourned to the next day when neither the Defendant nor his witnesses nor his pleader appeared, and the Court treating the defence case as closed, heard Plaintiff's arguments and delivered judgment:

Held.—*That the mere fact that the Court had materials before it upon which it could pronounce judgment was not enough*

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to bring the case under r. 3 of Or. 17, as the other condition, viz., *that the adjournment must have been at the instance of a party, was not fulfilled.*

That the case fell under r. 2 of Or. 17, and the Court must be taken to have proceeded to dispose of the suit in one of the modes directed by Or. 9, so that an application to set aside the order under Or. 9, r. 13 should have been entertained.

The provisions of Or. 9 by themselves do not apply to a case in which the Defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. On such a case Or. 17 applies, r. 2 applying to a hearing adjourned by the Court, r. 3 to a hearing adjourned at the instance of a party, in which last case, if the party fails to appear on the adjourned date and there are sufficient materials on the record to enable the Court to proceed to judgment the Court may dispose of the case under that Rule. Even in such a case if there are not sufficient materials on the record the proper procedure to follow would be that laid down in r. 2.

MARIANNISSA *v.* RAMKALPA (2) *referred to.*

The test of a Defendant's appearance in obedience to a summons for the purpose of r. 6, Or. 9 is, as indicated in the form of the summons in App. B to Sch. I of the Code, whether the Defendant has appeared in person or by pleader duly instructed and able to answer all material questions relating to the suit or who is accompanied by some person able to answer all such questions.

In the present case, as the pleader's being furnished with due instruction could not be doubted, there was no non-appearance within r. 6, Or. 9.

(2) I. L. R., 34 Cal. 236 (1907).

This was an Appeal preferred on the 4th of June 1913 against the order of Babu Chandra Kumar Chatterjee, Subordinate Judge of Zillah Rangpur, dated the 17th of May 1913.

The facts of the case sufficiently appear from the judgment.

Babus D. N. Bagchi and *S. K. Sinha* for the Appellant.

Babus D. N. Chuckerbutty and *Naresh Chundra Sen Gupta* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal against the order of the Subordinate Judge of Rangpur rejecting an application to set aside a decree said to have been passed *ex parte.* The application was made under Or. 9, r. 13 of the Code of Civil Procedure. The decree sought to be set aside was passed under these circumstances. On the day the hearing of the case commenced both parties appeared. The case then proceeded from day to day. The Plaintiff in the course of 9 days examined 14 witnesses, who were cross-examined by the Defendants' pleader, and then closed his case. The Defence pleader then began his case and examined one of the Defendants whose cross-examination not having been finished on the third day of his examination, the case stood adjourned to the next day when neither he, the witness nor the pleader of the defence appeared. The Subordinate Judge consequently noted the case for the defence as closed and proceeded to hear the argument of the pleader for the Plaintiff. There was no argument for the Defendants and the Subordinate Judge delivered his judgment decreeing the suit in Plaintiff's favour.

The Defendants made the application out of which this Appeal has arrisen for

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setting aside the decree alleging that it had been passed *ex parte.*, The Subordinate Judge relying on the case *Kader Khan* v. *Juggeshur Prasad* (1) held that he had no power to set aside the decree under r. 13 of Or. 9 and that the Defendants remedy lay in a review or an appeal.

In this Appeal it has been argued for the Appellant that the decree was passed *ex parte.* The expression *ex parte* has not been defined anywhere in the Code nor does it appear to have been the subject of a judicial decision for its definition. Its accepted meaning however according to Wharton's Law Lexicon seems to be "a proceeding by one party in the absence of he other." We may remark here that this accepted meaning does not help us in this case one way or the other. R. 6 of Or. 9 lays down that where the Plaintiff appears and the Defendant does not appear when the suit is called on for hearing then if it is proved that the summons was duly served the Court may proceed *ex parte.* For correctly applying this Rule it is important to consider what constitutes "appearance" of the Defendant. The nature of the Defendant's appearance in obedience to the summons is best explained by the language of the form, prescribed in the first shedule, App. B, for summons to a Defendant. That form directs the Defendant to appear in person or by pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions. The Defendant's failure to appear in either of the ways specified would lead to the determination of the suit in his absence. The test of a Defendants "appearance" is whether such of the requirements of the summons as relate to appearance have or have not been fulfilled. In the present case the Defendants appeared by their pleader whose being furnished with due instruction cannot be doubted as he conducted the case for the defence up to the stage when he failed to attend the hearing of the case. Thus it cannot be said that the Subordinate Judge proceeded under r. 6 of Or. 9.

The provisions of Or. 9 by themselves do not apply to a case in which the Defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in Or. 17 which deals with adjournments. R. 2 of that Order lays down that "where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Or. 9 or make such other Order as it thinks fit;" while r. 3 of the same Order lays down that "where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

The distinction between the two Rules is that the former Rule applies to hearing adjourned at the instance of the Court while the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted. A further distinction between the two rules has been pointed out in the case *Mariannissa* v. *Ram-*

(1) I. L. R. 35 Cal. 1023 (1908).

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kalpa (2), that in a case where there are no materials on the record the proper procedure to follow would be that laid down in r. 2 (s. 157 of the former Code) but if there are materials on the record the Courts ought to proceed under r. 3 (sec. 158 of the former Court). Thus to apply the procedure laid down in rule 3 to a case there must be the presence of both the elements *viz.*, (1) the adjourment must have been at the instance of a party and (2) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of r. 3.

The question in this appeal is whether the procedure of the Subordinate Judge on the default of the Defendan's was under r. 2 or r. 3 of Or. 17. The hearing of the case was proceeding from day to day and the case stood over for the next day as the cross-examination of the witness had not been finished. The adjournment therefore was not at the instance of a party. In the circumstances we are of the opinion that on the default of the Defendants the Subordinate Judge proceded under r. 2 to dispose of the suit in one of the modes directed in that behalf by Or. 9. That being our view we think, on the authority of the Full Bench decision in the case of *Janardan* v. *Ramdhone* (3), that the Appellant's application under r. 13, Or. 9 should have been entertained. The order of the lower Court is set aside.

The Appeal is decreed. The Subordinate Judge will now proceed to consider if the Appellant can make out sufficient cause for the decree to be set aside. We assess hearing fee 4 gold mohurs.

Appeal allowed.

(2) I. L. R. 34 Cal. 235 (1907).
(3) I. L. R. 23 Cal. p. 738 (1896)

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 188 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 29 and 30, April.
Judgment, 30, April.

PANKHABATI CHAUDHURANI, Defendant, Appellant,
v.
NANI LAL SINGH, Plaintiff, Respondent.

Contract Act (IX of 1872), sec. 69—"Interest in the payment," meaning of—Decree against Hindu widow and sale of husband's estate—Sale set aside by reversionary heir by deposit under sec. 310A Civil Procedure Code (XIV of 1882)—Suit to recover deposit from widow—Payment, if voluntary, if decree in law appears to bind widow personally.

Where by a deposit duly made under sec. 310A of the Civil Procedure Code of 1882 the reversionary heir expectant upon the death of a Hindu widow in possession of her husband's estate as his heiress, had a sale in execution of a decree for arrears of rent of properties other than the defaulting tenure set aside, and then sued the widow for recovery of the amount deposited :

Held—*That as the decree-holder professed to sell the entire interest in the properties sold and the auction purchaser also claimed to have acquired the entire interest, the reversionary heir was "interested in the payment" of the decretal amount which the widow "was bound by law to pay"—within the meaning of sec. 69 of the Contract Act.*

Until the sale is confirmed, the judgment-debt remains unsatisfied, and it is in satisfaction of the judgment-debt that the payment under sec. 310A (excluding the portion which represents damages payable to the execution purchaser) is made.

The question whether in point of law the reversionary interest was or was not touched

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by the sale, being a matter for serious controversy, the payment could not be viewed as a voluntary payment.

The words "interested in the payment of money which another is bound by law to pay" may include the apprehension of any kind of loss or inconvenience and not merely the actual detriment capable of assessment in money. Sec. 69 thus lays down a more comprehensive rule than is supported by English authority.

This was an Appeal preferred on the 3rd of February 1911 from a decision of S. S. Skinner, Esq., District Judge, Purneah, dated the 28th of June 1910, affirming that of Babu Nagendra Nath Dhar, Subordinate Judge, Purneah, dated the 20th of December 1909.

The fact of the case will appear from the judgment.

Babus Dwarkanath Chackrabartty and Jogendra Nath Mookerjee for the Appellant.

Babus Bepin Behary Ghose and Lalit Mohun Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Defendant in a suit for recovery of money. The circumstances under which this litigation was commenced are not in controversy. The Appellant is in possession of the estate left by her husband Mathur Lal Singh. One Ghanasyam Misser obtained a decree against her for recovery of arrears of rent of a tenure and in execution of that decree proceeded to sell a property other than the tenure in default. The sale took place on the 5th November 1908 and the property passed into the hands of a stranger, to the proceedings. On the 5th December following, the Plaintiff made an application under sec. 310A of the Code of Civil Procedure of 1882 for leave to deposit the amount requisite for the cancellation of the sale. He alleged that he was the reversionary heir to the husband of the Appellant and that he was entitled to have the sale set aside for the preservation of his reversionary interest. This application was contested, but was allowed on the 22nd February 1909 by the Subordinate Judge. On appeal to the District Judge the order was confirmed on the 12th May 1909. The sum required was deposited under sec. 310A and the sale was set aside. On the 23rd June 1909, the Plaintiff commenced this suit to recover from the Defendant the money paid by him. The Courts below have decreed the suit. On the present appeal the decree of the District Judge has been challenged on the ground that the payment was voluntary and that the sum paid by the Plaintiff was not lawfully payable by the Defendant. In our opinion, there is no substance in this contention.

The learned Vakil for the Appellant has argued that the payment was voluntary, because the effect of the sale would have been to leave untouched the reversionary interest of the Plaintiff. In support of this view, reliance has been placed upon the cases of *Baijun Doobey* v. *Brij Bhukoon* (1), *Kristo Gobind* v. *Hem Chunder* (2), *Brojolal* v. *Jiban Krishna* (3), confirmed on appeal by their Lordships of the Judicial Committee in *Jiban Krishna* v. *Brojolal* (4) and *Bireshwar* v. *Kamal Kumar* (5). It has been contended in substance that as the sale had been held in execution of a money decree

(1) L. R. 2 I. A. 275 : s. c. I. L. R. 1 Cal. 133 (1875).
(2) I. L. R. 16 Cal. 511 (1889).
(3) I. L. R. 26 Cal. 380 (1898).
(4) I. L. R. 30 Cal. 550 (1903).
(5) 17 C. W. N. 337 (1912).

against a Hindu widow, her limited interest alone had passed to the purchaser and that the Plaintiff was not called upon to protect his reversionary interest which was really not in jeopardy. It is not necessary for our present purpose to determine what precise interest passed at the sale. It is sufficient for us to hold that the question of the true effect of the sale was a matter for serious controversy. The Decree-holder had professed to sell the entire interest in the estate; the auction purchaser also claimed to have acquired such interest. It was in this view alone that the Plaintiff could be permitted to apply for reversal of the sale under sec. 310A of the Code of 1882. That section provides for an application by a person whose immoveable property has been sold under Chap. XIX of the Code of 1882. It was open to the decree-holder, the auction purchaser and the judgment-debtor at the time to oppose the application on the ground that all that had passed at the sale was the limited interest of the widow, that the immoveable property of the then applicant had not been sold, and, that, consequently, he was not competent to make the application. On the other hand, the reversioner asserted that the entire interest in the property had been sold and he was allowed to have the sale set aside on that footing. Whether, if he had not got the sale reversed, his interest would, as a matter of law, have been affected is a question which does not call for our decision on the present occasion. The effect of a sale of this description depends upon two factors, which involve matters of fact as well as law, namely, first, the nature of the debt satisfied by the sale; and secondly, the scope of the execution proceedings. If under these circumstances a reversionary heir makes a payment under sec. 310A of the Code of 1882, and obtains a reversal of the sale, there can be no room for serious controversy that the case does not fall within the rule enunciated in *Ramtahal* v. *Biseswar* (6), but that he makes such deposit as a person interested in the payment of money which the judgment-debtor was bound by law to pay. There is no foundation also for the contention of the Appellant that a payment of this description must be deemed a voluntary payment, unless and until it is established that the sale would have actually prejudiced the position of the person who pays the money. This argument is opposed to the decision of their Lordships of the Judicial Committee in the cases of *Fatima Khatoon* v. *Mohammad Jan* (7), *Dooli Chand* v. *Ram Kishen Singh* (8), *Dakshina Mohun Roy Chaudhuri* v. *Saroda Mohun Roy Chaudhuri* (9) and *Kanhaya Lal* v. *The National Bank of India* (10). The same view is supported by a long series of decisions of this Court amongst which may be mentioned *Bindu Bashini* v. *Harendra Lal* (11), *Suchand Ghosal* v. *Balaram Mardana* (12), *Nabin Krishna* v. *Monmohun* (13), *Smith* v. *Dinonath* (14), *Radha Madhab* v. *Sastiram* (15), *Bama Sundari* v. *Adhar Chandra* (16), *Farbhu Narain* v. *Beni*

(6) L. R. 2 I. A. 131 (143); 23 W. R. 305 (1875).
(7) 12 M. I. A. 65 (1868).
(8) L. R. 8 I. A. 93 (1881).
(9) L. R. 20 I. A. 160: s. c. I. L. R. 21 Cal. 42 (1893).
(10) 17 C. W. N. 541 (1913).
(11) I. L. R. 25 Cal. 305 (1897).
(12) I. L. R. 38 Cal. 1 (1910).
(13) I. L. R. 7 Cal. 573 (1881).
(14) I. L. R. 12 Cal. 213 (1885).
(15) I. L. R. 26 Cal. 826 (1899).
(16) I. L. R. 22 Cal. 28 (1894).

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Singh (17), *Mohendra* v. *Bhuban* (18) and *Jognarain* v. *Badridas* (19). As was pointed by Sir John Stanley, C. J., in the case of *Tulsa Kunwar* v. *Jogeshwar Prosad* (20), the terms of sec. 69 of the Indian Contract Act lay down a more comprehensive rule than is supported by any English authority. The words "interested in the payment of money which another is bound by law to pay" may include the apprehension of any kind of loss or inconvenience and not merely the actual detriment capable of assessment in money (c. f. *Valpy* v. *Manley* (21). Reliance, however, has been strongly placed upon the cases of *Bepin Behary Sarnakar* v. *Kalidas Chatterjee* (22) and *Baikuntha Nath Dey* v. *Udoychand Maiti* (23) as authorities in support of the contrary view. In our opinion, the cases mentioned are plainly distinguishable. In these cases the person who made the payment had no interest at all in making the payment. By no conceivable method of reasoning whether upon the facts of the case or of the law applicable thereto, could it be maintained for a moment that the sale would have affected the position of the person who made the payment. A payment made under these circumstances might rightly be held to have been made by a person who has no interest in the payment of money. Nor do we feel pressed by the decision in *Yogambal* v. *Naina Pillai* (24) which has been already doubted in the cases of *Dorilal* v. *Pattiram* (25) and *Jognarain* v. *Badri Das* (26). We must hold accordingly that, in the case before us, the Plaintiff was interested in the payment of the money which he did actually pay. The only other question which requires consideration is, whether the Defendant was bound by law to pay this money. It has been argued before us that as the payment was made after the sale had actually taken place, the Defendant at that stage was no longer bound by law to pay the money. This contention is ingenious but manifestly unsound. The sale had not then been confirmed and consequently the debt had not been satisfied, indeed, it is conceivable that execution might be taken again for recovery of the judgment-debt if the sale was not confirmed on account of irregularity or any other valid reason. Besides it is clear that when payment is made under sec. 310A, the payment is made in satisfaction of the judgment-debt. *Mohendra* v. *Bhuban* (18), *Jognarain* v. *Badridas* (19). This reason, however, does not apply to that portion of the sum deposited which represents the damage payable to the execution purchaser. From this stand point it was suggested in the case of *Suchand Ghosal* v. *Balaram Mardana* (12) that a person in the position of the Plaintiff might not be able to recover that portion of the deposit. The propriety of this view has not been contested on behalf of the Respondent.

The result is that this Appeal is allowed in part, and the decree of the Court below modified. The Plaintiff will have a decree for Rs. 1,825 with interest and costs in

(17) 14 C. W. N. 861 (1909).
(18) 12 C. L. J. 566 : s. c. 14 C. W. N. 945 (1910).
(19) 16 C. L. J. 156 (1911).
(20) I. L. R. 28 All. 563 (1906).
(21) 1 C. B. 594 ; 68 R. R. 778 (1845).
(22) 6 C. W. N. 336 (1911).
(23) 2 C. L. J. 311 (1905).
(24) I. L. R. 33 Mad. 15 (1909).
(25) 8 All. L. J. 622 (1911).

(12) I. L. R. 38 Cal. 1 (1910).
(18) 12 C. L. J 566 : s. c. 14 C. W. N. 945 (1910).
(19) 16 C. L. J. 156 (1911).
(26) 16 C. L. J. 156 (1911).

all the Courts. As the appeal has substantially failed the Respondent will be entitled to his costs in all the Courts. We assess the hearing fee in this Court at five gold mohurs.

Appeal allowed in part.

[CIVIL REVISIONAL JURISDICTION.]

RULES NOS 110 TO 117 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 10 and 13, February.
Judgment, 20, February.

UMA CHARAN MONDOL, Appellant, Petitioner,
v.
MIDNAPUR ZEMINDARY Co., LD., Respondents. Opposite Party.

Chota Nagpur Tenancy Act (VI B. C. of 1908), sec. 85—Settlement officer, proceeding for settlement of fair rent in the course of preparation of record of rights—High Court's power of superintendence over—Appeal to Commissioner—Superintendence of Board of Revenue—High Courts Act (24 and 25 Vict. c. 104), sec. 15.

Although for the purposes of the application of the power of superintendence of the High Court under sec. 15 of the Indian High Courts Act, it is not necessary that an appeal should lie to the High Court in the very proceeding in which the power of superintendence is invoked, where, by statute, superintendence over a Revenue officer in a particular matter is vested in the Board of Revenue, it would be anomalous to hold that the Revenue officer should be deemed even for the purposes of that particular proceeding a Court subordinate to the Appellate Jurisdiction of the High Court and so subject to its powers of superintendence.

A proceeding in the court of a Settlement Officer of Chota Nagpur under sec. 85 of the Chota Nagpur Tenancy Act for settlement of fair rent is not subject to the superintendence of the High Court under sec. 15 of the High Courts Act, as appeals from the orders of the Settlement Officer lie under statutory rules to the Commissioner, an officer not shown to be subordinate to the Appellate Jurisdiction of the High Court.

These were Rules granted on the 24th of January 1913, calling on the Opposite Party to show cause why pending the hearing of Second Appeal Nos. 603 of 1911 in the High Court, further proceedings in the Court of the Settlement Officer of Purulia should not be stayed.

The facts of the case will fully appear from the judgment.

Babu Khettra Mohan Sen for the Petitioner.

Babu Jogesh Chandra Ray for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule raises a question of first impression as to the jurisdiction of this Court to exercise the power of superintendence it possesses under sec. 15 of the Indian High Courts Act 1861, in relation to a proceeding for settlement of fair rents before a Revenue Officer under sec. 85 of the Chota Nagpur Tenancy Act 1908. The circumstances under which the question has been raised for decision may be briefly narrated.

The Opposite Party commenced a suit for recovery of possession of lands in the occupation of the Petitioners as under-tenure-holders on the allegation that they were purchasers of the superior tenure at a sale for arrears of rent, and as such were entitled to avoid all under-tenures granted after the creation of the tenure. The District Judge has held that the Plaintiffs are not entitled to avoid the under-tenures, but he has given them a declaration that they are entitled to enhance the rent pay

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able. The Defendants have appealed to this Court against the decree of the District Judge, and the Plaintiffs Respondents have preferred a cross-appeal. During the pendency of the appeal in this Court, the Plaintiffs have instituted proceedings in the Court of the Settlement Officer of Chota Nagpur for settlement of fair rents under sec. 85 of the Chota Nagpur Tenancy Act 1908, and for enhancement of the rent of the under-tenure from Rs. 1-4 a year to Rs. 480 a year. The Defendants have applied to this Court for an order upon the Settlement Officer to stay the trial of the proceedings instituted before him pending the determination of the appeal and cross-appeal preferred to this Court. It is urged on behalf of the Petitioners that if the appeal succeeds, the proceedings for the settlement of fair rents will become nugatory, and that the same result will follow if the cross-appeal succeeds and the Plaintiffs become entitled to a decree for ejectment : in other words, fair rent may have to be assesed only in the contingency of the failure of both the appeal and the cross-appeal. It has been contended under these circumstances that it is obviously desirable that the question of the settlement of fair rents should not be investigated during the pendency of the appeal and the cross-appeal in this Court. This position has not been seriously controverted by the Plaintiffs Opposite Party. But it has been argued on their behalf that this Court has no jurisdiction to issue any direction to the Settlement Officer, in respect of the proceedings under sec. 85.

It is plain that if this Court is competent to give any directions to the Settlement Officer in respect of the proceedings instituted before him, it can do so only in exercise of the power of superintendence vested in it by sec. 15 of the Indian High Courts Act 1861. This power of Superintendence can be exercised only over Courts which are subject to the Appellate Jurisdiction of the High Court. The question consequently arises, whether the Court of a Revenue Officer in which a proceeding for settlement of fair rents has been instituted under sec. 85 of the Chota Nagpur Tenancy Act is a Court subject to the Appellate Jurisdiction of this High Court. Sub-sec. 4 of sec 85 provides that when a settlement of rent is made, an appeal shall lie from such settlement in the prescribed manner and to the prescribed officer. Clause 8 of sub-sec. 2 of sec. 264 authorises the Local Government to make Rules with a view to prescribe the officer to whom and the manner in which appeals shall lie from orders or directions passed by Revenue Officers under sec. 85. On the 18th June 1909, the Local Government framed Rules to the effect that when rent has been settled by an Assistant Settlement Officer, the appeal shall lie to the Settlement Officer to whom the Assistant Settlement Officer is subordinate, and when rent has been settled by a Settlement Officer himself, the appeal shall lie to the Commissioner. It is plain consequently that where, as here, the proceeding for settlement of fair rent is instituted in the Court of a Settlement Officer, that Court is Subordinate to the Commissioner. Our attention has not been drawn to any Statutory provision or rule which makes the Commissioner or the Settlement Officer subordinate to the Appellate Jurisdiction of this Court. For the purpose of the application of the power of superintendence vested in this Court under sec. 15 of the Indian High Courts Act, it is not necessary that an appeal should lie to this Court in the very proceeding in which the power of

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superintendence is invoked : in fact, if the party aggrieved is entitled to relief by way of appeal, it is not necessary for him to invoke the exercise of the power of superintendence. To take one illustration, an appeal to this Court is barred under sec. 102 of the Civil Procedure Code of 1908, when the amount or value of the subject-matter of suits of the nature cognisable by a Court of Small Causes does not exceed five hundred rupees : in such a case if the suit has been tried by a Court subject to the Appellate Jurisdiction of this Court, the exercise of our power of superintendence may be invoked [*Shamadani* v. *Bhoja Ram* (1), *Rama Bai* v. *Trimbak* (2)] provided that the case is of such a nature as to require the interference of this Court in the exercise of its extraordinary powers. But where a Court is made subordinate to the Appellate Jurisdiction of a tribunal, different from and in no way subordinate to this Court, it cannot reasonably be held that the Court is subordinate to the Appellate Jurisdiction of this High Court. Analogy is furnished by the decision in *Darbari Panjara* v. *Bhoti Roy* (3) where it was pointed out that in the Sonthal Perganahs there are two entirely distinct series of Courts, Original and Appellate, and that the distinction is fundamental although the same individual may preside over two different Courts. The cases in which it has been ruled that the High Court has jurisdiction to interfere with the orders of Collectors and Deputy Collectors under Act X of 1859 are clearly distinguishable. *Horro Mohun* v. *Kedarnath* (4), *Bhyrub Chunder* v. *Shyama Soondari* (5), *Gobind Coomar* v. *Kisto Coomar* (6), *Deanutoollah* v. *Nawab Nazim* (7), *Gudadhur* v. *Nundlal* (8), *Nassir Jan* v. *Akbur Majumdar* (9) *Nilmoni Singh* v. *Taranath* (10), *Ramanuj Das* v. *Lakhun Parida* (11), *Chaitan Patgosi* v. *Kunja Behari* (12). The provisions, it may be pointed out, for appeals under Act X of 1859, are on entirely different lines from those prescribed by the Chota Nagpur Tenancy Act 1908. The cases of *Madho Prokash* v. *Murli Manoher* (13) and *Ramlochan* v. *Beni Prasad* (14) deal respectively with the question of procedure in Revenue Courts, and the procedure applicable to execution of decrees transferred from Revenue Courts to Civil Courts : the principle applicable to those matters does not in any way assist the contention of the Petitioners. Nor does the case of *Kartic Chandra* v. *Gora Chand* (15) advance the argument of the Petitioners. That decision is an authority for the proposition that proceedings on applications for enhancement of rent under the provisions of secs. 27 to 30 of the Chota Nagpur Tenancy Act are judicial proceedings before the Deputy Commissioner who is for this purpose a Court subordinate to the Appellate Jurisdiction of this High Court. Reliance was placed in support of this view on the circumstance that under sec. 224 an appeal does, under certain circumstances, lie from the judgment of a Deputy Commissioner to the

(1) 22 W. R. 44 (1893).
(2) 9 Bom. H. C. R. 283 (1872).
(3) 18 C. W N. 575 (1914).
(4) 5 W. R. Act X 25 (1866).
(5) 6 W R. Act X 68 (1866).
(6) 7 W. R. 520 (1867).
(7) 10 W. R. 341 (1868).
(8) 12 W. R. 406 (1864).
(9) 15 W. R. 418 (1871).
(10) I. L. R. 9 Cal. 295 (1882).
(11) 11 C. W. N. 112 (1906).
(12) 15 C. W. N. 863 : s. c. I. L. R 38 Cal. 832 (1911)
(13) I. L. R 5 All. 406 (1883).
(14) I. L. R. 36 Cal. 252 (1908).
(15) 17 C. L. J. 593 (1912).

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Contents.

NOTES

The Contempt Bill and the Law of Defamation.

The judgment of the Judicial Committee on *Arnola's* appeal (in the *Burma Critic* case) against the conviction and sentence on a charge of defamation passed at a trial held before Sir Charles Fox of the Burma Chief Court and a jury (reported at p. 785 of this issue) has an important bearing on the provisions of the proposed Contempt Bill, upon which we made some preliminary remarks some weeks ago. Lord Shaw who delivered the Board's judgment disposed of, *first*, the claim of special privilege in regard to freedom of comment put forward on behalf of the Press. "The freedom of the Journalist," his Lordship said, "is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from Statute law, his privilege is no other and no higher." Then his Lordship continued: "Upon the other side it would appear from certain observations of the learned Judge that *this false and dangerous doctrine* may have been hinted at, *that some privilege or protection attaches to the public acts of a Judge which exempts him in regard to these from free and adverse comment.* He is not above criticism, his conduct and utterances may demand it. *Freedom would be seriously impaired, if the Judicial Tribunals were outside the range of such comments.*"

Sec. 228A of the proposed Contempt Bill provides :—

"288A. Whoever by words, either spoken or written or by signs or by visible representation or otherwise, brings, or attempts to bring into contempt, or lowers or attempts to lower the authority—

(*a*) of any Court of Justice, or

(*b*) of any person empowered by law to record or direct the recording of evidence on oath (when exercising such powers),

shall be punished with simple imprisonment for a term, which may extend to six months, or with fine, or with both.

Exception.—It is not an offence under the section to comment on the action of any Court of Justice or person referred to in cl. (*b*), provided that any such comments are in substance true, and made in good faith for the public good.

What we have to consider now is whether this provision will have the effect of placing "Judicial Tribunals" "above criticism" to such an extent as to seriously "impair freedom." As the protection of the proposed section is intended to be thrown not merely on Judicial Tribunals, but on any person empowered to record evidence (and this would include even Sub-Registrars), the mischief that will follow, if the proposed law has this effect, will be incalculably greater.

In calculating the possible effect of the proposed law, it must not be forgotten that the judicial acts of Judges and Magistrates are already protected in a sense in which acts of Executive and Ministerial officers are not, *viz.*, that no Judge or Magistrate can be proceeded against either in a Civil or Criminal Court in respect of acts done by them in good faith, when performing their judicial functions. Such acts may, no doubt, be challenged before an Appellate Court or a Court of Revision by an aggrieved party, but this remedy is obviously inadequate to keep a reasonable check upon the actions of these officers; for Courts of Appeal and Revision have to go by the records and matters relating to the Judge or Magistrate's conduct can only rarely be brought to the notice of the Appellate or Revisional Court. The only effective check on objectionable conduct on the part of Judicial or other officers is newspaper criticism. To place them "outside the range of" such criticism would really be to place Judicial and other officers when acting as such on nearly the same constitutional footing as the Sovereign. One has to appreciate this in order fully to realise the significance of Lord Shaw's observations quoted above.

Nor must one forget the peculiar juncture at which this provision of law is sought to be introduced. The constitution and the personnel of our Courts, both Civil and Criminal, have of late

been the subject of searching and to a great extent legitimate criticism. The question in some of its aspects was discussed recently before a Royal Commission. According to many the case for a radical reform of the judicial system in India is overwhelming. The evidence given before the Public Services Commission on the other hand disclosed a virtual unanimity of official opinion in favour of continuing the present system. The question one has seriously to consider is whether the proposed law will not by silencing one of the two opposing views let judgment go in favour of the other by default—whether, in other words, the interests of judicial reform in this country will not seriously suffer by stifling criticism of the existing system which on the admission even of some of its most distinguished members (now retired) stands in need of radical readjustment.

It will no doubt be urged that the object of the proposed sec. 228 A is not to stifle criticism, but to regulate it. It will be argued that because Judicial officers must not be placed above criticism, it does not necessarily follow that all criticism of such officers would therefore be legitimate. The observation of Lord Shaw which we quoted at the outset furnishes perhaps a sufficient answer. The speaker or the writer of libellous matter concerning a Judicial officer—be he a newspaper editor or any other individual—is liable to be proceeded against for libel or defamation. In *Arnold's* case, although the Magistrate's conduct at the trial was found to be open to severe criticism, the prosecution for defamation nevertheless succeeded, as the writer was found to have transgressed the limits of legitimate criticism as laid down in sec. 499 of the Indian Penal Code. There is no ground for supposing that the ordinary law does not sufficiently protect Magistrates and Judges (and other officers empowered by law to record evidence) in the discharge of their public duties. It does not also appear that the libelling of Courts and other persons authorised as aforesaid has reached such dangerous proportions that the ordinary law must be pronounced insufficient to cope with the evil.

But assuming that a case for additional protection for Judges and Magistrates has been made out, how far ought that protection to go, consistently with public interests—consistently, in other words, with that "freedom" which Lord Shaw is so anxious, should not be "impaired." It is true, English law does regard the "scandalising of the Court itself" as a contempt. In the case of the printer of the *St. James's. Evening Post* (1742, 2 Atk. p. 471 = 26 E. R. 684) Lord Chancellor Hardwicke said "There are different sorts of contempt: One kind of contempt is scandalising the Court itself. There may be also contempt of this Court in abusing parties who are concerned in cases here. There may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard." And he added: "There cannot be anything of greater consequence than to keep the streams of justice clear and pure that parties may proceed with safety both to themselves and their character."

In *R.* v. *Almon* (1765, Wilm. 143), Almon was called upon to show cause why writ of attachment should not issue against him "for publishing a pamphlet, containing many *libellous* passages upon this Court (The King's Bench) and upon the Chief Justice for his conduct both in Court and out of it, and charging the Court and particularly the Chief Justice with having introduced a method of proceeding to deprive the subject of the benefit of the Habeas Corpus Act." In Wilmot, J.'s words, "though the Chief Justice was named and marked out in the passage, *yet the whole Court was most manifestly and in express words involved in it.*" It appears that after arguments were heard the proceedings were dropped. But the Judge's opinion, though never delivered, was published and has been repeatedly referred to in later cases bearing chiefly on the procedure by attachment. The principal plea taken in defence in that case was that the proper procedure was by indictment and not by the summary procedure of attachment. That a libel on the Court or a Judge could be proceeded against by way of indictment for criminal libel was not questioned in the case, and in fact, that was the procedure Almon invited. The reasons given in the judgment were, in consequeuce, wholly directed towards justifying the procedure by attachment.

"The power," said Wilmot, J., "which the Courts in Westminister Hall have of vindicating their own authority is co-eval with their first foundation and institution," though upon a "very careful examination to see if he could find out any vestiges or traces of its introduction," "he could find none." The historical accuracy of this statement of the origin of the jurisdiction has been doubted. But his Lordship continued: "By our Constitution, the King is the foundation of every species of justice which is administered in this kingdom. (12 Coke 115). The King is *de jure* to distribute justice to all his subjects; and because he cannot do it himself to all persons, he delegates his powers to his Judges who have the custody and guard of the King's oath and sit in the seat of the King 'concerning

his justice*.'" "The arraignment of the justice of the Judges," his Lordship proceeds, "is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of people a general dissatisfaction with all Judicial determination and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever"—"*not*" his Lordship was, however, modest enough to add, "*for the sake of the Judges, as private individuals, but because they are the channels by which King's justice is conveyed to the people.*"

In defining the "authority" of the Court, the contempt of which was under his Lordship's discussion, his Lordship said: "It is not *imperium*; it is not the coercive power of the Court; but it was homage and obedience rendered to the Court, *from the opinion of the quality of the Judges who compose it*, it is the confidence in their wisdom and integrity. . . ." "It is not their own cause, but the cause of the public which they are vindicating at the instance of the public." In another passage, his Lordship avers:" It may perhaps merit a less punishment to libel a single Judge in Court or out of Court than to libel the whole Court, but the *quantum* of the offence does not vary the mode of prosecuting it" (*i.e.*, by attachment). His Lordship's point of view thus elaborately outlined is admirably summed up towards the end of his judgment in the following words: "The principle upon which attachments issue for libels upon Courts is to keep a *blaze of glory* around them to deter people from attempting to render them contemptible in the eyes of the public. . . . . *A libel upon the Court is a reflection upon the King* and telling people that the administration of justice is in weak or corrupt hands, that the fountain of justice itself is tainted and consequently that judgments which stream out of that fountain must be impure and contaminated."

The picture here painted of judicial dignity is certainly not wanting in colour. It is certainly reminiscent of the times when "anything to the scandal of the Government, *i.e.*, written blame, true or false, concerning the King or his family, minister, Judges, Magistrates or officers" was punished as sedition. For a reliable sketch of the law of sedition as understood and applied before and after the Restoration, *see* Dean's Student's Legal History, pp. 92, 93. We are not in a position to say how far the framers of the Bill are indebted to this judgment for their ideas. If they derived any suggestions from it, they must have overlooked its limited scope—and also the fact that it represents views which are, to put it mildly, very much out of date. *R.* v. *Almon* has been repeatedly cited in later cases, and Judges have always professed to treat it with respect, but no Judge, after Wilmot, J., has repeated his extravagant assertion of the identity of the King's Judges with the King himself.

A case came up not very long ago before the Criminal Revisional Bench of the Calcutta High Court in which a Deputy Magistrate at a certain station in Northern Bengal appeared to have drawn up criminal proceedings against a respectable inhabitant (a pleader and the Vice-Chairman of the Local Municipality) for some supposed slight offered to his dignity. The judgment of the Deputy Magistrate in which he repeatedly described himself as the "King's representative" caused no small merriment in Court—and the absurdity of the position taken up by him appeared to be so manifest that the Deputy Legal Remembrancer under instruction from Government withdrew the proceedings. Nevertheless, the Deputy Magistrate was but following, though unconsciously, the precedent laid down in *R.* v. *Almon.*

The best commentary, however, on the highly coloured picture drawn by Wilmot, J., is offered by the following passage from Lord Brampton's Reminiscences: "The eccentricities of Judges would form a laughable chapter; some of them are overwhelmed with the importance of their position; none were ever modest enough to perceive their own small individuality amidst their judicial environments; and this thought reminds me of an occurrence at Liverpool Assizes when Huddlestone and Manisty, the two Judges on Circuit, dined as usual with the Lord Mayor. The Queen's health was proposed of course, and Manisty with his innate good breeding stood up to drink it, whereupon his august brother Judge plucked him violently by his sleeve, saying: 'Sit down Manisty, you damned fool! we are the Queen' (p. 193)." But the leaven of democracy had been in operation even on the Judicial Bench, for otherwise Lord Brampton, a successor of Wilmot, J., on the Bench, would hardly have given to the world this incident at the close of a judicial career of great eminence.

In 1784, when the "blaze of glory" theory of judicial dignity (if it ever obtained currency)

*The student of Constitutional Law need hardly be told that this statement really embodies a constitutional fiction. James, I's attempts to dispose of cases himself failed upon the opposition of Coke supported in this instance by the unanimous opinion of the Judges. Blackstone iii 41, Coke. 4th Inst. 73.

may be supposed to have been at its height, in the case of the *Dean of St. Asaph*, 21 St. Tr. 847, a discussion arose between Erskine who was counsel for the accused and the Judge (Buller, J.,) about recording the word "only" as part of the verdict delivered by a jury. At length Erskine said "I stand here as an advocate for a brother citizen and I desire that the word "only" be recorded, whereupon the Judge said," Sit down, Sir! Remember your duty, or I shall be obliged to proceed in another manner." To this Erskine retorted, "Your Lordship may proceed in whatever manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct." The Judge very wisely took no notice of the reply. Half a century later Lord Campbell, himself Lord Chief Justice of England and later on Lord Chancellor, was able to speak of the conduct of Erskine as a "noble stand for the independence of the Bar."

In *In re Johnson*, 20 Q. B. D. p. 68, at p. 74, Bowen L. J. observed "the law has armed *the High Court of Justice* with power, and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice; *it is not on any exaggerated notion of the dignity of individuals* that insults to Judges are not allowed. It is on the same ground that insults to witnesses or jurymen are not allowed" (Oswald 10). Witnesses, it must be conceded, are not like the Judges "the channels through whom the King's Justice is conveyed to the public"—and where insults to Judges are placed on the same footing as insults to witnesses, the last shred of the "blaze of glory" doctrine is gone.

R. v. *Almon*, was cited before the Privy Council at the hearing of an appeal by a barrister and solicitor of St. Vincent (in the Leeward Islands) against an order for committal for contempt by the Acting Chief Justice of the place with reference to certain scandalous remarks concerning himself and the administration of justice in the island generally which appeared in a local newspaper. Their Lordships (Lords Watson, Macnaghten, Morris and Davey, JJ.) held that "contempts of Court may be committed by publication of scandalous matter respecting the Court after adjudication as well as pending a case." But they thought that *committals* for such contempt had become obsolete in England. They went on to add, however, that in smaller Colonies consisting principally of "coloured population" they may still be necessary in proper cases. They then proceeded to set down the limits of its exercise in the following terms: "The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is *not to be used for the vindication of the Judge as a person. He must resort to action for libel or criminal information.* Committal for contempt of Court is a weapon to be used sparingly and always with reference to the interests of the administration of justice. Hence when a trial has taken place and the case is over the Judge or jury are given over to criticism."

Later cases no doubt show that committals for contempt have not become obsolete in England. But the soundness of the other observations in that judgment remains unchallenged and the passages from the judgment of Lord Shaw in *Arnold's* case, quoted above, go to add to their authority. In *R.* v. *Gray*, [1900], 2 Q. B. 36, where *R.* v. *Almon*, is cited in the judgment, Lord Russell, C. J., described "scandalising the Court" as "any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority," but added the important qualification that "Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The Court ought not to be astute in such cases to criticise adversely what under such circumstances and with such object is published."

These extracts from later judgments clearly show that Wilmot, J's. views were never accepted for practical application in later cases. But however that may be it is obvious that even Wilmot, J. would not have claimed the power of attachment or committal *brevi manu* on behalf of inferior Courts, and far less on behalf of "any person authorised to record evidence." His references to the "quality of Judges," "their wisdom and integrity" obviously make his remarks applicable to the Judges of the High Court only. Further, even according to him it is not contempt of the individual Judge, but of the King's justice as administered through him that constitutes the gist of the offence. Under the proposed law any act lowering in any way the dignity of even a Sub-Registrar would be a contempt of the King's authority quite as much as libelling a High Court Judge.

The net result of all these pronouncements, including that of Wilmot, J., expressed in plain prose, is this: That the authority of a Judge or a Court is not in itself and for its own sake an object of law's solicitude. The maintenance of that authority is demanded in so far only as the lowering of it in a particular way may affect the due administration of justice, and no further.

So long as this limit is not exceeded the matter between the Judge and his traducer is not one of contempt, but of ordinary law and procedure, available alike to the Judge and any other individual. This will appear more clearly from a consideration of the case to which we now proceed to refer.

In *R.* v. *Hart and White*, 30 St. Tr., p. 1113, the two accused named were proceeded against in the year 1808 before Grose, J. by way of information "for certain libels upon the administration of public Justice in England, upon the Hon. Sir Simon Le Blanc, Knight, one of the Judge's of his Majesty's Court of King's Bench and upon the jurors by whom certain persons accused of murder had been acquitted." Grose, J. in his charge to the jury, referred to the libel as consisting in this:—"That the laws and tribunals of the land are represented as having by the conduct of the Judge and jury in the adminis'ration of the laws received a wound which threatened their extinction—Magna Charta and the Bill of Rights are represented as almost abolished or rendered useless and the trial by jury is represented as having been perverted or destroyed and all this is described as the fruit and effect of judicial corruption."

He then proceeded to direct them in these terms: "You are undoubtedly to consider whether it was the *intention* of the two Defendants to discuss fairly and candidly the grounds of the acquittals to which they referred, or whether it was their intention, without discussing those grounds *to malign and vilify the administration of Justice in this country* and in reality to cast upon it the severest stigma which could be affixed to it." His Lordship then proceeded to point out that there was "no attempt to discuss the facts as they came out in the evidence on the trial, but *wholesale abuse of the administration of the Justice of the country*." Further on his Lordship said: "If you should be of opinion that the publication has been proved and that it is libellous, you will then have to determine that which is the *great question in the case*, *viz.*, whether the publication was with the intention to defame, traduce, vilify and subvert the administration of Justice in the way it has been administered on the occasions to which the libels refer. . . . "If from what you have heard you are satisfied that such in reality was the intention of the Defendants; if you are convinced that their object was to destroy the trial by jury and to defame and disgrace the administration of Justice you will of course say they are guilty. If you can find any fair reasonable ground that these papers were "intended merely as a public discussion whether the men who had been on trial at the Old Bailey and acquitted, were properly acquitted or not, then you will say they are not guilty. . . . . If therefore you believe in reality that it was the intention of these Defendants to libel the learned Judge you will say they are guilty; if you are of opinion that it was their intention to libel the jury, you will say they are guilty. If you beileve it was their intention to libel the administration of the Justice of the country and not to discuss the propriety of the verdicts which have been given, you will also in that case find them guilty. If you think the papers were published with no other view than that of discussing the propriety of these verdicts, you will of course find them not guilty."

This case deserves the most careful consideration of every one interested in seeing that our statute book be not encumbered with laws which are centuries behind time, and, opposed to existing circumstances to the best interests of the country. A libel on the Judge and on the jurors was in this case tried by way of criminal information and a conviction obtained. The same procedure is open in this country when a Judge or Magistrate is defamed, as *Arnold's* case shows. The case further lays down that "intentionally defaming, traducing, vilifying and seeking to subvert the administration of the justice of the country is criminal libel. The cases previously discussed go to show that such a libel also constitutes contempt punishable by the Superior Courts of Record *brevi manu* by attachment or committal. But to discuss fairly and candidly the grounds of the verdict or judgment would not according to the Judge's direction in this case, be defamation, nor, necessarily, would it be contempt (*R* v. *Gray*, supra).

The law as laid down by Grose, J., would in fact let in all the exceptions to sec. 499 of the Penal Code as grounds of defence to a charge of libel whether against the person of the Judge or Magistrate or jurors. To compare this now with what is laid down in the exception to the proposed sec. 228A, it is clear that that section does not codify for India the law of contempt, in so far as "scandalising the Court" is contempt according to English law. What it proposes to do, *in effect*, is to repeal the statutory defences to a charge of defamation so far as imputations against the public acts of Judges, Magistrates and other persons empowered to take evidence are concerned—all except Exception 1 to sec. 499 of the Penal Code which re-appears in the exception to the proposed section. This exception was taken from

Lord Campbell's Act of 1842 which for the first time admitted the plea of justification to charges of criminal libel (not being seditious libels). It was a plea which that Act made it possible to the accused to take *in addition* to other pleas which so far as concerns British India, are codified in the other exceptions to sec. 499 of the Penal Code. But the proposed section would allow this plea only and no other. The exception to the proposed section thus makes only comments which are *true in substance* and made *in good faith* and also from purely altruistic motives (*for public good*) exempt from punishment. This obviously is laying down an impossible standard. It will in practice raise Judges and Magistrates (and other persons authorised to record evidence) "above criticism" to quote Lord Shaw's language.

Whilst instituting this comparison one must not overlook what we have already shown *viz.*, that the proposed section makes the lowering by words spoken or written, and even unintentional acts tending to lower the authority of *individual* Judges or Magistrates or other officers empowered to record evidence a criminal offence triable before the local Magistrate irrespective of its effect on the administration of justice. This has never been the law in England. *R.* v. *Gray* no doubt suggests that scandalising the Court includes lowering the authority of *a Judge* of the Court but a careful examination of the case shows that the Court in that case also was confronted with a libel on the administration of Justice, for the accused Gray had by affidavit admitted that his conduct reflected not only upon the individual Judge but upon the Bench of Judges and the administration of Justice.

Besides, what was stated in that case was only with reference to the summary procedure by attachment or committal, a power which in England is exercisible only by Courts of Record. The ordinary Courts can take cognisance of charges which, though they may amount to contempt, must also be Criminal libels in the sense laid down in Grose J.'s charge to the jury in *R.* v. *Hart and White.* It is only the Highest Courts which can be trusted to exercise jurisdiction in contempt with discretion. The Calcutta High Court has no doubt held that it has no jurisdiction to punish contempts of inferior Courts in the Mofussil. If it be this ruling to which exception is taken, why not give power to the High Courts to take cognisance of and try contempts of inferior Courts in the Mofussil and put them on an equal footing in this respect with the King's Bench Division of the High Court in England? The necessity of sanction by the Local Government would really afford no protection, for the law would be there, held *in terrorem* over legal practitioners, parties and newspaper-men, to stifle free discussion of the merits of the orders and acts of the officers in question, and the trial will be before inferior *local* Magistrates.

There is another very pertinent observation to be made with reference to the plea of justification which the exception to sec. 228A in a manner allows. What is to happen if a Magistrate's or Judge's legal knowledge and competency for his office be questioned? How can the accused establish the plea except by calling upon the Judge or Magistrate to submit to an examination in law before the trying Magistrate who may, for aught one knows, be a Magistrate of inferior grade and jurisdiction? The section as proposed, if it is not to be omitted altogether, needs thorough recasting in the interest of the officers themselves.

We also feel constrained to refer to the language of sec. 228B which makes every false or misleading report of a judicial proceeding an offence punishable with six months' rigorous imprisonment. Are false and misleading reports of judicial proceedings so very common in this country that they must be constituted into criminal offences irrespective of the existence of what in legal language is called *mens rea?* Whatever other alterations may or may not be made in the language of the proposed sections, one thing must be made clear that none of the newly proposed rules of law should bring a person within the clutches of criminal law in the absence of proof of *mens rea* and that in all cases the defence of *bona fides*, upon the lines laid down in the Exceptions to sec. 499 of the Penal Code, or such of them as are applicable to the nature of the offence contemplated, should be admissible in all such proceedings. To leave the sections as they have been framed would be to import the Continental notion of *lese majeste* into a portion of H[is] Majesty's Empire in opposition to views expre[ssed] by His Majesty's Judges in England in a series [of] cases some of them arising in the Colonies an[d] Dependencies, the latest of them being a ca[se] from Burma which is a part of British India.

The proposed law if passed without substantia[l] modification will not only affect newspaper criticis[m] to the prejudice of the subject's freedom, it w[ill] also have a most undesirable effect upon th[e] attitude of the Bar towards the Bench in th[e] Mofussil if not also in the Presidency towns. "[An] over-subservient Bar," says Oswald (p. 54), "would be one of the greatest misfortunes that could happen to the administration of Justice in England." The conditions which exist in this count[ry]

are not calculated to develop a healthy spirit of independence in the Bar. A passage at arms like that which took place between Erskine and Buller, J., would under the proposed law be a criminal offence punishable with six months' imprisonment or fine or both.

We do not indeed wish to be understood as saying that the authority or the dignity of judicial officers (or any other class of public officers, for that matter) is of no account either to the public or to Government. It is, we think, very desirable that public officials, whe her Judges or not, should carry themselves with dignity and be respected by the public according to their rank and station. But a man's dignity is after all in his own hands. No amount of penal legislation will help to secure respect for a man who individually is unworthy of it. If the object be to secure respect for and deference towards any particular class of officials, that object can be best attained by exercising greater discrimination in their appointment and promotion and by rigorously excluding from its ranks those who are unable to maintain their dignity by the force of their own character and conduct. Malicious and unworthy attacks will no doubt be made occasionally upon even the best of officials, but the ordinary law of defamation and libel is sufficient to cope with such attacks. Those in charge of the Bill will, we hope, seriously weigh all these matters and particularly the passages from Lord Shaw's judgment quoted above in their consideration before deciding to pass it in the shape in which it now stands or in any other at all like it.

CURRENT INDIAN CASES.

(CIVIL.)

Transfer of Property subject to mortgage—Proceedings between prior mortgagee and mortgagor.

SHANKAR VENKATESH KARGUPPI, I. L. R. 38 Bom.

Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties.

Adverse possession.

KRISHNA DIXIT *v.* BAL DIXIT, I. L. R. 38 Bom. 253.

The land in suit belonged to the family of the Defendants. The members or a member of the Plaintiff's family was an agent leasing the land out and taking its accounting for them to Defendant's family. In 7 their agent on behalf of the Defendant's family leased the land by a registered lease for eighteen years to one N who took possession under the lease and remained in possession until the term of the lease expired or at least up to some time within twelve years of the institution of the suit. In 1893 or 1894 the Plaintiff and his family asserted that they and not the Defendant's family were the owners of the land and thenceforth they kept the rents received from the tenants.

Held—That the title by adverse possession was not made out.

Arbitration award—Setting aside of, by Court.

AISHABAI *v.* ESSAJI, I. L. R. 38 Bom. 60.

The suit was brought to recover a certain sum on mortgages and other adjusted accounts. The cause was referred to arbitration with the consent of the parties by an order of the Court. The terms of reference contained the following provision—"the said arbitration to proceed on the basis of there having been no adjustments and the adjustments relied upon by the Plaintiff in this suit shall not be taken into consideration by them." The arbitrators having failed to arbitrate, an umpire appointed in the reference took their place. With reference to the question whether a particular debit was proved the Plaintiff tendered in evidence an adjusted account in which the item appeared. In spite of the Defendant's objection the umpire admitted the account. The Court of first instance set aside the award.

Held—It would be bad law and injustice if under the circumstances of the case and having regard to the language of the reference defining the umpire's jurisdiction, the Court were to hold that the award was void and the enquiry before the umpire was all infructuous.

Agreement of sale—Time being of the essence of the contract.

BURJORJIE *v.* JAMSHED, I. L. R. 38 Bom. 77.

An agreement of sale of land was in the following terms—

"The conveyance of sale of this land is to be prepared and received within two months from this day. And at the time of signing the document of sale Rs.——is to be paid. As to the balance of Rs.—— the same is to be paid on the transfer of the land after the document shall have been registered.

On payment of Rs. by the purchaser to the vendor as mentioned above the document of sale is to be got executed by the vendor. But should I not pay the amount within the fixed period given herein then I shall have no right to Rs.——paid this day to you under this bargain paper as earnest money on account of this sale. And if I prefer any claim the same is null and void. And after this date the vendor of this property has authority in every way to sell the same to another."

Held—That time was of the essence of the contract.

Hindu Law.

MAHABALESHWAR RAM CHANDRA, I. L. R. 38 Bom. 94.

In a family consisting of minors and women it is a matter of practical convenience that the dying adult male should be able to make arrangements for guardianship and management.

A Hindu may by will appoint one widow guardian of all his sons to the exclusion of the natural mother of two of them even though the will should prove invalid so far as it purported to affect the devolution of the property.

Attachment before judgment—Property passing by survivorship.

SUB RAO v. MAHA DEVI, I. L. R. 38 Bom. 105.

The Appellant obtained a money decree against one B Prior to the decree the Appellant had obtained attachment before judgment of the property in suit as being the property of B. Some time after the decree B. died. Admittedly he was in union with the Respondent and the property was joint-family property which on B's death would ordinarily have passed to the Respondent by survivorship.

Held—That the Respondent's title by survivorship was not defeated by the Appellant's attachment before judgment.

Reviews.

THE ALL INDIA DIGEST (CIVIL). 1811—1911. *By T. V. Sanjiva Row. Law Printing House. Madras.*

The present volume of the above Digest begins with "Preliminary Objection" and brings the subject-matter down to "Ryotwari Tenure." So this compilation may now be said to be well within view of completion. The classification of cases and the order in which they are set out are as we have previously noticed satisfactory, and there can be no question that the completed work will prove of great use to busy practitioners.

MEWS' ANNUAL DIGEST OF ENGLISH CASE LAW. 1913. *By John Mews, Bar at Law. London. Sweet & Maxwell, Ld, 3, Chancery Lane. Stevens and Sons, Ld, 119, 120, Chancery Lane.*

Mews' Annual Digest in many respects furnishes a model of what a Digest ought to be. The volume under notice is the third annual supplement for the year 1913 containing all the reported decisions of the superior Cours in England, including a selection from the Scottish and Irish Courts as well, with a collection of cases followed, distinguished, explained, commented on, overruled or questioned.

THE INDIAN DECISIONS (New Series). Calcutta: Vol. VII. Madras, Vol. V. *Edited by the Lawyers' Companion Office. Trichinopoly and Madras. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. Law Printing House Madras. 1914.*

The books under notice are verbatim reprints of volumes 14 and 15 of the Calcutta Series and volumes 14-16 of the Madras Series of the Indian Law Reports, respectively. We notice with pleasure that these volumes are marked by the useful features which distinguish these series of neatly got up and yet moderately priced reprints.

THE ALL INDIA CIVIL COURT MANUAL, LOCAL ACTS, BOMBAY. *Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. Law Printing House, Madras. 1914.*

The above which forms one of the series noted under the general name of "The All India Civil Court Manual" is a collection of all the important Bombay Acts with the legislative changes up-to-date and very brief notes of the case-law. These compilations do credit to the publishers from the points of view of price as well as of get-up and execution.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

FULL BENCH REFERENCE. Before JENKINS, C. J. AND STEPHEN, WOODROFFE, HOLMWOOD, AND D. CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE No. 1913 OF 1911. THE MIDNAPUR ZEMINDARY COMPANY LD., Plaintiffs Appellants v. HRISHIKESH GHOSH AND OTHERS Defendants Respondents. 24th April 1914.

Non occupancy raiyati holding if heritable.

One of the questions in controversy in the case being whether the right of a non-occupancy raiyat in his holding was heritable, the Division Bench before whom the case came up for hearing (Mukerjee, and Beachcroft. JJ.) in view of the conflict of judicial opinion on the point—a conflict which was not settled by the Full Bench *Uday Chandra* v. *Hari Das*, 13 C. W. N. 937 referred the appeal for decision to the Full Bench.

Held, by the Full Bench, that when Act X of 1859, Bengal Act VIII of 1869 and the Bengal Tenancy Act VIII of 1885 were passed, (apart from possible exceptions) a tenancy-at-will had ceased to be the measure of any raiyati right and so all had interests that were capable of descent.

That holdings of raiyats are distinctly recognised as heritable by the Bengal Tenancy Act [secs. (2), 20 (3), 44 Chap. IX, secs. 82, 160.]

That, apart from possible exceptions, the holding of a non-occupancy raiyat is heritable.

Babus Jogesh Chandra Ray, Rajendra Chandra Guha and Sitaram Banerjee for the Appellants.

Babus Ram Chandra Majumdar and Chandra Sekhar Banerjee for the Respondents.

Appeal dismissed.

Judicial Commissioner and in certain other circumstances to the High Court. The case before us stands plainly on a wholly different footing. It would in our opinion be anomalous to hold that where, by statute, superintendence over a Revenue Officer is vested, in a particular matter, in the Commissioner and the Board of Revenue, the Revenue Officer should be deemed even for the purposes of that particular proceeding a Court subordinate to the Appellate Jurisdiction of this High Court. In our opinion, sec. 15 of the Indian High Courts Act 1861 has no application to proceedings for settlement of fair rents instituted before a Revenue Officer under sec. 85 of the Chota Nagpur Tenancy Act, 1908. In this view the Rule must be discharged with costs, one gold mohur.

The other Rules, it is conceded, will be governed by this judgment, and will consequently be discharged, but there will be no order for costs in those Rules.

Rules discharged.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD SHAW.
LORD SUMNER.
LORD PARMOOR.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
7, April.

CHANNING ARNOLD, Appellant,
v.
THE KING-EMPEROR, Respondent.

Indian Penal Code (Act XLV of 1860), secs. 52, 499, Exc. 9—Defamation—Magistrate, allegation against, of corruption and conspiracy to save an accused under trial, by manipulating procedure—Magistrates' and Judges' public acts if above criticism—Press, if specially privileged in criticising such acts—Limits of legitimate comment—Libel, no plea of justification, yet truth of charges asserted by innuendo, *propriety of—Defence of good faith—Matters relevant to the enquiry and proper to be placed before jury—Judge's right to state his own views, without withdrawing case from the jury—Charge to jury—Misdirection—Misdirection when sufficient for interference by Privy Council—Privy Council, practice of, in interfering with criminal trials—Libel published under mistake—Duty of apologising on discovery of mistake —Bail, discretion as to granting.*

No privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist; but, apart from statute law, his privilege is no other and no higher.

No privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment.

A, as District Magistrate, having declined to commit one M for trial on a charge of having abducted and committed rape upon a Malay girl of about 11 years of age, the Appellant wrote an article in a newspaper charging A with being engaged with others in a corrupt plot to defeat justice in order to save M, with having bailed him out for a non-bailable offence and with having manœuvred his procedure to that end. M had himself admitted that, being informed that the child was suffering from gonorrhœa, he had taken her to his house and himself had personally examined her—although there was a hospital 8 miles away. A, in declining to commit M, had further stated that in his opinion M's conduct was pure and philanthropic :

Held—*That this declaration by the Magistrate with which the enquiry before*

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him concluded, laid the whole trial open to searching and severe observations, and no blame could be attached to these. But it was not open to the Appellant to make against the Magistrate charges of corruption and conspiracy, which were admitted to be untrue, and were grossly libellous, and the Appellant could not justify them in a criminal proceeding for defamation, unless he was able to establish affirmatively that he believed them to be true and that on reasonable grounds, as provided in the ninth exception to sec. 499 of the Indian Penal Code.

That the conduct of M referred to above and of the Magistrate at the enquiry were relevant for a consideration of the question of accused's bonâ fides *and were properly submitted to the jury in support of the defence.*

That the Judicial Committee was not prepared to say that the granting of bail to M was an improper exercise of the Magistrate's discretion, but in any case it was a difficult and delicate point of law which could not have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel.

That the fact that every officer, judicial or administrative, except one, had agreed with the conclusion to which the Magistrate had arrived, and that an investigation in the department of a Lieutenant-Governor of great experience had, to the Appellant's knowledge, resulted in exonerating the Magistrate from blame, and the attitude of the Appellant who neither defended the articles as true nor gave any assistance on the subject of what were the actual things upon which he founded his own beliefs and what steps, if any, he took to investigate the truth of the charges before giving them publicity, were also matters for consideration by the jury.

A charge to a jury must be read as a whole. If there are salient propositions in law, in it these will be the subjects of separate analysis, but in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if upon the general view taken, the case has been fairly left within the jury's province. In the region of fact, the Privy Council will not interfere, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred.

Where, in answer to a charge of defamation, the accused did not plead justification, but nevertheless the truth of the libels continued throughout the trial to be urged by way of repeated innuendo, *the Judge was justified in stating his own view of the facts, in order to counteract the improper use which was being made of the procedure, provided he did not withdraw the case on facts from the jury.*

When during the trial the accused was apprised from materials placed before the Court that certain serious charges against the complainant were quite without foundation, he should have at once acknowledged his mistake and should not have adhered to the libel.

The power of the Privy Council to review proceedings of a criminal nature, unless such power and authority have in any local area been parted with by Statute, is undoubted. But there are reasons, both consti.

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tutional and administrative, which make it manifest that this power should not be lightly exercised. Before they will interfere, it must be established demonstrably that justice itself in its very foundation has been subverted, and that it is therefore a matter of grave Imperial concern that by way of an appeal to the King it be restored to its rightful position in that particular part of the Empire.

The authority of DILLET'S *case* (4) *does not justify interference by the Privy Council in a criminal case wherever there has been misdirection, leaving it uncertain whether that misdirection did or did not affect the jury's mind. That would be to convert the Judicial Committee into a Court of Criminal Review or Appeal for the Indian and Colonial Empire.*

The practice of the Committee in respect of criminal trials is to this effect: It is not guided by its own doubts of the Appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law, unless there has been such an interference with the elementary rights of an accused, as has placed him outside the pale of regular law, or within that pale there has been a violation of the natural principles of justice so demonstrably manifest as to convince their Lordships first, *that the result arrived at was opposite to the result which their Lordships would themselves have reached, and,* secondly, *that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided.*

RE DILLET (4) *considered.*

MAKIN *v.* THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (5), PILLAI *v.* THE KING-EMPEROR (6), LANIER *v.* THE KING (7), CLIFFORD *v.* THE KING-EMPEROR (8) *referred to.*

THE QUEEN *v.* MOOKERJEE (2), THE FALKLAND ISLANDS COMPANY *v.* THE QUEEN (3) *followed.*

This was an appeal from a conviction under sec. 499 of the Indian Penal Code, by the Chief Court of Lower Burma by special leave. The proceedings on special leave were reported in 17 C. W. N, p. cxviii. The facts of the case sufficiently appear from their Lordships' judgment.

Sir Robert Finlay, K. C., (with *Messrs. David Alec. Wilson* and *Arthur Page* for the Appellant), submitted that the Appellant had acted in good faith, and that he was protected by the Ninth Exception to sec. 499 of the Indian Penal Code. The Exception read with sec. 52, I. P. C., was fully made out. Although at the beginning of the trial, the Chief Judge intimated that the Court could not enter into that part of the case which related to proceedings against Captain McCormick, the Chief Judge in his summing up went very fully into that matter, and that prejudiced the defence. The guilt or innocence of Captain McCormick was not in issue in the case. The defence that the Appellant had exercised due care and attention in writing what he did, that the Appellant published the libels in good faith, believing them to be true, having taken due care and attention to see that they were true, that was the only question for the jury to try. The Chief

(2) 1 Moo P. C. N. S. 272 (1862).
(3) 1 Moo. P. C. N. S. 299, 312 (1863).
(4) 12 A. C. 459 (1887).
(5) [1894] A. C. 57 (1893).
(6) L. R. 40 I. A. 193 : s. c. 17 C. W. N. 1110 (1913).
(7) L. R. [1914] A. C. 221 : s. c. 18 C. W. N. 98 (1913).
(8) L. R 40 I. A. 241 : s. c. 18 C. W. N. 374 (1913).

Judge in his charge had misdirected the jury, and the jury's minds had been diverted from the true issue. The learned counsel discussed the evidence in detail and submitted that admitting for the sake of argument that the charge against Captain McCormick was false, the Appellant had materials before him from which he had formed the judgment, and believed that the libels were true in good faith. The Appellant was prejudiced by a series of observations made by the Chief Judge in his summing up, specially the reference to the English law and authorities relating to libel. His observations with reference to Mr. Buchanan's state of mind and the guilt or innocence of Captain McCormick which was not material to the trial, created the greatest prejudice against the Appellant. There was a serious misdirection of the jury, and the Appellant was not properly tried.

[LORD SHAW remarked that the Board were not in the position of a Court of Criminal Appeal. What they had to consider was whether—apart from the alleged misdirection of the Judge—they could advise his Majesty that, taking into account the nature of the libel and the flaw in the proceedings, he should upset the conviction.]

Sir Robert Finlay.—It was not a mere flaw, but a vice which permeates the greater part of the summing up, and renders the verdict one which should not be allowed to stand.

It was the right of every British subject to be tried according to law. There was a misdirection of the most serious nature, which had resulted in a grave miscarriage of justice and caused substantial wrong, and the Board ought to set aside the conviction and sentence. Reference was made to the following authorities :—

Reg. v. *The Inhabitants of Newbold* (9), *Woodgate* v. *Ridout* (10), Mayne's Criminal Law, p. 699, *Makin* v. *The Attorney-General for New South Wales* (5), *The Queen* v. *Gibson* (11), *The King* v. *Dyson* (12), *Rex* v. *Stoddart* (13), *Bray* v. *Ford* (14), *The King* v. *Norton* (15), *The King* v. *Rodley* (16), *Dillet's* case (4), *Pillai* v. *The King-Emperor* (6), *Wafadar Khan* v. *The Queen* (17).

Mr. Wilson followed.

Sir Erle Richards, K. C., and *Mr. A. M. Dunne* for the Crown submitted that the Appellant had not made out a case in which the Board ought to interfere and quash the conviction. There was no misdirection of the jury, and even if there was, that would not be a ground for recommending to His Majesty in Council that the conviction should be set aside. The Judicial Committee was not a Court of Criminal Appeal. To allow such appeals on the mere ground of misdirection would be opening the door for criminal appeals in other cases, and that would paralize the administration of criminal justice in the Empire. Reference was made to the authorities cited by counsel for the Appellant, relating to the practice of the Board. Misdirection of the jury was no ground to set aside a conviction in India under sec. 537 of the Code of Criminal Procedure. The Appellant's case did not

(4) 12 A. C. pp. 459, 467, 469 (1887).
(5) [1894] A. C. pp. 57 and 68 (1893).
(6) L. R. 40 I. A. pp. 193, 199, 200, and also at p. 241 : s. c. 17 C. W. N. 1110 (1913).
(9) 11 Cox C. C. p. 57 (1869).
(10) 4 F. & F. 221 (1865).
(11) L. R. 18 Q. B. D. 537 (1887).
(12) L. R. 2 K. B. 454 (1908).
(13) 25 T. L. R. 612 (1909).
(14) [1896] A. C. 44.
(15) L. R. 2 K. B. 497 (1910).
(16) L. R. 3 K. B. 468 (1913).
(17) I. L. R. 21 Cal. 955 (1894).

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come within the principle of *Dillet's* case (4). *Pillai's* case (6) was an exceptional one. It was not the practice of the Board to interfere, except in rare cases, in which gross miscarriage of justice had taken place. The Board ought not to exercise powers greater than those given to the High Courts in India by the Legislature under the Indian Criminal Law. On the merits, the Appellant was properly convicted. Taken as a whole, the summing up of the jury was quite proper. In order to ascertain whether there was misdirection or not, the whole conduct of the case ought to be examined—the plea of the accused and the speeches of his advocates and the summing up of the Judge *Rex* v. *Stoddart* (13). The defence of the Appellant was under provisos 2 and 9 of sec. 499, I. P. C. The Appellant maintained in the Courts below that the libels were true, and in fact, he persisted in saying that even in his petition for special leave. The onus was on the Appellant to prove good faith, and in the absence of such proof, the jury and the Court held that the accused was guilty. The evidence on the record did not justify the view that the Appellant really believed what he wrote. There was a discharge of the accused by competent Courts, and the complainant had a remedy under the Code of Criminal Procedure by revision to the Chief Court. That was not done; there was not sufficient material to afford a reasonable basis to the Appellant for believing that the libels were true. The reference to the English Law in the summing up of the Judge was evidently made in answer to arguments of counsel. The Appellant's defence based on proviso 9 was fairly and properly put by the Judge to the jury who disbelieved it, and even if the Board looked at it as a Court of Criminal Appeal, the conviction was right. Reference was made to the following authorities: *Rex* v. *Stoddart* (13), *The Queen* v. *Mookerjee* (2) *Pillai* v. *The King-Emperor* (6), *Lanier* v. *The King* (7), *Bir Bhan* v. *The King* (18). [Secs. 45, 105, Evidence Act, sec. 52, I. P. C., sec. 497, 537, Cr. P. C., *Clarke* v. *Brojendra Kishore* (19)].

Sir Robert Finlay in reply.—The Board had jurisdiction to set aside the conviction. *Dillet's* case (4) was decided without actually deciding the guilt or innocence of the accused. It was held that the trial was not properly conducted. It could not be laid down generally that misdirection was no ground for interference. It ought to be a question in each case. That view was supported by *Makin's* case (5), where there was other evidence on the record, which might possibly have supported the conviction. In the present case, misdirection was a vital part of the trial, and substantial wrong had been caused by it. *Dillet's* case (4) ought not to be nullified. That would be a calamity. It is a great thing, that there is in the Empire a Court that could interfere with the admininistration of justice in the Criminal Courts of the Empire in

(4) 12 A. C. pp. 459, 467, 469 (1887).
(6) L. R. 40 I. A. pp. 193, 199, 200, and also at p. 241: s c. 17 C. W. N. 1110 (1913).
(13) 25 T. L. R. 612 (1909).

(2) 1 Moo. P. C. N. S. 272, 295, 299 (1862).
(4) 12 A. C. 459, 467, 469 (1887).
(5) A. C. [1894] pp. 57, 68 (1893).
(6) L. R. 40 I. A. 193 and 241: s. c. 17 C. W. N. 1110 (1913).
(7) L. R. [1914] A. C. 221: s. c. 18 C. W. N. 98 (1913).
(13) 25 T. L. R. 612 (1909).
(18) 18 C. W. N. 22n (1913).
(19) 16 C. W. N. 865 (1912).

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cases of gravity and injustice for proper reasons. It was no answer to the Appellant's argument to say that one of the advocates for the Appellant referred in argument to the guilt of Captain McCormick. That fact made it all the more incumbent upon the Judge that his charge to the jury should have been proper and should have been confined to the real issue, namely, whether or not the accused acted in good faith. It was the duty of the Judge to censure counsel, if necessary, and not to be misled by irrelevant considerations. There was no proper trial of the Appellant, and he was entitled to an acquittal.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—By leave granted by His Majesty in Council this appeal is brought from a conviction of, and sentence upon, the Appellant by the Chief Court of Lower Burma, pronounced on the 19th October 1913. The charge was one of defamation or criminal libel, and the prosecution was laid under the 21st chapter of the Indian Penal Code. In that chapter, sec. 499 gives a definition of defamation, and sets forth categorically no fewer than ten exceptions, any one of which forms a proper defence to the charge. By sec. 500 it is provided that the punishment of defamation shall be "simple imprisonment for a term which may extend to two years, or with fine, or with both."

The Appellant was charged with having defamed Mr. G. P. Andrew, Deputy Commissioner and District Magistrate of Mergui, by the publication of two articles in the *Burma Critic*, a Rangoon newspaper, on the 28th April 1912. These articles were entitled "A Mockery of British Justice."

Mr. Arnold has had experience as a journalist; and it appears from the proceedings that he was at one time the chief editor of the *Rangoon Times*. He ceased to be editor of that journal in the end of September 1911, and in January 1912 he was registered as one of the proprietors and the editor of the *Burma Critic*. The articles bear witness to the writer's possession of great invective and declamatory power; and it ought to be said at once that his motives have not been challenged except in so far as that is necessarily involved in the contention that he published serious libels and did so otherwise than in good faith.

The proceedings against him were initiated on the 11th June 1912 by Mr. Andrew, the District Magistrate, already mentioned. On the 3rd October 1912 the trial of the case began before Sir Charles Fox, the Chief Judge, with a jury. It was protracted and lasted from the 3rd to the 19th October. On the latter date the jury returned a unanimous verdict of guilty, and a sentence of one year's simple imprisonment was pronounced. The Board were informed that after undergoing four months' imprisonment the remainder of the sentence was remitted.

Their Lordships listened to a lengthy argument in support of this appeal, during which the entire history of three stages of proceedings or sets of circumstances was discussed. These were, first, the details of the conduct of one McCormick, a planter, who was charged with having abducted and committed rape upon a Malay girl of about 11 years of age; secondly, the conduct and proceedings of Mr. Andrew as District Magistrate at the investigation, which was conducted before him into this charge and which ended in his declining to commit McCormick for

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trial: and thirdly, the proceedings at the trial in the present case.

From one point of view the discussion might have been greatly shortened by the exclusion of the consideration of the two first elements mentioned. But their Lordships were unwilling, in view of the importance which is said to attach to the appeal, to adopt any step which would appear to prevent the fullest statement by the Appellant's counsel of his entire position. And secondly, it has to be admitted that Sir Robert Finlay was justified in his observation that, although there was no justification of the libel pleaded, still the circumstances demanded a prolonged investigation on this other issue, namely, whether the Appellant, from the material placed before him when he wrote the libel, was acting in good faith. If he did so act, he would stand within the exception under the Indian Penal Code, and the libel, otherwise unjustified, would be excused by Statute. In these circumstances the fullest investigation was permitted to take its course.

It is now important to see what are the provisions of the Penal Code which apply to the case.

"Whoever," says sec. 499 of the Indian Penal Code, "by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." Of the ten exceptions under the section, three were mentioned. The first exception is in these terms: "It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact." It was admitted by the counsel for the Appellant at their Lordships' Bar that their client claimed no benefit under this exception: he did not suggest that the series of libels or any one of them was true; on the contrary all of them, in so far as they were assertions of fact, were admitted to be false.

In point of form, the same course was taken in the Court below. But while this was so, and while the plea of *veritas* was not openly or plainly made, their Lordships regret to observe that surreptitiously it did appear and reappear in the case by way of repeated *innuendo*. It may be as well to bring this matter to a point at once. In Sir Charles Fox's charge to the jury this passage occurs: "You will observe that under the first exception the only question, apart from the question of the public good that could arise, was whether what had been said was true or not. Now it is noticeable that the defence does not rely on that exception, although up to the end we have had it reiterated that what was said was true." Upon being questioned the learned counsel for the Appellant frankly admitted that the exception was not in point of fact pleaded as a defence, and their Lordships do not understand that they disputed that the learned Chief Judge's statement of what occurred at the trial by reiterated *innuendo* was correct. It was open to the Appellant to defend his utterances as true. But he declined to take that course. Their falsehood stood as an admission in the case, the words themselves being so plainly of a libellous character. This part of the case may accordingly be definitely dismissed.

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The second exception is in these terms: "It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct, and no further." The distinction between this and the first exception is that the former deals with allegations of fact, and this second exception deals with the expression of opinion. This also has nothing to do with the case, as it now stands, because it was, as it must be, admitted that the articles did not confine themselves to expressing an opinion as to the conduct of Mr. Andrew, but in much detail made definite defamatory allegations of fact against him.

It is accordingly upon the ninth exception that the determination of the present appeal solely depends That is in these terms:—"It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good." In connection with this exception, it is necesrary to take its language along with that of sec. 52 of the Code, which is to this effect: "Nothing is said to be done or believed in good faith, which is done or believed without due care and attention."

Notwithstanding the elaboration of the arguments and the introduction of much matter affecting the conduct of McCormick and the conduct of Mr. Andrew, it was accordingly this question, and this question only, which the jury charged by Sir Charles Fox had to try, namely, whether in publishing the libels, admitted to be false, Mr. Arnold did so in good faith, because he believed them to be true, having given due care and attention to seeing that they were so. If the jury were satisfied that he did give that due care and attention, and that he acted in good faith, then the exception formed a good defence, and the accused would be found not guilty. If, on the other hand, they were not so satisfied, then no course, according to the Indian Criminal Law and the Indian Evidence Act, was open to them but to negative the exception and to find the accused guilty. No question is made that each of these propositions is sound.

It is contended, however, by the Appellant that in the course of the charge there was misdirection by the Judge, and that the jury's minds were diverted from this, which it is admitted was the true and only issue, to other questions. What were these? They were the very things which the prisoner's counsel had throughout the trial insisted on introducing, namely, the question of the conduct of McCormick and of Mr. Andrew, the narrative as to Mr. Andrew being accompanied by the suggestion that it was after all indefensible and corrupt. Their Lordships recognise that this mode of conducting the defence, which it appears to have been difficult to repress, was not unlikely to lead to confusion; but it is at least satisfactory to find that the learned Judge in charging the jury made no mistake in stating what the true issue was. It is admitted by the Appellant's counsel that this is so. "What you will have to consider," said the learned Judge to the jury, is "whether the imputations in these articles were published in good faith, after due care and attention had been exercised on the part of the writer of them. What is 'due care and attention' must depend on the circumstances of each particular case." It is also fair to the learned Judge

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to say that, while he felt constrained—a course which, in view of the conduct of the defence, is not to be wondered at—to go with some fulness into a narrative of fact, he concluded his charge to the jury by bringing their minds directly back to the exact issue which they had to try. He did so in this language: "It is now for you to consider these matters, and to decide whether the accused has satisfied you that he used the reasonable care that he ought to have used. If you are satisfied that he did, and that he did not overstep the bounds of law as I have explained the law to you, then you must acquit him, but if he has not satisfied you that he has exercised such due care and attention before he committed himself to paper in this way, then it is your bounden duty to convict him."

Before the exception and the alleged misdirection of the jury are dealt with, it is expedient to state what the libel contained. Being headed "A Mockery of British Justice," after a considerable amount of inflammatory matter, it proceeds to "speak out against those officials who have forgotten their duty and have dared to trifle with the fair fame of England." Having made these very serious allegations the Appellant added: "The facts before us indicate that he (Mr. Andrew) conspired with Mr. Finnie to burke the case; that he conducted it *in camera*; that he refused to heed the protest of the complainants that the interpreter employed was a paid parasite of McCormick, and did, in fact, deliberately mistranslate; that of the witnesses for the prosecution only those called by the District Superintendent of Police, and not even all of them, were allowed to give evidence; that in a word the whole enquiry was an outrageous make-believe and a mockery of what he is nominally representative, the fair play and judicial honour associated with the name of England. By what looks like the meanest of tricks, the unfortunate Complainants were unrepresented by any lawyer at this judicial farce."

It would serve no good purpose to cite further from the libels; they mention disgusting details and incriminate other officers besides Mr. Andrew, as engaged in a corrupt plot. They contain not one, but a series of libels of the grossest character. These libels were at least seven in number. First, of conspiracy with Finnie to prostitute justice by saving McCormick. Secondly, of having apparently knowingly and as part of the partisanship, bailed out McCormick for a non-bailable offence. Thirdly, of having misled the Malay girl, her parents and friends, by leaving them without professional advocacy, which they had been led to expect. Fourthly, of having perverted the course of truth by a partisan interpreter. Fifthly, of having tried the case *in camera*. (Very little was made of this in argument.) Sixthly, of not having called certain witnesses in the inquiry; and Seventhly, of Mr. Andrew having heard the case knowing that certain people objected to his doing so.

Of these libels the first was the real basis of all. It imputed corruption. Several of the others might not appear but for their resting upon that basis of corruption to be of so serious a type. But in their Lordships' opinion this cannot be said of the third and fourth, for if it were true that the magistrate had designedly deprived the complainants of legal assistance, and provided them with a false interpreter, then such wicked

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conduct would not only be itself indefensible but would colour all the rest. Upon the whole it cannot be denied that if any substantial part of this defamation was true, it meant ruin to the career of Mr. Andrew and any others engaged in conspiring with him as alleged.

The points put forward in the Appellant's favour as establishing that although the charges were false, yet he was excused by statute because he believed them *boná fide*, and had given due care and attention to their truth, were substantially three. In the first place, it was urged that he relied upon a letter published with the signature of "Vigilance," and addressed to the *Rangoon Times*. It is dated the 31st August 1911, and at that time the Appellant was connected with that paper. It contains a long narrative incriminating Mc Cormick and also Mr. Andrew and others.

The second element proponed in support of Mr. Arnold's good faith is of a different and an important character. It is this: In the district of Tenasserim referred to, the position of Subdivisional Magistrate was occupied by Mr. Buchanan. It is alleged that Mr. Buchanan had been on unfriendly terms with Mc Cormick, but their Lordships do not think that there is anything substantial in this allegation, and they further think it right to put on record their opinion, which is in entire concurrence with that of the Chief Judge, that Mr. Buchanan in his investigations and conduct was actuated by entire good faith. Although his conclusions and suspicions may have been erroneous, their Lordships see no reason to think that from beginning to end he did not act in accordance with the best traditions of the service. He had been absent on leave from the middle of April to about the middle of May 1911, and on his return he heard rumours of misconduct by Mc Cormick. Towards the end of June, Mahomed Din, who had lega differences with Mc Cormick, made allegations which amounted to a charge that the crimes of abduction and of rape had been committed. Mr. Buchanan himself made enquiries and came to the conclusion that McCormick should be put upon his trial. It is a point in the accused's favour that the Subdivisional Magistrate thought that there was a case for committal.

The third point in these protracted proceedings, which is more important than either of the foregoing in support of the contention that the writer of the libels believed them to be true, is the admitted conduct of McCormick himself. Their Lordships do not attach much weight to the question of abduction, because it appears to be the case that the child had formerly lived in McCormick's house for a short period, and the evidence is somewhat confused as to the conduct of the mother of the child in regard' to her absence from the house. But the allegation made by McCormick was that he had been informed that this child was suffering from gonorrhœa, that he had taken her to his house, and himself (there being a hospital eight miles away) had personally examined her, and had then passed her on for treatment by the mistress of one of his male servants. But their Lordships find themselves in entire agreement with the learned Judge when he says: "It is not surprising that there should be indignation and hot feeling on the part of the sympathisers with the mother of the child Aina, and good reason for feeling of indignation at some of the conduct —the admitted conduct—of McCormick. . . . However strong his inclination for

amateur doctoring may have been, there could have been no justification for that. It was a thing no man with a proper sense of decency should have done."

Although accordingly it is no part of the submission of the Counsel for the Appellant at their Lordships' Bar that McCormick was guilty, their Lordships think it is an element relevant to the consideration of whether Mr. Arnold was acting in good faith in these libels to shew that he believed that McCormick's own admissions would have justified his committal for trial.

The last matter which their Lordships reckon to be a perfectly relevant one in the category of elemen s in the case which bore upon the point of the accused's good faith was this. Importance is attached to a pronouncement by the Magistrate. After investigating the facts, and declining to commit, he went on to say that in his opinion McCormick's conduct was pure and philanthropic. Their Lordships cannot agree with such an opinion, and their views coincide with those of the Chief Judge upon that subject.

They are of opinion that there were thus several elements in the case which were all with perfect propriety submitted to the jury in support of the defence. Their Lordships, however, do not attach so much importance to the other allegations. That as to bail having been granted to the accused rests on a slender foundation. It is held by the Judges on the spot, and it was proved to be also the opinion of the civil authorities, that the discretion of granting bail applied to this case. It was evidently a case, unless forbidden by Statute, for discretion being exercised, and it would rather appear to their Lordships, looking to the great distance to be traversed before the authority claimed by the Appellant as requisite for granting bail could be obtained, that much practical hardship would ensue to prisoners unless such a discretion existed. They are not prepared to say that the humane view which was taken of an accused's rights was mistaken. It is unnecessary in this case to decide or dwell upon the point, because their Lordships' opinion is very clear to the effect that this difficult and delicate point of law could never have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel. The same observation applies to the other elements in the case which need not be entered upon, but all of which have been fully considered. Their Lordships are of opinion that a fair and statable case in support of the statutory defence and of the belief in the wickedness of Mr. Andrew was put forward on the points which have been already enumerated, but that no others were of any real weight. In putting forward, however, the points mentioned, their Lordships think that a case was made which demanded an answer.

Such an answer was given, and it also was both fair and statable.

In the first place, a serious and weighty reply was made on the subject of the letter signed "Vigilance." It was not confined to the remark that the letter was no valid excuse for a belief in gross slander. The points proved were these: When that letter was received by the *Rangoon Times*, a most proper course was taken, and that with the Appellant's knowledge. It was forwarded by Mr. Stokes, the assistant editor, to the Chief Secretary to the Government of Burma, so that there might be official confirmation of its allegations prior to its being published. These allegations were examined into, and

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on the 31st October, the Chief Secretary wrote stating that the Lieutenant-Governor had caused inquiry to be made, and had found that the allegations against the officers were without foundation. By this time the Appellant had ceased to be editor of the *Rangoon Times*, but on the 2nd November 1911 Mr. Stokes forwarded a reply to the Chief Secretary stating that the incident, so far as the *Rangoon Times* was concerned, was closed.

This was not so, however, with regard to the Appellant, for in the following spring, namely, on the 7th March 1912, an article appeared in the *Burma Critic*, of which he was then editor, entitled "Alleged Grave Scandals in Tenasserim." On inquiry being officially made of the Appellant, asking for particulars, the answer given was that the case referred to was that inquired into and disposed of in the previous autumn. The Appellant's attention was at the same time called to the fact that Mr. Stokes had accepted the reply of the Lieutenant-Governor. All this took place before the libels in question were published.

Their Lordships cannot see their way to hold this part of the Appellant's case to be satisfactory.

An investigation in the department of a Lieutenant-Governor of great experience having resulted in exonerating Mr. Andrew from blame, the Appellant assumed the grave responsibility for re-opening the matter. He gave the authorities no inkling of any fresh information which had come to his hand, and in answer to their enquiry he simply stated that it was the old incident which he was reviving. Up to the present, the Appellant has not given at their Lordships' Bar or in any Court any statement of any fresh facts which he had discovered. This circumstance was, in their Lordships' opinion, well worthy of consideration by the jury.

In the second place, both Judge and jury had seriously to consider the attitude of Mr. Arnold himself. He neither defended the articles as true, nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs, nor finally upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

Thus, although the true issue in the case was as to his own *bonâ fides*, and the care and attention which would verify that, Mr. Arnold's action, when charged, gave no help to the Court, and must to some extent have embarrassed even his own defence. Having admitted that he assumed responsibility for the articles, he was asked by the Magistrate as follows: "*Q.* Do you wish to make any explanation of your position in the case as to your *bonâ fides*, &c.? (I pointed out to the accused that, under sec. 105 the burden of proof lies upon him)." "*A.* No. I have nothing to say. Every one, from the Lieutenant-Governor downward, knows my character, and I leave it at that." But of course it was quite impossible to leave it at that, because the libels were there, in all their number and seriousness; the charge was made under the Statute, and the law had prescribed that the author of such libels could only be excused by showing good faith after due care and attention. It is not in accordance with the due or proper administration of justice for an accused to brush all the statutory regulations affecting his position aside in this manner. The attitude and absence of the accused may well have been considered by the jury, rather destructive than helpful to the defence set up.

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In the third place, this has to be borne in mind: Every officer, judicial or administrative, who investigated this case, except Mr. Buchanan, had agreed with the conclusion at which Mr. Andrew had arrived, namely, that the charge should be dismissed. This circumstance was one peculiarly suited for the appraisement of a local jury.

The next circumstance in the case is one to which their Lordships do not conceal that they attach serious importance. They were moved by the allegation that the prosecutors and those in that interest were alleged to have been led on to the trial by Mr. Andrew, and that Mr. Andrew had wickedly conspired suddenly to leave them in the lurch without an advocate, and to furnish them with a false interpreter. This allegation was, as it turned out, not only untrue, but was, as was made abundantly clear at the trial, particularly cruel. Letters were produced showing that instead of Mr. Andrew having taken up such an attitude, his desire, and indeed his endeavour and entreaty throughout were that in the enquiry before him an advocate should not only be employed for the prosecution, but should, in fact, be paid by the Government. Letter after letter was written to this effect—to engage a pleader. On the 3rd August 1911, Mr. Andrew had intimated to Mr. Buchanan that he would engage an advocate to prosecute, and that his presence and the presence of Mr. Sherard, the investigating officer, would also be required. On the 4th, he specially wrote to Mr. Buchanan, "Can you bring up interpreter trusted by all parties? Ask complainants to choose between," two advocates named, "to conduct their case." On the 7th, Mr. Buchanan having been unable to get such an interpreter, but having stated that the complainant wished to consult a certain Vakil in Rangoon before choosing a lawyer to conduct the case, Mr. Andrew wrote to Mr. Buchanan, "Kindly do so, and name advocate early. As regards interpreter, your Court-interpreter must come along to assist at any rate." On the 10th sanction was asked to engage Mahomed Ayoob "on the terms he asks." It most clearly appears from the letters that the arrangement as to legal assistance broke down, because upon the 12th August the Commissioner at Mergui declined to sanction the proposal to retain an advocate, he having demanded of Mr. Andrew to state whether he thought the charges could be substantiated, and Mr. Andrew having stated in answer to this difficult question that he thought the abduction charge alone could be made out. In short, the refusal to provide an advocate was made neither by Mr. Andrew nor by connivance or consent of Mr. Andrew, but in spite of him. With regard to the interpreter, it should also be added that Mr. Andrew's anxiety upon that subject was manifest, and it was entirely in the right direction. Mr. Buchanan objected to one Chean Gee and he recommended Musaji. As mentioned Mr. Andrew wanted an "interpreter trusted by all parties" and Musaji, Mr. Buchanan's nominee, was employed. Mr. Buchanan was present at Mergui during the investigation and he made no objection to this. There was, of course, no proof that a single word was interpreted falsely. In their Lordships' opinion these two parts of the libel were very gross, and they can see no justification for the proposition that the Appellant had any reasonable ground for believing them to be true.

It does not appear that in any view of

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the case there could have been a defence under the Statute in regard to these substantial portions of the libellous matter, and the case of *The Queen* v. *Newman* (1), was founded upon to this effect. But their Lordships are very anxious, however, not to have the case disposed of on what may be considered a narrow ground. They take these points as included in the sum of the matter to be considered before the jury as relevant to the general case of Mr. Arnold's justification on the ground of having, after due care and attention, and so in good faith, believed that these things were true.

One final matter has, however, to be kept in view. Some of the letters last cited were undoubtedly not before Mr. Arnold when he wrote the libels. But they were before him in the course of his trial. In their Lordships' opinion, when it was discovered that the truth with regard to Mr. Andrew had not been that in these particulars he wickedly conspired to defeat justice, but that he was, on the contrary, anxiously endeavouring to secure that justice should be furthered and guarded, then the duty of the accused, Mr. Arnold, was plain. Their Lordships make every allowance for the heat of advocacy which, as noted by the Chief Judge, seems to have been in this case great. But when a gross mistake of that kind on a matter of fact—the truth of which, when exposed, would have ruined any administrative or judicial officer's career—was discovered, the libel should not have been adhered to for a moment. The mistake should have been acknowledged and an apology tendered. This was not done, but upon the contrary the case was conducted to its close upon the footing that an unstated defence was

(1) 1 E. and B. 558 (1853).

the real and good defence, namely, that the libels and all the libels were true. Nobody is to be blamed in these circumstances for thinking that the plea of good faith on the part of Mr. Arnold had sustained a serious shock.

The speeches of the learned counsel for the accused have not been printed, but their Lordships had the advantage of hearing Mr. Wilson, who had been in communication with those engaged in the case and who informed their Lordships that the views presented by the senior and junior counsel for the Appellant somewhat diverged. It is, however, unnecessary to labour this matter, because no doubt was thrown upon the narrative of the proceedings given by Sir Charles Fox in his charge. There is enough disclosed in the case to show that no light task was thrown upon the Judge in disentangling relevant from irrelevant topics and in presenting the true issue to the minds of the jury. The real objection taken at their Lordships' Bar to this charge was that the jury were misdirected in this sense, and that the narrative of the learned Judge must have left the impression upon the mind that Mr. Andrew had not acted wickedly as the libel alleged. But it was, looking to the advocacy, necessary for the learned Judge to state his own view, and their Lordships do not see anything in the charge to give countenance to the idea that he withdrew this question from the jury or from their province. With a large portion even of the narrative their Lordships see no occasion to quarrel. Some portions of it here and there might be the subject of difference of opinion.

A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the

subject of separate analysis, but in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. Their Lordships do not say that upon any particular in this case they would differ from the views laid down by Sir Charles Fox, but these observations are made in order to discountenance the idea that in the region of fact, unless something gross amounting to a complete misdescription of whole bearing of the evidence has occurred, this Board will interfere. The separate and peculiar position of this Committee under the Constitution will be afterwards dealt with.

Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful : but the range of his assertions, his criticisms or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

Upon the other side it would appear from certain observations of the learned Judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The present case affords a good illustration of what is meant. When the examination before Mr. Andrew concluded with his declaration that in his judgment the action of McCormick was pure and philanthropic, the whole trial would seem to have been laid open to searching and severe observations, and no blame could be attached to these. But when the criticism was converted into an attack upon the Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who had manœuvred his procedure so as to defeat truth and protect an associate, then, of course, it is for the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. On both of these matters last mentioned the learned Judge seems to have properly directed the jury.

This also has to be said. A large part of the criticism directed against the charge of the learned Judge in this case was to the effect that the narrative of the proceedings led up to the conclusion inevitably that Mr. Andrew was innocent of the wicked dereliction of duty which was alleged. If it was so, the result upon the case is somewhat remarkable. For then the charge had in fact impressed the jury's

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minds with the innocence of Mr. Andrew, and it is that very innocence which is in the foreground of the admissions made in this case. The foregoing narrative in this view might have been spared, because it is now seen that nearly all, if not all, of the items in the narrative which are said to constitute misdirection are parts of a narrative which leads to a conclusion that that is in accordance with fact which has all along been admitted to be true.

It is here that the peculiarity of the procedure becomes evident, for the narrative thus criticised was undoubtedly, as it appears to their Lordships, the narrative given by the learned Judge to the jury in order to counteract an improper use which was being made of the procedure. While the truth of the libels was not asserted formally, and while the admission of their falsehood was formally granted, an endeavour was repeatedly made to withdraw all this and to persuade the jury to take all that was asserted as true. Such things may occur; but it is the duty of Judges to put what check they can upon them, and in the present case their Lordships see no occasion to think that the learned Judge failed to exercise that duty with propriety.

From what has been said it will, their Lordships think, clearly appear that there was material before the jury on both sides of this case, and that the determination was on a subject peculiarly within the jury's province. In their Lordships' opinion the case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. But even if it were conceded that upon a meticulous examination of the Judge's charge or conduct of the case certain flaws could be discovered, it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the Empire, as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case incline their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute, is undoubted. Upon the other hand, there are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The overruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in *The Queen* v. *Mookerjee* (2), and Lord Kingsdown, in the case of *The Falkland Islands Company* v. *The Queen* (3), stated the matter compendiously in these words: "It may be assumed that the Queen has authority by virtue of Her Prerogative to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal

(2) 1 Moo. P. C. N. S. 272 (1862).

(3) 1 Moo. P. C. N. S. 299, 312 (1863).

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character, unless Her Majesty has parted with such authority. But, the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the Colonies is so obvious, that it is very rarely that applications to this Board similar to the present have attended with success." Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *re Dillet* (4). It should be observed that while *Dillet's* case (4) was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a barrister and solicitor against a verdict convicting him of perjury, but there had been a consequential order of the Court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential order. Lord Blackburn referred to Lord Kingsdown's judgment in the *Falkland Islands* case (3) as authoritative and binding. After citing that learned Judge, Lord Blackburn added: In "this statement of the general practice their Lordships agree. They are not prepared to advise Her Majesty to make this conviction for perjury an exception if it were not made the sole foundation for the subsequent order of 27th March 1885," and liberty accordingly was granted "to appeal against the order of the 27th March 1885, striking him off the roll, and also to the extent above stated, and no further, against conviction for perjury."

(3) 1 Moo. P. C. N. S. 299, 312 (1863).
(4) 12 A. C. 459 (1887).

While accordingly the familiar sentences again about to be quoted from Lord Watson are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just alluded to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position that it occupied under the judgments of Dr. Lushington and Lord Kingsdown pronounced about a quarter of a century before. Lord Watson in *Dillet's* case (4) observed that "the rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done."

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound.

(4) 12 A. C. 459 (1887).

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This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the Appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in *Dillet's* case (4) has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the Appellant was to an entirely contrary effect. In the forefront of it the case of *Makin* v. *The Attorney-General for New South Wales* (5) was cited. *Makin's* case (5) in truth did not raise the question at issue in the present case. It depended upon the construction of sec. 423 of the Criminal Law Amendment Act of 1883 (a New South Wales Statute). That section set up the Judges of the Supreme Court as a tribunal to determine questions submitted to them in a case stated by the Judge at the trial, and there was a proviso that there should be no quashing "unless for some substantial wrong or other miscarriage of justice." It was stated by this Board that under that section the Judges have not been substituted for the jury. As they said, "In their Lordships' opinion substantial wrong will be done to the accused if he were deprived of the verdict of the jury on the facts proved by legal evidence and there were substituted for it a verdict of the Court founded merely upon the perusal of the evidence."

The second case founded on is that of *Pillai* v. *The King-Emperor* (6), in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board imperatively to demand that it should interpose, because the very foundations of justice seemed to have been attacked in the proceedings. A whole body of inadmissible evidence had been received in the case. The one witness whose evidence was relevant and who remained in the case was supporting another witness who was a confessed perjurer. The remaining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the Magistrate and certain officials. "If true," observed Lord Atkinson, "they show that these officials, or at least the Sub-Inspector, induced the witness to forswear himself and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father; and if false, they show that the witness was ready to commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements. There is no alternative." The simple case accordingly confronting the Board was a case of a subject sentenced to death upon no evid-

(4) 12 A. C. 459 (1887).
(5) [1894] A. C. 57 (1893).

(6) L. R. 40 I. A. 193; s. c. 17 C. W. N. 1110 (1913).

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ence at all. In these circumstances, although the principle of *Dillet's* case (4) was again re-affirmed, their Lordships did not see their way to refrain from interfering.

The third case referred to is that of *Lanier* v. *The King* (7), and, fortunately, it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the Judge himself. He, as narrated in the report, was a member of the family council which instigated the proceedings and himself was a party to appointing two barristers to conduct the prosecution and arranged about their fee. The facts need not be referred to. The indictment was altered by drastic amendments; the trial was hurried on; but the narrative need go no further, for, as the report states, "In short, counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the Appellant of crime." The Board were of opinion that the sentence pronounced against the Appellant "formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere." But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's* case (4), was again cited. It was pointed out that the interference was not on any matter of form, but because of matters lying at the very foundation of justice (the Judge had been a Judge in his own cause), justice had "gravely and injuriously miscarried." *Lanier's* stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the Colonies or Dependencies. That extreme case is this, that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford* v. *The King-Emperor* (8), on the 17th November last, and their Lordships refer to the Judgment of the Lord Chancellor in this and the other refusals referred to.

The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal, it is hardly doubtful that the appeal would fail. *A fortiori* their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the Appeal be dismissed. There will be no order as to costs.

(4) 12 A. C. 459 (1887).

(7) L. R. [1914] A. C. 221 : s. c. 18 C. W. N. 98 (1913).

(8) L. R. 40 I. A. 241 : s. c. 18 C. W. N. 374 (1913).

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Solicitors: *Messrs. Bramall & White* for the Appellant.

The Solicitor, India Office, for the Crown.

B. D. *Appeal dismissed:*
No order as to costs.

[SPECIAL BENCH.]

APPEAL FROM APPELLATE DECREE
No. 1647 OF 1911.

JENKINS, C. J.
STEPHEN, J.
WOODROFFE, J.
HOLMWOOD, J.
D. CHATTERJEE, J.
1914,
Heard, 21, April.
Judgment, 24, April.

GOPESHUR PAL, Plaintiff, Appellant,
v.
JIBAN CHANDRA CHANDRA and others, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 184—Sch. III, Art. 3—Bengal Tenancy Amendment Act I (B. C.) of 1907, sec. 61 3)—Suit for possession by mokarari *raiyat—Effect of the Amending Act of 1907—Special limitation of two years if applicable to suits instituted after the passing of the amending Act, but in which cause of action arose more than two years previous thereto—Right of suit, if a vested right—Construction of statute—Taking away of vested right without saving—Sec. 184, scope and meaning of—Decision of Privy Council on the construction of a different Act, binding effect of.*

The Plaintiff who had been dispossessed by his landlord in July 1903 sued in July 1909 for declaration of his title to, and possession of, a piece of land on the allegation that he had a mokarari raiyati *right therein:*

Held—*That the suit was not barred by the special limitation of two years prescribed by Art. 3, Sch. III, of the Bengal Tenancy Act and made applicable to all classes of raiyats by sec. 61 (3) of the Bengal Tenancy Amendment Act I (B. C.) of 1907 which was passed and came into operation on 11th May 1907.*

That the Plaintiff at the time when the amending Act was passed had a vested right of suit and there is nothing in the Act as amended that demands the construction that the Plaintiff was thereby deprived of that right. The law as amended may regulate the procedure in suits in which the Plaintiff could comply with its provisions, but cannot govern suits when such compliance was from the first impossible.

The facts in LALA SONIRAM *v.* KANAHAIYA LAL (2) *did not involve the position when a suit cannot be brought after the passing of the amendment, and the decision of the majority in* MANJHOORI BIBI *v.* AKEL MAHUMED (1), *so far as it relates to that position, has not been affected by the judgment of the Privy Council in* LALA SONIRAM *v.* KANAHAIYA LAL (2).

A right of suit is a vested right, and it is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still the intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature, unless it be expressed in unequivocal terms.

THE COMMISSIONER OF PUBLIC WORKS *v.* LOGAN (5), COLONIAL SUGAR REFINING CO. *v.* IRVING (6), JACKSON *v.* WOOLEY (7) *applied.*

This was an Appeal preferred on the 3rd of July 1911, against a decree of R. L. Dutt, Esq, District Judge of Bankura, dated the 12th April 1911, reversing a

(1) 17 C. W. N. 889: s. c. 17 C. L. J. 186 (1913).
(2) 17 C. W. N. 605: s. c. I. L. R. 35 All. 227; 40 I A. 74 (1913).
(5) L. R. [1903] A. C. 355.
(6) L. R. [1905] A. C. 369.
(7) 8 Ell. and Bl. 784 (1858).

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decree of Babu Debendra Prosad Bagchi, Munsif, Bishnupur, dated the 28th of February 1910.

This Appeal originally came on for hearing before Fletcher and N. R. Chatterjea, JJ., who differed on a point of law and delivered the following judgments from which the facts of the case will fully appear.

FLETCHER J.—This is an appeal against a judgment and decree passed by the District Judge of Bankura, dated the 12th of April 1911, reversing the decree passed by the Court of the Munsif of the 1st Court at Bishnupur The suit was brought for declaration of title to and possession of a certain piece of land of an area about 10 bighas.

The land in dispute was originally Ghatwali land held by one Kali Lohar the Ghatwal. In the year 1806, the Ghatwal granted to the Plaintiff's great-grandfather a temporary lease of the land in dispute for cultivating purposes.

In the year 1874 a renewed lease was granted to the Plaintiff's grandfather by a registered document. On the 1st of April 1879, documents were executed purporting to convert the holding into Mokarari.

In the year 1902, the Ghatwali land was resumed by the Maharaja of Burdwan, and the Maharaja settled the land with the former Ghatwal Kali Lohar in May 1902.

On the 28th June 1903, Kali Lohar sold the lands to the contesting Defendants who almost immediately dispossessed the Plaintiff of the same. The present suit was instituted in the month of July 1909. The Court of first instance decreed the Plaintiff's suit, but on appeal the learned District Judge reversed the decree passed by the Munsif.

On the appeal before us it was first argued that when Kali Lohar obtained the lands in 1002 in settlement from the Maharaja of Burdwan, the estate then conferred on him went to feed the estoppel created on the purported grant of the Mokarari interest to the Plaintiff's ancestor on the 1st of April, 1879, or at any rate by the acceptance of rent by Kali Lohar between May 1902 and June 1903 he had confirmed the lease to the Plaintiff. As to the question of estoppel, I agree with the Lower Appellate Court, and on the facts found I think that the acceptance of rent would amount to a confirmation of the tenancy of the Plaintiff. But before the latter points can avail the Appellant, it must be shown that his suit is not barred by limitation.

Now Sch. III, part I, Art. 3 to the Bengal Tenancy Act, 1885, provides that the period of limitation to recover possession of land claimed by a Plaintiff as an occupancy raiyat is two years from the date of dispossession. It has been decided in this Court that the Article only applied to suits by occupancy raiyats (See *Ramdhan Bhadra* v. *Ram Kumar Dey* (8).

But by sec. 61 (3), Act I (B C.) of 1907 the words "A raiyat or an under-raiyat" were substituted in Art. 3 in the place of the words "an occupancy raiyat."

Act I (B. C.) of 1907 came into force on the 11th of May 1907, and as I have already stated, this suit was instituted in the month of July 1909.

The argument put forward by the learned Vakil for the Appellant is that the statute of limitation that was in force when the cause of action arose, and not that when the suit was instituted applies to this case. Therefore as the cause of action arose before the passing of Act

(8) I. L. R. 17 Cal. 930 (1890).

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I (B. C.) of 1907, the present suit was brought in time.

In support of this argument reliance was placed on the decision in the case of *Manjhoori Bibi* v. *Akel Mahumed* (1).

That case was a decision of Mukerjee and N. R. Chatterjea, JJ. (Carnduff, J. dissenting) and is, if the case remains un affected by subsequent decisions, binding on us here.

The Privy Council, however, in the case of *Lala Soniram* v. *Kanhaiya Lal* (2), expressed the opinion that the Statute of limitation in force at the time of the institution of the suit and not that in force when the cause of action arose applied to the case before them.

Following on that decision Mukerjee and Beachcroft, JJ, held in the case of *Budhu Koer* v. *Hafiz Husain* (9), notwithstanding the view expressed by the Privy Council in the case of *Lala Soniram* v. *Kanhaiya Lal* (2), the decision of the majority of the Judges in the case of *Manjhoori Bibi* v. *Akel Mahumed* (1), remained unaffected. On the other hand, Coxe and Ray, JJ., in an unreported case, Second Appeal No. 4251 of 1910, which was cited to us during the argument declined to follow the decision in *Manjhoori Bibi* v. *Akel Mahumed* (1), having regard to the decision of the Privy Council in *Lala Soniram* v. *Kanhaiya Lal* (2). In this conflict of judicial authority, I prefer to follow the decision of Coxe and Ray, JJ, to that of Mukerjee and Beachcroft, JJ.

In my opinion both on principle and authority the amendment of Art. 3 of Sch. III, Part I of the Bengal Tenancy Act being an enactment relating solely to procedure applies to suits instituted after the amendment came into operation notwithstanding that the cause of action arose prior to the amendment.

I may also point out that Art. 6 to Sch. III, Part I of the Bengal Tenancy Act has been held by Mukerjee and Vincent, JJ, in the case of *Thakamani* v. *Mohendra Nath* (10), to be retrospective. It is not necessary for me to go through the earlier authorities. It is sufficient for the present purpose to say that I agree with the judgment of Carnduff, J., in *Manjhoori Bibi* v. *Akel Mahumed* (1).

N. R. CHATTERJEA, J.—Two questions have been raised in this Apeal. The first is whether the Plaintiff has a Mokarari right to the lands in dispute, and the second, whether the suit is barred by the special limitation provided by Article 3, Sch. III of the Bengal Tenancy Act.

The facts appear to be these The lands in suit were included in a Ghatwali tenure and the Ghatwal Kali Lohar granted a cultivating lease of the lands to the Plaintiff's grandfather in 1281. Subsequently, in 1285 a registered Mokarari lease was granted by the Ghatwal, and it is found that the Plaintiff's grandfather and then the Plaintiff's father were in possession of the lands down to 1309, when the ghatwali lands were resumed by the Government and settled with the Zemindar, who again settled the same in Mokarari with the Ghatwal Kali Lohar. The name of the Plaintiff's father appears as tenant of the land in the resumption proceedings. After Kali Lohar obtained the Mokarari settlement from the Zemindar, he sold the

Tenancy Act and W. N. 889 : s. c. 17 C. L. J. 3).
Classes of raiyats by N 605 . s. c. I. L. R 35 All.
Bengal Tenancy Amen A. 74 (1913).
(1913).

(1) 17 C. W. N. 889 : s. c. 17 C. L. J. 316 (1913).
(10) 10 C. L. J. 463 (1909).

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lands to the Chandra Defendants and they dispossessed the Plaintiff from the lands. Hence this suit.

Now, a ghatwal cannot create a permanent lease binding upon his successor, but Kali Lohar who granted the Mokarari to the Plaintiff's grandfather in 1285, acquired a permanent right to the lands in 1902. It is unnecessary to discuss the arguments addressed to us, and the authorities cited in connection with the question of estoppel. The title of the Plaintiff in the present case does not rest upon estoppel. The ghatwali was not resumed under any statute, but under an agreement between the Ghatwal, the Zemindar and the Government, and Kali Lohar by surrendering his ghatwali under the above arrangement could not affect the Mokarari right of the Plaintiff. In any case, it was perfectly open to Kali Lohar after he acquired a permanent interest in the land to confirm the permanent interest which he had professed to create in 1285, and it is found by the Court of first instance that he distinctly recognised the Mokarari title of the Plaintiff after the lands had been resumed and settled with him by the Zemindar, and before he sold the lands to the Chandra Defendants. This finding has not been displaced on Appeal, and is supported by evidence. The finding that the Chandra Defendants are *bonâ fide* purchasers for value without notice of the Mokarari title, therefore, does not affect the Mokarari right of the Plaintiff, and the provisions of sec. 27, cl. (*b*) upon which reliance was placed on behalf of the Respondents do not affect the question.

I am accordingly of opinion that the Plaintiff had a Mokarari title. But even if he had no Mokarari right, there can be no doubt that he had the right of a non-occupancy raiyat and the tenancy was recognised by Kali Lohar after resumption of the lands and before the transfer to the Chandra Defendants. The latter therefore had no right to dispossess the Plaintiff.

The next question is whether the suit is barred by the special limitation of two years prescribed by Art. 3, Sch. III, of the Bengal Tenancy Act. The Plaintiff, it is found, was dispossessed in July 1903 (Asar 1310) and the suit was instituted in July 1909. He had, as a raiyat holding at fixed rates or even as a non-occupancy raiyat, a period of 12 years within which he could sue for possession of the lands on declaration of his title. But Art. 3, Sch. III of the Bengal Tenancy Act which formerly applied only to occupancy raiyats, was amended in 1907 and made applicable to all classes of raiyats. The period of two years prescribed by that Article for a suit, had already expired from the date of Plaintiff's dispossession, when the amending Act was passed and the Act came into operation at once. The question therefore is whether the amending Act applies to the present case. The case of *Manjoori Bibi* v. *Akel Mahumed* (1), exactly covers the above point. The principle enunciated in that case has been recognised in *Bisheswar* v. *Jasoda Lal* (11), by the learned Chief Justice and Mallik, J., and the case has been followed in *Budhu Koer* v. *Hafiz Husain* (9), by Mookerjee and Beachcroft, JJ., but has been dissented from by another Division Bench of this Court (Coxe and Ray, JJ.) in the unreported case (Second Appeal No. 4251 of 1910) decided on the 16th August 1913. The decision of the majority in *Manjhoori Bibi's* case (1)

(1) 17 C. W. N 839: s. c. 17 C. L. J 136 (1913).
(9) 18 C. L. J. 274 (1913).
(11) 17 C. W. N. 622 (1913).

is binding on every Division Bench until it is overruled by a Full Bench of this Court or by the Privy Council The learned Judges Coxe and Ray, JJ, in the unreported case cited above, were of opinion that the matter is settled by the decision of the Privy Council in *Lala Soniram* v. *Kanhaiya Lal* (2). With every respect for the opinion of the learned Judges, I think the Privy Council did not decide the point of law which arose in *Manjhoori Bibi's* case (1) and which has been raised in the present Appeal.

The Privy Council had not to consider the special limitation provided for in the Bengal Tenancy Act, nor any statute of limitation coming into operation at once.

The question before the Privy Council was whether the Limitation Ac XIV of 1859 or the Limitation Act XV of 1877 was applicable to the case, and their Lordships observed: "The High Court rightly holding that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary, held that Act XV of 1877 and not Act XIV of 1859 was the Lmitation Act which was applicable to the suit." As a general proposition, the principle enunciated in the above passage cannot be disputed apart from the fact that it is laid down by the Privy Council; and in fact is recognised in the Judgments of this Court in *Manjhoori Bibi's* case (1). But the question, *viz*, whether an Act amending even a statute of limitation when it comes into force at once applied retrospectively so as to affect causes of action which accrued before the amending Act came into force where the period prescribed by the amending Act had already expired before it came into operation, was not before, and was not considered by, their Lordships. The question was not, and could not be raised in the case before the Privy Council, because there was an interval of time between the passing of Act IX of 1871 which repealed Act XIV of 1859 and Act XV of 1877 which repealed Act IX of 1871 and their coming into operation respectively. The principle therefore upon which *Manjhoori Bibi's* case (1) was decided, could not possibly apply to the case which was before their Lordships. Their Lordships were not dealing exhaustively with the whole law on the subject of the retrospective operation of the law of limitation, and the general observations made by their Lordships should, I think, be held to apply only to the particular point which was raised before and considered by their Lordships.

The case of *Lala Soniram* v. *Kanhaiya Lal* (2), has been considered by another Division Bench of this Court in *Budhu Koer* v. *Hafiz Husain* (9), cited above. The learned Judges (Mukerjee and Beachcroft, JJ.) treated the Privy Council decision as laying down merely that the law of limitation applicable to a suit is *primâ facie* the law in force at the date of the institution of the suit, and followed the ruling in *Manjhoori Bibi's* case (1). In the opinion of those learned Judges, therefore, the Privy Council did not overrule the law laid down in *Manjhoori Bibi's* case (1). I agree with the view taken in the case of *Budhu Koer* v. *Hafiz Hussain* (9),

(1) 17 C. W. N. 889: s. c. 17 C. L. J. 136 (1913).

(2) 17 C. W. N. 605: s. c. I. L. R. 35 All. 227; L. R. 40 I. A. 74 (1913).

(1) 17 C. W. N. 889: s. c. 17 C. L. J. 316 (1913).

(2) 17 C. W. N. 605: s. c. I. L. R. 35 All. 227; L. R. 40 I. A. 74 (1913).

(9) 18 C. L. J. 274 (1913).

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and I am of opinion that the suit is not barred by limitation.

Babu Mohini Mohan Chatterji (with *Babus Ambica Pada Chowdhury* and *Probodh Chandra Dutta*) for the Appellant:—In this case the dispossession by the landlord's assignee was in the beginning of July 1903, and the suit was commenced on the 9th July 1909. Under the law in force at the date of dispossession, the raiyat had twelve years to sue for the property. The amending Act came into operation the day it was passed, that is, on 11th May 1907. The effect of the amendment is to cut down the period from 12 years to 2 years from the date of dispossession, so that if the law is made to operate on pre-existing causes of action accruing more than two years before the law was passed, the Plaintiff was at once barred as soon as the Act came into force. The question therefore is—Is the amended Art. 3 retrospective in its operation? In other words, does the amended law apply retrospectively to causes of action which accrued more than the time limited by the new law, before the amending Act came into operation on 11th May 1907?

This point was considered in the case of under-raiyats under the Eastern Bengal and Assam Tenancy Amendment Act which came into operation on the 10th June 1908, and was answered in the negative [*Manjhoori Bibi* v. *Akel Mahumed* (1)] But Mr. Justice Fletcher in this case and a Division Bench in S. A. No. 425 of 1910 have taken the view that the dicision in *Manjhoori Bibi* v. *Akel Mahumed* (1) is not correct; and at any rate has been affected by the dicision of the Privy Council in *Lala Soniram* v. *Kanhaiya Lal* (2). Another Division Bench in *Budhu Koer* v. *Hafiz Husain* (9) has however held that the case in *Manjhoori Bibi* v. *Akel Mahumed* (1) is not at all affected by the decision of the Privy Council in *Lala Soniram* v. *Kanhaiya Lal* (2).

The case in *Lala Soniram* v. *Kanhaiya Lal* (2) is distinguishable. A reference to the facts of that case makes it clear. There was an interval of time between the passing of Act IX of 1871 or of Act XV of 1877 and their coming into operation. As to the effect of an interval being given *Bisheswar* v. *Jasoda Lal* (11) and *Towler* v. *Chatterton* (12), *Emperor* v. *Wilson* (13), the Privy Council was not dealing exhaustively with the whole law on the subject of retrospective operation of the law of limitation. In that case even after Act XV came into operation, the mortgagor had about 25 years within which he could sue. No question of retrospective operation could arise, for the question was whether a right of action could be kept alive by a stranger as against a person not claiming through him. See *Astbury* v. *Astbury* (14) A statute as a general rule is prospective. See *Young* v. *Adams* (15), *Abdus Samad* v. *Kushun Husain* (16), *Dulluh Dass*. v. *Ram Lal* (17). What is the meaning of retrospective?—Affecting past transaction, *Queen* v.

(1) 17 C. W. N. 887: s. c. 17 C. L. J. 136 (1913).

(2) 17 C. W. N. 605, I. L. R. 35 All 227, L. R. 40 I. A. 74 (1913).

(9) 18 C. L. J. 274 (1913).

(11) 17 C. W. N. 622 (1913).

(12) 6 Bing. 258 (1829).

(13) [1898] 2 Q. B. 547 at p. 553.

(14) [1898] 2 Ch. 111 at p. 118.

(15) [1898] A. C. 469.

(16) L. R. 31 I. A. 30, 37 (1903).

(17) 5 Moo. I. A. 109, 126 (1850).

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Ipswich Union (18), *Phillips* v. *Eyre* (19), Wilberforce, pp. 157-58; or as affecting rights acquired before the passing of the Act, *i.e.*, vested rights *Turnbull* v. *Forman* (20), *West* v. *Gwynne* (21) Maxwell (4th Ed.), pp. 321-23; Sedgwick, pp. 160. Right of action is a vested right *Doe* v. *Page* (22), *Knight* v. *Lee* (23), *Jackson* v. *Woolley* (7), *Re Joseph Suche* (24). A statute is prospective, unless a retrospective operation is clearly expressed in the statute in plain and unambiguous language. This is specially the case, when it affects vested rights of a limited class of persons *Young* v. *Adams* (15) or unless such a construction arises by necessary and distinct implication *Smith* v. *Callander* (25), *West* v. *Gwynne* (21), *Jogodanund* v. *Amritalal* (26) or where the enactment affects mere procedure and does not extend to vested rights. It is said, alterations in mere procedure are always retrospective, provided no injustice is done, but strictly speaking processual laws are not retrospective. See *Turnbull* v. *Forman* (20). An Act dealing with mere procedure cannot be rightly said to be retrospective, because it is only the subsequent procedure that it affects. Such an enactment cannot be said to affect any right which existed before it; statute of limitation is generally considered as dealing with procedure, *i.e.*, as affecting the form of the remedy (Story on Conflict of Laws, 8th Ed., 576), but if it affects the substance of the right itself it is substantive law, Austen VII, p. 611; Foote, p. 424 Storey, Art. 582. See *Krishna Mohun* v. *Okhilmoni* (27), *Gunga Gobinda* v. *Collector, 24-Perganahs* (28). Even if it deals with mere procedure, it ought not to be retrospective. Hardship is a material element in the construction of doubtful enactments (Craies, 94, Sedgwick, 208) *Delhi and London Bank* v. *Orchard* (29), *Re Ratansi Kalianji* (30).

Babu Sarat Chandra Roy Chaudhury, for the Respondent, conceded that the application of the amended law to the case will cause hardship. But having regard to the broad principle laid down in *Soniram's* case (2), considerations of hardship are inadmissible, specially as in this case Plaintiff had four years to sue before the amendment. The Privy Council lays down the principle that in the absence of distinct provisions to the contrary, the new law would apply.

[THE CHIEF JUSTICE—The principle would apply, where a suit could be brought after the passing of the amending Act.]

Reg v. *Dorabji Balabhai* (31) *Gurupadappa Basapa* v. *Virbhadrapa Irsemgapa* (3).

Similar questions of limitation arose also, when Act VIII of 1885 itself was passed.

[*Babu Mohini Mohan Chatterjee.*—The

(7) 8 Ell. and Bl. 784, 787 (1858).
(15) [1898] A. C. 469.
(18) 2 Q. B. D. 269 (1877).
(19) L. R. 6 Q. B. 1 at p. 23 (1870).
(20) 15 Q. B. D. 234 (1885).
(21) [1911] 2 Ch. 4 at p. 15.
(22) 5 Q. B. 767 (1844).
(23) [1893] 1 Q. B. 41.
(24) 1 Ch. D. 48 (1875)
(25) [1901] A. C. 297.
(26) I. L. R. 22 Cal. 767 (1895).

(2) 17 C. W. N. 605 : I. L. R. 35 All. 227 ; L. R. 40 I. A. 74 (1913).
(3) I. L. R. 7 Bom. 459 (1883).
(27) I. L. R. 3 Cal. 331 (1877).
(28) 11 M. I. A. 345 : s. c. 7 W. R. 21 (1867).
(29) I. L. R. 3 Cal. 47 P. C. (1877).
(30) I. L. R. 2 Bom. 157 (1877).
(31) 11 B. H. C. R. 117.

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Bengal Tenancy Act did not come into operation at once.]

In the case in *Reg* v. *Dorabji Balabhai* (31) also, the right was killed before it arose.

[*Babu Mohini Mohan Chatterjee*, refers to *Khusalbai* v. *Kubhai* (32), where the decision in *Reg* v. *Dorabji Balabhai* (31), is explained by Melville, J.]

Reads sec. 184, saving cl. (*2*). The converse case of enlargement of time is provided for, but not that of curtailment. Then the intention of the legislature must have been to make the amended limitation applicable to cases where the cause of action arose before the amendment.

[WOODROFFE, J.—The question referred is whether the Privy Council decision affects the correctness of the decision of this Court. That is the sole question.]

Then on that question there is a conflict.

[WOODROFFE, J.—The observation in Coxe and Ray, JJ.'s judgment was unnecessary.]

The principle is not whether the amending Act destroys a right of action, but whether it destroys a vested right. A right to sue is not a vested right. Cl. (*2*) of sec. 184, moreover, does by implication destroy the right to sue.

[STEPHEN, J.--The section says, suits which were barred by limitation would remain barred. Suits which were not barred, would be barred, if not instituted within the specified period. The section is against you.]

Refers to Bengal General Clauses Act, sec. 8.

[THE CHIEF JUSTICE.—This is not a repealing Act.]

Halsbury Laws of England, Vol. 27, p. 160.

[THE CHIEF JUSTICE.—The Legislature does not say, you shall not do that which you cannot.]

[CHATTERJEE, J.—Right to sue for recovery of property is more than a right to sue. It is a subsisting right in property.]

Refers to cases under the amended Art. 6, *Thakamani* v. *Mohendra Nath* (10); Art. 6 was amended at the same time as Art. 2. Right to execute a decree is as much a right as a right to sue.

Then look at the anomaly. A, whose cause of action arose 6 years before the amendment, has six years more after it to sue, whilst B, whose cause of action arose a year and 11 months before the amending Act, must sue within a month.

[THE CHIEF JUSTICE.—It is no anomaly. It merely means that law which applies to one class of cases, does not apply to another.]

Here the class of persons is the same.

Relies on *Cornhill* v. *Hudson* (33), referred to in Carnduff, J.'s judgment in *Manjhoori Bibi* v. *Akel Mahumed* (1) and accepted by Fletcher, J.

Babu Mohini Mohan Chatterjee, in reply. The decision of Kindersley V. C. on which *Cornhill* v. *Hudson* (33) was based was overruled in *Jackson* v. *Woolley* (7), in which also *Cornhill* v. *Hudson* (33) was cited.

(31) 11 B. H. C. R. 117.
(32) I. L. R 6 Bom. 26 (1881).

(1) 17 C. W. N. 889 : S. C. 17 C. L. J. 136 (1913).
(7) 8 Ell. and Bl. 784 (1858).
(10) 10 C. L. J. 463 (1909).
(33) 8 E. & B. 429.

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[THE CHIEF JUSTICE. Asked if sec. 28 of the Limitation Act applied to cases under the Bengal Tenancy Act.]

Yes; *Manjhoori Bibi* v. *Akel Mahumed* (1). Reads sec. 185.

[THE CHIEF JUSTICE. Can you say that part IV of the Limitation Act is incorporated in Chap. XVI of the Bengal Tenancy Act.]

[STEPHEN, J.—The point is considered in *Nund Kumar* v. *Ajodhya Sahu* (34)].

Gunga Gobinda v. *Collector, 24 Pergana*s (28). As to *Thakamani* v. *Mohendra Nath* (10), the question there was whether a co sharer's decree for rent was a decree for rent or decree for money and that has been settled by the Privy Council in *Pramada Nath* v. *Ramani Kanta* (35)

The JUDGMENT OF THE COURT was as follows:—

Owing to a difference of opinion, a point of law has been stated by Mr. Justice Fletcher and Mr. Justice N. R. Chatterjea under sec. 98 of the C. P. C., and the appeal has accordingly been heard upon that point only by five of the other Judges of the Court. The point of law stated is "whether the decision of the majority in the case of *Manjhoori Bibi* v. *Akel Mahumed* (1), has been affected by the judgment of the Privy Council in the case of *Lala Soniram* v. *Kanhaiya Lal* (2)." The actual decision of the majority in *Manjhoori Bibi's* case (1), was that the special rule of limitation extended to under raiyats by the amendment in 1908 of the 3rd Article in the 3rd Schedule of the Bengal Tenancy Act did not apply, where the dispossession was in 1898 and the suit for recovery of possession was instituted on the 25th of August 1908.

The judgment of the Privy Council in *Lala Soniram* v. *Kanhaiya Lal* (2) was concerned not with the special law of limitation, but with the general law as enacted in Act XIV of 1859 and Act XV of 1877. The suit in that case was instituted on the 4th March 1907, and was brought for the redemption of a mortgage. One defence was the bar of limitation. The Plaintiff sought to meet this plea by setting up certain acknowledgments, and relied on the fact that they had been given, when Act XIV of 1839 was in force. On the other side, it was argued that the case was governed by Act XV of 1877, and so the Plaintiff could not claim the benefit of the law as to acknowledgments contained in the earlier Act. As to this it was said by the High Court: "the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary: See *Gurupadappa Basapa* v. *Virbhadrapa Irsemgapa* (3). As Act No. XV of 1877 was in force when the suit was brought, and there is no provision in it limiting or postponing its application, sec 19 of that Act applied to the case." [*Shib Shankar Lal* v. *Soniram* (4)] This statement of the law was approved by the

(1) 17 C. W. N. 889: s. c. 17 C. L. J. 136 (1913).

(2) 17 C. W. N. 605: s. c. I. L. R. 35 All. 227: L. R. 40 I. A. 74 (1913).

(10) 10 C. L. J. 463 (1909).

(28) 11 Moore I. A. 345: s. c. 7 W. R. 21 (1867)

(34) 14 C. L. J. 292 (1911).

(35) 12 C. W. N. 249 (1907).

(2) 17 C. W. N. 605: s. c. I. L. R. 35 All. 227, L. R. 40 I. A. 74 (1913).

(3) I. L. R. 7 Bom. 459 (1883).

(4) I. L. R. 32 All. 33 (1909).

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Privy Conncil on Appeal, and it is this approval that is supposed to have affected the decision of the majority in *Manjhoori Bibi* v. *Akel Mahumed* (1). It certainly is not a decision on the same Act as that under consideration in *Manjhoori Bibi's* case, (1), and as it is the construction and effect of a different Act that was under consideration, the Privy Council judgment cannot be regarded as a direct authority on the Act not before it.

On the contrary, the essential conditions of the two cases are so distinct that in our opinion it cannot be said that the earlier decision is, in relation to the circumstances of this case, affected by the judgment of the Privy Council. It is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still, the intention to take away a vested right without compensation or any saving, is not to be imputed to the Legislature, unless it be expressed in unequivocal terms [cf. *The Commissioner of Public Works* v. *Logan* (5)]. That this view is not limited to those cases where rights of property in the limited sense are involved, is shown by the *Colonial Sugar Refining Co* v. *Irving* (6), where it was held that an Act ought not to be so construed as to deprive a suitor of an appeal in a pending action, which belonged to him as of right at the date of the passing of the Act. Equally is a right of suit a vested right, and in *Jackson* v. *Woolley* (7), the Court of Exchequer Chamber declined, in the absence of something putting the matter beyond doubt, to put on an Act a construction that would deprive any person of a right of action vested in him at the time of the passing of the Act. William, J. said: "It would require words of no ordinary strength in the statute to induce us to say that it takes away such a vested right."

Here the Plaintiff at the time when the amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the Plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act. It is not (in our opinion) even a fair reading of sec. 184 and the Third Schedule of the Bengal Tenancy Act as amended to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law as amended may regulate the procedure in suits in which the Plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. Its effect is to regulate, not to confiscate. There are thus two positions; where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment will apply, but where it could not, then the amendment would have no application. The facts in *Lala Soniram* v. *Kanhaiya Lal* (2), did not involve the second of these positions, and we therefore hold that the decision of the majority in *Manjoori Bibi* v. *Akel Mahumed* (1), so far as it relates to

(1) 17 C. W. N. 889 : s. c. 17 C. L. J. 136 (1913)
(5) L. R. 1903 A. C. 355
(6) L. R. 1905 A. C. 369
(7) 8 Ell. and Bl. 784 (1858)

(1) 17 C. W. N. 889 : s. c. 17 C. L. J. 136 (1913).
(2) 17 C. W. N. 605 : s. c. I. L. R. 35 All. 227 ; L. R. 40 I. A. 74 (1913).

GOPESHUR PAL v. JIBAN CHANDRA CHANDRA.

that position, has not been affected by the judgment of the Privy Council in *Lala Sumiram* v. *Kanhaiya Lal* (2), though it may perhaps be affected, if and so far as it lays down a similar rule for suits within the first of the two positions. This, however, is a point not before us, and on it therefore we do not express any definite opinion. Our judgment is on the question of limitation only, and the result is that we restore the decree of the Munsif with costs throughout.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No 3830 OF 1910.

MUKERJEE, J. BEACHCROFT, J. 1913, 8, April.

CHOWDHURY KIRTIBAS DAS, v. GOPAL JIU.

Mortgage—Plea that mortgagee benamdar, if admissible—Sons of mortgagor if may take it.

A usual mortgage decree was obtained by a mortgagee who put it into execution and the sale of the mortgaged property was notified to take place on a certain date when the sons of the mortgagor brought a suit for declaration that they were not bound by the mortgage or by the decree made on the basis thereof on the ground that the Decree-holder was not the real mortgagee, but only the ostensible mortgagee for the benefit of a real creditor and consequently he was not entitled to enforce the security though it stood in his name:

Held—*That the person named in the mortgage deed was entitled to sue on it and it was not competent to the mortgagor to dispute that the ostensible mortgagee was entitled to maintain the suit and the sons of the mortgagor were bound by the mortgage-bond equally with the executant and did not stand in any better position.*

This was an Appeal from a decision of Babu Khetralal Singha, Subordinate Judge, Cuttack, dated the 23rd of August 1910, reversing that of Babu Rakhal Chandra Bose, Munsif, Puri, dated the 14th of June 1909.

The material facts of the case will appear from the judgment.

Babu Susil Madhab Mullick for *Babu Provash Chandra Mitter* for the Appellant.

Babu Suresh Chandra Chackraburtty for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the first Defendant in a suit for declaration of title to immoveable property and for an injunction to restrain the sale thereof in execution of a mortgage decree. On the 7th October 1896 the first Defendant took a mortgage of the property from the other four Defendants. He subsequently sued to enforce the security and obtained the usual mortgage-decree on the 25th August 1899. The decree was put into execution in due course, and a proclamation was served on the 13th August 1908, under which the sale was notified to take place on the 15th September 1908. On the 25th August 1908, the Plaintiffs, who are the sons of the mortgagor, commenced this suit for declaration that they were not bound by the mortgage or by the decree made on the basis thereof, and, also for consequential relief. The Court of first instance held in substance that the Plaintiffs were bound by the mortgage transaction, and that they were only entitled to redeem, as they would have

(2) 17 C. W. N. 605: s. c. I. L. R. 35 All. 227: L. R. 40 I. A. 74 (1913).

CHOWDHURY KIRTIBAS DAS *v.* GOPAL JIU.

been if they had been made parties to the mortgage-suit. Upon appeal the Subordinate Judge has reversed that decision and given the Plaintiffs a decree, which practically nullifies the mortgage-decree to the extent of their interest in the property. The Subordinate Judge has based his judgment on the ground that the first Defendant was not the real mortgagee, that he was only the ostensible mortgagee for the benefit of a real creditor, and, that consequently he was not entitled to enforce the security though it stood in his name. In support of this position, he has invoked the authority of the decision in *Mahendra Nath Mukherjee* v. *Kali Prosad Johuri* (1). This view has been now assailed on behalf of the first Defendant as erroneous, and it has been contended that as the bond stood in his name, it was competent to him to sue to enforce the security. In support of this argument, reliance has been placed upon the case of *Satchidanand Mahapatra* v. *Balaram Gorain* (2), which was accepted as good law in *Hara Gobinda* v. *Purna Chandra* (3). In our opinion, there is no room for controversy that this contention is well-founded.

In the case of *Satchidanand Mahapatra* v. *Balaram Gorain* (2), it was ruled that a suit for foreclosure of a mortgage may be brought by the person named in the mortgage deed as the mortgagee, although he was in fact only the benamdar of the beneficial owner, and that such a suit should not be dismissed on the ground that the beneficial owner has not been joined as a party. The learned Judges add that the same point had been brought up for decision to this Court before and that it had been decided that the contract could be enforced by the parties who had entered into it and that the suit should not fail merely because the beneficial owner was not on the record. The earlier decision to which reference was thus made was apparently the case of *Sreenath Nag* v. *Chandra Nath Ghose* (4), where, as subsequently pointed out in the case of *Bhubaneswar Roy* v. *Jogeswar Chowdhurani* (5), it was ruled that in a case of mortgage where A advanced money taking a bond in the name of B, if a suit was afterwards brought in the name of B, the suit should not be defeated on the ground that he was merely the ostensible mortgagee; A was the person who sought to enforce the mortgage and as the Defendant had received the money from A, and chosen to contract with B, it did not lie in his mouth to object to the institution of the suit in the same form. It is clear, therefore, that if this suit were resisted by the mortgagor alone, it would not be competent to him to dispute that the ostensible mortgagee was entitled to maintain it. We are of opinion that the sons of the mortgagor, who are bound by the mortgage-bond equally with the executant, do not stant in any better position. The case of *Mohendra Nath Mukerjee* v. *Kali Prosad Johury* (1), where it was ruled that a benamdar as such is not entitled to maintain a suit for recovery of possession of immoveable property which stands in his name, is plainly distinguishable and does not touch the question now before us. As pointed out by Mr. Justice Mitter in the case of *Gopinath Chowbey* v. *Bhagwat Pershad* (6), so

(1) I. L. R. 30 Cal. 265 (1902).
(2) I. L. R. 24 Cal. 644 (1897).
(3) 11 C. L. J. 47 (1909).

(1) I. L. R. 30 Cal. 265 (1902).
(4) 17 W R. 192 (1872).
(5) 22 W. R. 413 (1874)
(6) I. L. R. 10 Cal. 697 (1884).

CHOWDHURY KIRTIBAS DAS *v.* GOPAL JIU.

long as benami system is recognised, it is to be presumed, in the absence of any evidence to the contrary, that a suit instituted by a benamidar has been instituted with the full authority of the beneficial owner, and any decision made in such a suit is as much binding upon the real owner as if the suit had been brought by the real owner himself. Under these circumstances, we must hold that the ground assigned by the Subordinate Judge for his decision cannot be supported.

The result is that this Appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with one variation. The Court of first instance allowed the Plaintiffs to redeem within three months from the 14th June 1909 and directed that in the mortgage accounts interest was to be calculated only up to date of the judgment. The time fixed for redemption has long since elapsed and we understand that the Plaintiffs have not availed themselves of the opportunity afforded to them. In the circumstances of the present case, we think that as the decision of the first Court is to be restored, a fresh date must be fixed for redemption. *Noor Ali* v. *Koni Meah* (7), *Nam Narain* v. *Raghunath* (8), *Tarachand* v. *Brojo Gopal* (9). We accordingly direct that the records be sent down to the Court of first instance and that accounts be taken of the sum due under the mortgage-decree up to the date of the account (*Kedar Lal* v *Bishen* (10), *Gangadas v. Jogendra* (11), *Gurdeo* v. *Chandrika* (12) and that the Plaintiffs be allowed to redeem within 15 days of the date when the sum payable for redemption has been notified to them after determination by the Court of first instance. The Defendant Appellant is entitled to his costs both here and in the Court of Appeal below. If the Plaintiffs do not redeem within the time allowed, the suit will stand dismissed with costs in all the Courts.

Appeal allowed.

(7) I. L. R. 13 Cal. 13 (1886).
(8) I. L. R. 22 Cal. 467 (1895).
(9) 17 C. L. J. 120, 122 (1912).
(10) L. R. 31 I. A. 57 : s. c. I. L. R. 31 Cal. 332 (1903).
(11) 5 C. L. J. 315, 323 (1907).
(12) 5 C. L. J. 611, 637 (1907).

THE

Calcutta Weekly Notes.

Vol. XVIII.] MONDAY, MAY 25, 1914. [No. 28.

Contents.

NOTES

Sir Henry Prinsep and Public Services Commission.

We publish below a letter from Sir Henry Prinsep which speaks for itself. We express our sincere regret for having done him the injustice of expressing our opinion, in ignorance of the fact mentioned in his letter, that it would have been better, if he had offered to give evidence before the Public Services Commission instead of writing to the "Nineteenth Century" on the questions awaiting the deliberations of the Royal Commission. We are also surprised to learn that he did actually offer to give evidence before the Commission and the Commission did not consider it worth their while to examine him. We have no hesitation in saying that the Commission has committed a blunder in not receiving the evidence of this veteran Indian Official. There are few members of the Indian Civil Service who have had such a thorough and practical experience of the Executive, Revenue and Judicial administration in Bengal. As Judge he and the late Mr. Justice Macpherson commanded unbounded confidence not only of the legal profession, but also of the litigating public and their example is worthy of emulation by the members of the Indian Civil Service who are desirous of qualifying themselves for the High Court Bench.

Report of the Prisoners' Aid Society.

The Report of the Calcutta Prisoners' Aid Society which was laid before its General Committee at a meeting held in the Old Sessions Court of the Calcutta High Court on Friday last shows a steady advancement of the objects of the Society. During 1913, 71 prisoners were helped, of whom 28 were Europeans and 43 Indians. The former received a temporary aid in the shape of food and clothing and passage money as preliminary to their settling down in life or finding some employment. The total cost incurred on their behalf was Rs. 263 6-9. Of the Indians, all except five were helped in the Society's Book-binding shop. The monthly average of men employed in the book-shop was 22.5, and the wages paid to them during the year amounted to Rs. 2,201-13 8. The working of the Society regarded even from a business point of view is also very satisfactory as the following figures would show.

> The year opened with a balance of Rs. 5,856 7-2, the receipts amounted to Rs. 9 635 9-1, the expenditure to Rs. 9,316 12-9 and the year closed with a balance of Rs 6,175-3-6 with an additional sum of Rs. 269-12-0 due to be credited to the closing balance.

The Society has during the year incorporated itself under sec. 26 of the Companies Act. The Society is to be congratulated for having been able to acquire a very desirable site in Rani Sarnamoyi's Road near Sealdah, a plot of land, one bigha and three cottahs, through the co-operation of the Calcutta Municipal Corporation and the Bengal Government. The Government of Bengal paid Rs. 26,450 for the acquisition of the land and imposed the condition amongst others that the Society should be registered under the Companies Act. The estimated cost of the building and the boundary wall that the Society propose to put up there is Rs. 27,000 and the Society also propose to acquire new machinary and plant for book-binding and printing which is likely to cost Rs. 3,000. The Society is thus urgently in need of this money and having regard to the very useful work they have been doing, we are sure that they will receive more generous support from both the legal profession and the public than they have hitherto. We invite particular attention to the following appeal with which the Report for the year 1913 closes.

> It will be noticed that our subscription list for 1913 falls short of the Rs 2,500 0 0 which we stated last year that we required: and an analysis of the names of the subscribers shows that some branches of the Profession are not as fully represented as could be wished We are, however, now asking for capital in order to make a fresh start on a permanent basis. Hitherto, we have been trying experiments in any way that suggested itself. After seven years' experience, we feel that we are justified in appealing to our record

of the work we have done, as a reason why the Society should be put on a footing that may enable us to develop our work as far as is possible

The Incorporated Law Society's Lecture course for articled clerks.

The Incorporated Law Society has, we are glad to see, arranged for a course of lectures to be given to Articled Clerks on the subject in which they are to be examined. The movement is a good one, and we wish the Society every success in its undertaking and congratulate its Committee upon this fresh evidence of their energy. The lectures at present arranged are as follows:—The Law relating to Solicitors—Mr. M. M. Chatterjee, M. A., B. L., Hindu and Mahomedan Law—Mr. Raj Chunder Chunder, M. A., Criminal Law and Practice—Mr. A. E. Martelli, B. A., Commercial Law—Mr. F. M. Leslie, B. A. Mr. Gonesh Chunder Chunder gave an inaugural lecture to Articled Clerks on Saturday the 9th May 1914, and while publishing the same, we commend his words not merely to those who hope to become Solicitors, but to many others.

CURRENT INDIAN CASES.

(CIVIL.)

Appeal—Transfer of Property Act.

M. NARASAYA *v.* UNDU ROJAHA, I. L. R. 37 Mad. 1.

There is not to be found in the sections of the Code which relate to the powers of an Appellate Court or in the rules any provision which corresponds to Or. LVIII, r. 1 of the English rules of the Supreme Court that all appeals shall be by way a re-hearing and it cannot be said that a statute passed during the pendency of an appeal should control the decision thereof.

Sec. 51 of the Act does not apply in terms as between landlord and tenant.

Sec. 269, C. P. C. (Act XIV of 1882)—Rules framed under.

RE THE DISTRICT MUNSIF OF TIRUVALLUR, I. L. R. 37 Mad. 17.

Until rules are made by the High Court, the rules made by Government under sec. 269 of the Code of Civil Procedure are in force.

Sale by Court—Evidence.

VIRUTHMOYEE *v.* RAMANUJA ROW, I. L. R. 37 Mad. 220.

The state of the law as understood at the time is evidence to be considered with the other evidence in the particular case in determining what the Court intended to sell and what the purchaser understood that he bought. In determining the question of what the Court intended to sell and the purchaser understood he bought, evidence as to how the parties affected by the transaction themselves viewed it at the time is of much greater value than evidence which may be procurable some twenty years after the transaction took place.

Decree which cannot be appealed against.

SECRETARY OF STATE FOR INDIA *v.* SAMINATHA KOWNDEN, I. L. R. 37 Mad. 25.

Where the decree is entirely in favour of the Appellant, he cannot appeal against it.

Civil Procedure Code, s. 2, 47.

LAKSHMI *v.* MARU DEVI, I. L. R. 37 Mad. 29.

According to sec. 2, C. P. C., "the determination of any questions within sec. 47" is a decree. The question whether a decree is executable or not is certainly one that comes within this definition.

Guardians and Wards Act, sec. 7 (2).

ARUMACAN CHETTI *v.* DURALSINGA TEVOR, I. L. R. 37 Mad. 38.

The Court's order appointing a guardian under the Act will have the effect of removing any other guardian.

The want of authority of a *de facto* guardian is a good defence to a suit brought by a mortgagee to enforce his mortgage against a minor.

Civil Procedure Code, Or. 21, r. 46.

NATARAJA IYER *v.* THE SOUTH INDIAN BANK, I. L. R. 37 Mad. 51.

The language of r. 46 which treats as moveable property a debt not secured by a negotiable instrument is undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage.

Correspondence.

TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."

SIR,—It is unfortunate that you omitted to send it to me before, because I now learn for the first time of your criticism of my article in the *Nineteenth Century Magazine* on the Indian Civil Service. At this distance of time it is impossible to continue any discussion on this subject much as I would desire to do so.

But there is one portion of your comments that calls for a protest from me. You have stated that you "think on the whole that it would be more consistent with dignity and conducive to public interest if Indian Civilians in retirement who have any advice to offer to the Commission were to come forward as witnesses instead of contributing articles to periodicals." And you accuse me of thus attempting to mislead the Public Services Commission in a manner which amounts practically to a contempt of Court, seeing that it performs *quasi*-judicial functions, though it may not be technically so.

You are no doubt aware that the Public Services Commission is competent to invite any one to appear before it for examination, and I think that I may also take it that you have observed that the Commission has not thought proper to examine one of the numerous Indian Civilians in London who have retired after long service in India. To exclude the evidence of these cannot have been expected, by you—and yet it has been so. I certainly had some reason to believe that

at least in determining the future of the Judicial Service in India, my evidence would have been valuable. It will probably surprise you to learn after your remarks that I have quoted, that my endeavour to get examined more than one year ago was met by being told that the Commission did not intend to take any evidence in England on the first part of their inquiry as they were satisfied with the immense mass of evidence that they had taken in India. A prominent Member of the Public Services Commission, before his appointment to it, held up the opinions of "sundried bureaucrats" to derision. The Commission has certainly not removed this stigma, the justice of which I venture to hope will not be accepted in India.

LONDON, H. T. PRINSEP.
April 28, 1914.

ATTORNEYS' LIBRARY,
HIGH COURT, CALCUTTA.
Dated the 20th May 1914.

FROM

F. M. LESLIE, ESQ.,
Hony. Secy., Incorporated Law Society of Calcutta,

TO

THE EDITOR,
Calcutta Weekly Notes.

DEAR SIR,

With the permission of the Officiating Registrar I now send you a copy of his letter to me No. 938, dated the 16th May 1914. The matter to which it relates is of much concern to the Public and the Profession and I trust that in the interests of all concerned, you will find room for Mr. Remfry's letter in your hospitable columns.

Yours faithfully,
F. M. LESLIE,
Hony. Secy.

16th May, 1914.

FROM

MAURICE REMFRY, ESQ.,
Offg. Registrar, High Court, Calcutta, Original Jurisdiction,

TO

THE HONORARY SECRETARY,
Incorporated Law Society, Calcutta.

Present:
The Hon'ble
The Chief Justice.
Mr. Justice Chitty.
Mr Justice Chaudhuri.
Mr. Justice Imam.

SIR,

Complaints as to the length of time some cases have appeared on the Peremptory list of defended cases have been brought to the attention of the Hon'ble the Chief Justice and the Judges on the Original Side. I have the honour to inform you that the position has been carefully considered, and in the opinion of their Lordships the most satisfactory solution is as follows:—

The Peremptory list of defended cases before each Judge on the Original Side should ordinarily contain fifteen cases. Every case, however, shall be liable to be heard on any day it appears on the list, not necessarily by the Judge on whose list it stands at the beginning of the day; but, by any other Judge if the exigencies of business so require, as where a list breaks down. This will apply to all defended cases, whether Commercial Liquidated Claim, or otherwise. In all cases, therefore, appearing on the Peremptory list the parties must be prepared to go to trial, and applications for adjournment will not be entertained on the ground that the parties are not ready either by reason of the absence of witnesses or the difficulty of obtaining the services of their Counsel or otherwise.

I am directed to ask you to place this letter before your Committee or Members and that any suggestions you may desire to make be sent to me as early as possible.

I am further directed to request you to call the attention of your members to the new Rules regarding the prospective lists, which are not being utilized to the extent they should be.

I have the honour to be,
SIR,
Your most obedient servant,
(Sd.) MAURICE REMFRY,
Offg. Registrar.

MR. G. C. CHUNDER'S ADDRESS TO ARTICLED CLERKS.

GENTLEMEN,—The objects of the Incorporated Law Society are, among other things, to promote honourable practice to repress malpractice . . . . to decide all questions of professional usage or courtesy between or among Solicitors, to encourage the study of law by articled clerks and to promote information on legal subjects by lectures and discussions.

It has been lately noticed by the members of our profession and of the Bar that the young men who have lately joined our ranks, though qualified in other respects, are not up to the proper mark in their work for this profession specially on the practical side of it It has been frequently observed with great regret that the character of some Solicitors requires to be looked after, and that our Society should have for its object the promotion of honourable practice and repression of malpractice. It is lamentable that there should be occasion for this state of things, and this, among other objects, should have to be placed prominently before the young men of the profession. It has been decided by our Committee that attempts should be made by availing of the services of well-known members of the profession to have a series of lectures on those matters for which the present articled clerks have no other means of acquiring any knowledge or idea.

The object of these lectures is to assist you in obtaining such practical insight into the profession as is expected to be of use and value to you in after life.

Our profession is one of great responsibility, and being in direct touch with clients and having the conduct of their affairs under our guidance, the responsibility becomes very onerous, and imposes great circumspection and foresight in our dealings with them. You should never lose sight of this aspect and spare no effort to act with that due and deliberate caution which the urgency of the occasion would require, and let it be a rule with you that you should never jump to a conclusion and proffer your advice, unless you are convinced yourself of the soundness and propriety of the course you would advise to be followed. Conscientious discharge of your duties is sure to ensure result to the satisfaction of yourself and your client. You should never consider it a trouble or worry, when you undertake to do

a work, to give a patient hearing to all the narration your client has to make. Do not forget that the client is not a trained lawyer and has not that insight into the mysteries of law which would enable you to understand his position and locate his rights or wrongs. He would talk, as he would think best or as he had been told by his numerous lay advisers to talk to you. Your duty will be to get out of him all such facts and circumstances as would enable you to advise him A careful perusal of all written documents shall always be your rule, for therein you will find safe and sure indications of the course pursued by your client and of the intentions he had in view in his dealings and help you to fix the line of conduct you may adopt or advise him to adopt. Be pains-taking and thorough in the foundation you lay, for a weak foundation will not admit of a desirable structure. Always keep in mind that the ground work, if properly laid, would relieve you of great anxieties in the future construction and maintenance of your work.

You should always aim to be accurate and precise in all your communications. It need hardly be pointed out that the habit of accuracy and precision, if once acquired, would be very helpful in your dealings, and you would be able to grapple with your subject rather than wander about it.

You should always be plain and straightforward in your work. This will make it easy for you to find out what you have to do and what is required, if you and your work would go on smoothly

Your dealings with your colleagues in the profession should be that of a gentleman with a gentleman. You will remember that your colleague is similarly situated as you are, and has common interest with you in maintaining the welfare of the profession. Frank and sincere dealings will facilitate rather than impede work, and will tend to cultivate feelings of comradeship which should be the aim and object of members of the same profession.

You should always bear in mind that you owe a duty to the community and that duty can be discharged faithfully, if you are honest and sincere. Your object should be not to foment litigation or encourage the same, but to guide it honourably and conscientiously.

The effects of litigation on the community have been discussed in other spheres, but I regret to say not to the credit of the profession. Your aim should be to make united efforts to remove so much of the stigma as is possible, and I can tell you from my own experience that an honest effort to minimise the evils of litigation and to avert the recklessness of litigants has never been unsuccessful.

Finally, I have to say a few words as to what you should do after your enrolment. You should not forget the oath of allegiance to the Soverign and you should lead a respectable life and become useful members of the community. You should not fancy to yourself that your success in the various examinations in law you had to undergo has given you a full and perfect knowledge of law. Always bear in mind that law is a progressive science and a study of it is necessary to keep you abreast of the times. I find in my experience that many promising young men having neglected to keep up their study, marred their prospects in the profession. Apart from the delight you will feel in noticing and appreciating the gradual development of legal principle as embodied in judgments of the Courts of law and the masterly text-books you will derive this practical benefit that you will be always up to date and would never feel embarrassed or taken aback in your work The stigma attached to an inadequately informed legal adviser brings discredit not only to himself, but to the profession, and I am sure you will always keep prominently before you the dignity of the profession, and you will not hesitate to contribute your share in maintaining and upholding the same. If you are well stocked in your legal knowledge and be of good cheer and exemplary in the discharge of the duties you owe to Society and do not depart from the path of rectitude in your conduct, you are sure to be successful to the benefit of yourself, welfare of the community and honour of the profession.

We are all very thankful to those gentlemen, who have kindly offered to give lectures from time to time in furtherance of the objects of our society, and we also thank those gentlemen who have suggested this course of action.

May the lectures so to be delivered be productive of real good to the young men to whom they are to be addressed, and may those lectures be of permanant benefit to this Society in general and to those who are qualifying themselves for being admitted as attorneys in particular.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, and CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE NO. 3930 OF 1910. ABDUL GANI SAFIANI, Plaintiff, Appellant *v.* LUTFUNNESSA BIBI and others, Defendants, Respondents. 15th April 1914.

Second appeal—Law, question of—Misreading of deposition—Deposition by a deceased member—Admissibility in evidence—Evidence Act (I of 1872), sec. 32, cl. (5).

The suit was for recovery of possession after declaration of title to a share in certain immoveable property originally belonging to a Mahomedan family. The suit was dismissed by both the Courts below.

In a suit brought in 1885, Kamaruddin whose estate was represented by Lutfunnessa Bibi, one of the Respondents, and who was a member of a Mahomedan family, had deposed that his father's step brother Dagu had predeceased the latter's father Najeemuddin. The lower Appellate Court said:—"If so, Dagu never succeeded to any share in the property in suit, and the Plaintiff, who purchased from a descendant of Dagu, clearly had no title." *Held*, that this misreading of the deposition was not a question of law. *Himmut Ali* v. *Nyamutoolah* (1875) 23 W. R. 250, referred to.

The deposition by a member of a family as to the non-existence at a particular time of one who had also been a member of it, was admissible under sec. 32 cl. (5) of the Evidence Act.

Babu Rajendra Chandra Guha for the Appellant.

Moulvi A. K. Fuzlul Huq for the Respondent.

A. T. M. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN.
SIR JOHN EDGE.
LORD MOULTON.
MR. AMEER ALI.
1914,
Heard,
11, March.
Judgment,
25, March.

HARENDRA LAL ROY CHOWDHURI, Appellant,
v.
SRIMATI HARI DASI DEBI and others, Respondents.

Registration in fraud of Registration law—Fictitious entry of property to give jurisdiction to Registering officer in Calcutta to register a mortgage of properties in mofussil—Suit on mortgage in Original Side—Jurisdiction—Decree if binds purchaser after mortgage and before decree—Amendment of description of parcels so as to bring document within Court's jurisdiction, if binds strangers—Rectification—Mutual mistake—Onus—Evidence of mistake—Admissibility—Concurrent finding of fact, based on no evidence.

When in order to obtain registration at the office of the Sub-Registrar of a particular district, of a conveyance relating to properties no part of which is situate within that district, the parties to the conveyance make a fictitious entry of an item of property purporting to be within that district, the entry is a fraud on the Registration law and registration obtained by means thereof is invalid.

Such a fictitious entry in the conveyance cannot give jurisdiction to a Court, whose jurisdiction is limited to deeds concerning immoveable properties within that District, to entertain a suit to enforce such conveyance.

The inclusion of non-existing property purporting to be situate within the District would not, even apart from fraud, give the Sub-Registrar authority to register the document, nor jurisdiction to the Court whose jurisdiction is limited to properties within that district to entertain a suit to enforce the document, and its decree would be invalid.

Where in such a suit, the Court at the instance of the parties allowed the description of the property to be so amended as to correspond to property actually existing within its jurisdiction and then, holding that it had jurisdiction, passed a decree :

Held—*That the decision that it had jurisdiction, if erroneous, could not extend the jurisdiction of a Court of limited territorial jurisdiction, and neither the direction to amend nor the decree could bind strangers who had acquired title in the property before the date of the amendment, nor render valid the registration—if they could establish that no portion of the property conveyed was within the jurisdiction of the Registering officer.*

Quære :—*Whether such amendment came within the scope of the suit which was in no respect a suit for rectification.*

The proper description of houses in towns for the purpose of registration is by the street in which they are situated and the number which they bear in that street.

Where a stranger to a mortgage-decree passed in the Original Side of the High Court, who had previous thereto acquired a title in property actually intended to be conveyed (all of which was outside Calcutta) proved that there was no property in Calcutta bearing the street name and number given to the only item of Calcutta property included in the mortgage, and that the property in Calcutta which in fact answered the description of that property by metes and bounds given in the mortgage deed did not belong to the mortgagor :

Held—*That the onus of proving (as it was open to him to prove) that there was a clerical or other error in the description of the property and that in fact an existing property situated in Calcutta was intended*

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by both parties to be mortgaged was on the mortgagee decree holder.

That to prove this the mortgagee should have examined himself as also his mortgagor.

That as no evidence whatever was given to prove this case, it was not open to the Courts in India to come to the conclusion that the entry of the property was a mistake.

Evidence to show that the mortgagor had purported to mortgage with other mortgagees the same property under the same description and had been compelled by them to consent to rectification was irrelevant at the trial to prove that the entry in the document was a mistake.

That the principle of concurrent findings of fact did not apply to such a case as it was a case of no evidence, and it was open to the Privy Council to hold from the conduct of the mortgagee in not examining himself or his mortgagor and from other evidence in the case, that the entry was intentionally fictitious.

A decision that there is no evidence to support a finding is a decision of law.

This is an Appeal from the Judgment and two several decrees, dated the 3rd March, 1909, of the High Court of Judicature at Fort William in Bengal, which reversed the decree, dated the 31st May, 1906, of the Subordinate Judge of Midnapur in Suit No. 318 of 1905.

The said suit related to a half-share formerly held by Fakir Chandra in Mahal Gumokpota, situated in the district of Midnapur. The said lands were attached before Judgment in Suit No. 16 of 1892, brought by Hari Dasi, Respondent, against the said Fakir Chandra. That suit resulted in a decree for Rs. 20,800 and the attachment was continued and renewed after decree. While the property was under attachment, Hari Dasi paid Rs. 1,700 in respect of arrears of Government dues on the lands and got a decree for the amount against Fakir Chandra and obtained a decree declaring this sum to be a charge on the lands. A further sum having accrued due thereon for road-cess the said lands subject to attachment were brought to sale in 1893 and purchased for Rs. 800 by one Marik who sold them to Hari Dasi. Subsequently, only small sums having been paid towards satisfaction of the Decree in Suit No. 16 of 1892 Hari Dasi proceeded to execute it by the sale of the lands which were bought by Hari Dasi. She then obtained a certificate of sale in the ordinary course and she afterwards mortgaged them to the third Respondent.

In 1895 Mani Mohan mortgaged the said lands to the present Appellant. The mortgage deed purported to mortgage *inter alia* a house 25 Raja Gurudas's Street in Calcutta and this led the Registrar of Assurances in Calcutta to register it, and the High Court to pass a decree thereon to which Hari Dasi was not a party.

On the 16th September, 1905, the present Appellant instituted the present suit against Hari Dasi and her mortgagee joining Mani Mohan as second Defendant *pro forma*, and he prayed for *inter alia* a declaration "that no right of ownership or possession has accrued to the female Defendant" in the said lands "by virtue of her auction-purchase as described in the plaint." The Plaintiff's case was that the decree in Suit No. 16 of 1892 was fraudulent on the part of Hari Dasi and collusive and was barred by limitation at the date on which it was executed.

On the pleadings issues were framed as follows :—

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1st. Has the Plaintiff any cause of action for this suit?

2nd. Has the Plaintiff any right to maintain this suit?

3rd. Is the suit barred by limitation?

4th. Is the suit barred under Civil Procedure Code, sec. 244?

5th. Is the suit maintainable in its present form?

6th. Is the plaint properly stamped?

7th. Did the Defendant No. 1 acquire any title to the property in question by her alleged purchase in execution of the decree stated in the plaint?

8th. Is the Plaintiff entitled to the relief prayed for?

The Subordinate Judge held that the suit was not barred by limitation and that it was maintainable as framed. He further held that Hari Dasi acquired no title by her purchase at the Court sale, and that the lands were the property of her husband, whom he considered the real purchaser from Marik. He further recorded his finding that the agreement of compromise and the deed of release were the deeds of Hari Dasi and were binding on her. He overruled the objections taken to the mortgage and decree held by the Plaintiff in the following words:—

"It is contended that the Plaintiff has no right to bring this suit. The contention is this:—the Plaintiff is the mortgagee of Mani Mohan who mortgaged the disputed property which is in Midnapur, some property in Hooghly, and a house, 25, Raja Gurudas's Street, in Calcutta. The mortgage deed was registered by the Sub-Registrar of Calcutta. Now it is admitted on all hands, and, in fact, it is proved that there is no such house as 25 Raja Gurudas's Street. The Plaintiff's case is that what was mortgaged was 25, Ashutosh Dey's Lane, Calcutta, and not 25 Raja Gurudas's Street. The defence is, that 25, Ashutosh Dey's Lane, did not belong to Mani Mohan. So, there was no property of Mani Mohan in Calcutta that had been mortgaged, and so the Sub-Registrar of Calcutta had no jurisdiction to register the deed, and the High Court in its Original Jurisdiction had no jurisdiction to try the mortgage-suit instituted by the Plaintiff, and that, consequently, the decree obtained by the latter was passed without jurisdiction, and is a nullity.

"First, as regards the title to the house in question. It is admitted by the Plaintiff's pleader that there is no such house as No. 25, Raja Gurudas's Street. The Plaintiff's case is that it was mistaken for 25, Ashutosh Dey's Lane. It appears from the deed of rectification (Ex. 20) executed by Mani Mohan in favour of one Preo Nath Bose, when he had executed a mortgage, that Mani Mohan by mistake had mortgaged 25, Raja Gurudas's Street, whereas it should be 25, Ashutosh Dey's Lane. This was in October 1897. The deed of rectification does not, however, state that 25, Ashutosh Dey's Lane belongs to Mani Mohan.

"From the evidence adduced it appears that this house belonged to one Nistarini Debi, who sold it to Basanta Kumari Dasi, by a registered kobala in Falgun 1214 = March 1888. It appears that Basanta Kumari mortgaged this house to one Hem Chandra Mukerji, and then sold the house to Khemankari Debi on the 13th January 1890. This Khemankari paid the mortgage-money, and Hem Chandra Mukerji executed a deed of release in favour of Khemankari on the 15th January 1890. So, it will appear that the house never belonged to Mani Mohan. At the

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time of the mortgage to the Plaintiff, the house belonged to Basanta Kumari, and, when Mani Mohan executed his deed of rectification in October 1897, the title of the house had passed from Basanta Kumari to Khemankari Debi.

"So, it is urged that when the mortgage-deed did not cover any property in Calcutta which belonged to Mani Mohan, the Sub Registrar of Calcutta had no jurisdiction to register the document, that is, the question is—if the mortgagor had no property *of his own* in Calcutta, was the bond (registered as it was by the Sub-Registrar of Calcutta) duly registered? I am of opinion that the Sub-Registrar of Calcutta would have jurisdiction if the bond purported to mortgage any property actually existing in Calcutta. Sec. 28 of the Registration Act enacts that a Sub-Registrar has jurisdiction to register a document when the whole or some portion of the property to which *such document relates* is situated within his sub-district. In the case before me, the document certainly *relates* to an existing property in Calcutta, and the Sub-Registrar had jurisdiction to register the document if the description as required by sec. 21 (*b*), sufficiently identified the property. Sec. 28 does not say that the property to which the document relates must belong to the executant of the document, and the Registrar or the Sub-Registrar cannot, of course, enter into the question of title. A mistake in the number or the name of the Street would not, I think, invalidate the registration provided the boundaries, area &c., sufficiently identify the property.

"Here I may state that the boundaries of the house and the area of the land on which the house stands, as given in the mortgage-deed, tally exactly with those given in Nistarini's kobala in favour of Basanta Kumari. So the description given in the mortgage deed identifies 25, Ashutosh Dey's Lane. The number also agrees, only the name of the Street was a mistake. Then I may say Raja Gurudas's Street and Ashutosh Dey's Lane are very near to each other. I hold that the description is sufficient to identify the property and the Full Bench decision in *Baijnath Tewari* v. *Sheo Sahoy Bhagut* (1), does not apply.

"I, therefore, hold that the registration was valid. It has not been suggested that there was any other irregularity; and, even if there was any other defect in procedure by the Sub-Registrar, the same may be cured by sec. 87 of the Registration Act.

Then the question is raised whether the High Court had jurisdiction to entertain and decree the Plaintiff's suit on the mortgage-bond. I am inclined to answer the question in the affirmative. The proper scope of a mortgage suit is to cut off the equity of redemption, and to bar the rights of the mortgagor and of those claiming under *him*. *Other* persons cannot be made parties to a mortgage-suit, and the mortgagor's title to any of the properties comprised in the mortgage cannot be investigated in such a suit. [*See* the elaborate judgment of Mr. Justice Mookerjee, reported in *Joggeshur* v. *Bhuban Mohan* (2)]. Under cl. 12 of the Calcutta Letters Patent of 1865, the High Court has jurisdiction to try suits relating to lands lying wholly or partly within the local limits of the Ordinary Original Jurisdiction of the said Court. And, I think, the jurisdiction of the Court would not be ousted, even if the

(1) I. L. R. 18 Cal. 556 (1891).
(2) I. L. R. 33 Cal. 425 (1906).

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Plaintiff fails to *establish* his right to that part of the property which lies within the local limits of its Ordinary Original Jurisdiction. It may be *otherwise*, if the Plaintiff *fraudulently* includes a property in his plaint for the purpose of giving jurisdiction to the High Court. But, in a suit on a mortgage-bond comprising properties in Calcutta and outside, the Plaintiff mortgagee can hardly be found to be guilty of such a fraud. In fact, there is absolutely nothing before me to hold that the Plaintiff is guilty of such a fraud. I hold that the High Court's decree is valid, and the Plaintiff is entitled to bring this suit." He made a decree in Plaintiff's favour.

Against the said decree appeals were preferred by Hari Dasi and her mortgagee the third Respondent.

The said Appeals came on for hearing before the High Court in December, 1908, and judgment was delivered on 3rd March, 1909.

Their Lordships (Caspersz and Lalmohun Dass, JJ.,) held that the Plaintiff's mortgage and decree were not invalid. They also were of opinion that the suit was not barred by limitation or by the provisions of Civil Procedure Code, sec. 244. On the other hand they negatived the existence of any collusion between Hari Dasi and her husband and expressed the view that he imposed on her. They held that the release and agreement above referred to were invalid as against Hari Dasi, even if she executed them, observing: "We are not satisfied on the evidence in the present case that Hari Dasi executed those documents under independent advice and with a full comprehension of their true significance." On the question what right Marik acquired on his purchase, the judgment was to the effect that he took the lands subject to the ultimate result of Suit No. 16 of 1892 and to the attachment made in that suit, of which he had full notice. In the result they held that the title being in Hari Dasi, the Plaintiff by his mortgage obtained no right in the land. Their judgment on the point of registration of the mortgage and the jurisdiction of the High Court was in these words:—

"On the 1st and 2nd contentions we entertain no doubt that the registration of the Plaintiff's mortgage, by the Sub-Registrar of Calcutta, was valid, and that Mr. Justice Sale's decree was one which it was competent to him to pass By cl. 12 of the Charter, the High Court has jurisdiction in the case of "suits for land or other immoveable property situated within the local limits of its Original Jurisdiction." Mr. Justice Sale was satisfied that the property, item No. 28 of the mortgage, described as 25, Raja Gurudas's Street, was, in reality, 25, Ashutosh Dey's Lane. Apart from the question of fraud, as to which there is no indication or evidence, we also are satisfied, on a comparison of the boundaries in the conveyance, dated the 13th January 1896, Ex A (*a*), and the boundaries in the Deed of Release, dated the 15th January 1896 (Ex. P.) with the boundaries of item No. 28 of the Plaintiff's mortgage, that the property is one and the same. Moreover, in the absence of fraud, the Court's jurisdiction would be regulated by the situation of the land, and it would not be affected by considerations of title to the land so situated. Cases are of frequent occurrence where it is found by the Court that the Plaintiff has no title to the property with which he has been dealing, but such a finding has never been held, so far as we are aware, to invalidate the

judgment of the Court, or to take away its jurisdiction *ab initio* to investigate the title set up. A contrary conclusion would result in the gravest inconsistencies. No doubt, Hari Dasi may show, under sec. 44 of the Indian Evidence Act, that Mr. Justice Sale's decree was passed without jurisdiction, or that it was obtained by the practice of fraud, but she has not succeeded in so doing. Moreover, that decree was passed on the basis of a registered deed of mortgage. Sec. 28 of the Registration Act, III of 1877, provides that every document, such as a mortgage, shall be presented for registration in the office of a Sub-Registrar within whose sub district the whole or some portion of the property, to which such document relates, is situate. Sec. 30 (*b*) of the Act says that that the Registrar of a district, including a Presidency-town, may receive and register any document referred to in sec. 28 without regard to the situation in any part of British India of the property to which the document relates. It has not been shown to us that the Registrar of Calcutta registers any documents. It has not been argued, and it would be impossible to argue, that a Sub Registrar is authorized by law to make any enquiry into the title of an executant of any document presented for registration; *Raj Chunder Bundoo* v. *Rajessory Dossee* (3). The scheme of the Registration Act is that registration can be effected in respect of properties purporting to be situated within the area assigned to the Registering officer. In *Jogini Mohan Chatterji* v. *Bhoot Nath Ghosal* (4) the decision of Ameer Ali, J. in *Jogini Mohan* v. *Bhoot Nath* (5) was reversed on the question of fact, but the principle of the Full Bench decision in *Baijnath Tewari* v. *Sheo Sahoy Bhagut* (1) remains untouched. If there had been no property within the local limits of the Sub-Registry Office, Calcutta, the registration of the Plaintiff's mortgage deed would have been invalid as being in contravention of the provisions of the Registration Act. The facts of the present case are quite different. The 28th item of property mortgaged was within the local limits of Calcutta, and the question of title to that item of property is beside the point. We are, therefore, of opinion that the Defendants Appellants cannot succeed on either the first or second contention."

(3) 1 Ind. Jur. (N. S.) 240 (1866).
(4) I. L. R. 31 Cal. 146 (1903).
(5) I. L. R. 29 Cal. 654, 658 (1902).

Hence this appeal.

Mr. L. DeGruyther, *K. C*, and *Mr. O'Gorman* submitted for the Appellant that Bhagirath by his purchase on the 14th August 1893 acquired an absolute title to the property in dispute free from all claims thereto by Hari Dasi and that the High Court had erred in holding that Hari Dasi under her purchase made in 1904 acquired a title which overrode that acquired by Bhagirath. (It is unnecessary to report this part of the argument as their Lordships have decided the Appeal on an objection taken on behalf of the Respondent.)

Mr. Upjohn, *K. C.*, *Mr. A. M. Dunne* and *Mr. K. Brown* for the Respondents submitted that the decree made by the Calcutta High Court on the basis of the mortgage, dated the 23rd September 1895, was without jurisdiction. Moni Mohan had no right to register the mortgage in Calcutta, as no part of the mortgaged property was situate in Calcutta. Both the Courts below had found, and it was not denied that there was no such property

(1) I. L. R. 18 Cal. 556 (1891).

as premises No. 25 Raja Gurudas Street, Jorasunko, as was described Parcel No. 28 in the Schedule attached to the mortgage. It was purely a ficticious property frauduently entered in the deed in order to bring the suit in the Calcutta High Court. There was no evidence upon the record that a mistake had been committed in describing Parcel No. 28; neither the mortgagor nor the mortgagee deposed that there was such a mistake. The Subordinate Judge was not justified in relying upon the deed of rectification (Exhibit No. 20) and in holding that Parcel No. 28 was really No. 25 Ashutosh Dey's Lane in Calcutta. In any case there was no evidence to show that Moni Mahan had any title whatever to No. 25 Ashutosh Dey's Lane. The registration of the deed was effected by a Registrar who had no jurisdiction in that behalf under sec. 28, Registration Act, III of 1877. The deed did not operate as a mortgage under sec. 59 of the Transfer of Property Act, 1882 and the decree of the Calcutta High Court was without jurisdiction and was not binding on the Respondents who were no parties thereto. Reliance was placed on *Jogini Mohan* v. *Bhoot Nath* (5).

Mr. L. De Gruyther in reply :—The Appellant obtained a decree from a competent Court which had jurisdiction to make the decree. It was for that Court to decide whether a bond in dispute operated as a mortgage or not. That question had been finally decided by the High Court. The High Court had jurisdiction to try the suit under clause 12, Letters Patent, 1865. It was not essential for the purposes of jurisdiction that the mortgagor must have a title to the property in order to give jurisdiction to a Sub-Registrar. The Registering officer is not entitled to enquire into titles. He is required to register a deed if the document relates to a property situate within his jurisdiction. In any case it was a mere misdescription, and could not vitiate the decree. Both the Courts below had concurrently found that a mistake was committed in describing Parcel No. 28.

The suggestion of fraud had been negatived by the Courts below and it ought not to be held that the decree was made without jurisdiction because of a mistake.

Reference was made to the following authorities :—*Hari Ram* v. *Sheodial Ram* (6), *Mohammad Ewaz* v. *Brij Lall* (7).

Their Lordships' Judgment was delivered by

Lord Moulton.—In this Appeal the Appellant Harendra Lal Roy Chowdhuri is the Plaintiff in the action which was commenced by a plaint filed on the 16th September 1905. The claim of the Plaintiff was based on a mortgage decree dated 28th July 1905, granted in a Civil suit in the High Court of Judicature at Fort William in Bengal, acting under its Ordinary Original Civil Jurisdiction. That mortgage decree purported to enforce an English mortgage of the 23rd September 1895 executed by the *pro formâ* Defendant Moni Mohan Roy in favour of the Plaintiff of certain properties, among which was an eight-anna share of lands known as Mahal Gumokpota. The object of the present suit is to obtain a declaration that the female Defendant Hari Dasi Debi acquired no right of ownership or possession in that property by virtue of an auction-purchase made by her on the

(5) I. L. R. 29 Cal 654, 658 (1902).

(6) L. R. 16 I. A. 12 (1888).

(7) L. R. 4 I. A. 166 (1877).

23rd of November 1904. It is therefore brought to establish the title of the Plaintiff to those lands as being lands charged under his mortgage and subject to the decree free from any prior right of the female Defendant.

The transactions between the parties to the suit and the litigation arisen therefrom are of the most complex character, and raise questions of considerable difficulty, both in fact and law. But the Respondents, at the hearing of the Appeal raised a preliminary point which goes to the root of the action, namely, that the Plaintiff shows no title enabling him to bring such an action. They submit that the mortgage of the 23rd September 1895 was not duly registered, and further that the Court which granted the mortgage decree of the 28th July 1905 had no jurisdiction to entertain the suit in which that Decree was granted. If these contentions of the Respondents can be sustained, it is clear that the Plaintiff's action must fail, and that the decision of the High Court dismissing this action must be affirmed.

The facts of the case, so far as they are relevant to this preliminary point, are as follows: On 23rd September 1895 Mani Mohan Roy purported to mortgage to the Plaintiff various properties set out in a schedule to the mortgage deed for the purpose of securing an account current of Mani Mohan Roy with the Plaintiff, and freeing him from certain liabilities. The properties in question as set out in the schedule are 28 in all, the first being the eight-anna share of Mahal Gumokpota, to which the suit relates, and the last a property described as follows:—

"All that two-storeyed brick-built messuage, tenement or dwelling-house, with the piece or parcel of rent-free land on part whereof the same erected and built, containing by estimation cottah, situate, lying, and being premises No. 25 Gurudas Street, Jorasunko, in the town of Calcutta and butted and bounded—on the north, by a private lane of Ashutosh Dey; on the east, by the dwelling house of Nandakumari Dasi; on the south, by the dwelling-house of Khetra Mohan Dhara; and on the west, by a Government drain."

This last property is the only one which purports to be in the town of Calcutta. All the other properties enumerated in the schedule are outside Calcutta and outside the local limits of the Ordinary Original Jurisdiction of the High Court of Judicature at Fort William in Bengal.

This mortgage was presented for registration at the Calcutta Registry Office by the executant Mani Mohan Roy on the day of its execution and registered by the Sub-Registrar in the usual manner. In 1903 the Plaintiff brought a suit on this mortgage deed against the Defendant Mani Mohan Roy and others, in the High Court of Judicature at Fort William in Bengal, and on the 28th July 1905 obtained the ordinary decree for sale. Neither of the two effective Defendants in the present suit were parties to such action. The parties to the suit upon the mortgage seem to have set up that there was a mistake in the description of Parcel 28, and that the words Ashutosh Dey Lane should be substituted for Gurudas Street. The learned Judge accepted this contention and accordingly held that property situate in Calcutta was included in the mortgage and that he had jurisdiction. No such decision, if erroneous, could extend the jurisdiction of a Court of limited territorial jurisdiction, and therefore the validity of this decree is open to challenge by the present Defendants, who were no parties to the proceed-

ings. Similarly, the direction to the said Judge that the description of the parcel in question should be amended (even if it was effective between the parties to that suit) cannot affect the present Defendants, whose title is of earlier date, or render valid the registration if they can maintain their contentions relating thereto. It is difficult, indeed, to see how the direction to amend the description of the parcel which formed part of the decree came within the scope of the suit, which was in no respect a suit for rectification.

The Defendant Mani Mohan Roy did not appear in the present suit. The female Defendant Hari Dasi Debi, and the third Defendant Hem Chandra Bose (who was interested in the suit as claiming an interest in the property through her) appeared and filed written statement clearly putting in issue the existence of the property No. 28 above set forth, and alleging that no portion of the property mortgaged by the mortgage bond lay within the jurisdiction of the High Court of Judicature at Fort William in Bengal in its Original Jurisdiction or within the jurisdiction of the Sub-Registrar of the Calcutta Registry. Accordingly they contended that the alleged mortgage was not legally registered, and that the decree was given by a Court which had no jurisdiction to entertain a suit on the mortgage bond in question.

At the hearing of the action the Plaintiff called no evidence with regard to the Parcel No. 28. Neither the Plaintiff nor Moni Mohan Roy went into the box to give evidence as to there being any mistake in the description of the parcel. On the other hand, the Defendants proved that there is not and has never been any such property as No. 25, Gurudas Street, in Calcutta, and they further proved that the property lying within the metes and bounds set out in Parcel 28 did not belong to Mani Mohan at the date of the mortgage bond, and that on the contrary he had not then and never has had any interest in the property within those metes and bounds. Such property has always belonged to parties wholly unconnected with the parties in this suit and has been continuously registered in their names in the Calcutta Registry.

It follows therefore that No. 25, Gurudas Street, which is the Parcel No. 28, was a non-existing property. It was no doubt open to the Plaintiff to prove that there was a clerical or other error in the description of the property and that in fact an existing property situate in Calcutta was intended by both parties to be mortgaged and to be described in Parcel No. 28. But there is not a particle of evidence that such was the case. Neither the mortgagor Mani Mohan nor the mortgagee the Plaintiff Harendra Lal Roy went into the box to give evidence as to this. As to Mani Mohan, their Lordships cannot see how it would have been possible for him to give any such evidence, because it would amount to stating that he intended that the deed should purport to mortgage an existing property in which he had not and knew that he had not any property or interest whatever. This being so, their Lordships in the absence of evidence decline to accept an unsupported suggestion of counsel that the description of the property mortgaged as No. 25 Gurudas Street was inserted by mistake. It must be remembered that the proper description of houses in towns for the purpose of registration is by the street in which they are situated, and the number which they bear in that street, so that the description

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No. 25 Gurudas Street is that to which one should primarily look.

It may well be that the above is sufficient to preclude any rectification of the mortgage bond. If the mortgagor intended it to stand as it appears in the deed, there is no question of mutual mistake. But if the case of the mortgagee be considered, there is similarly no ground whatever for thinking that there was any mistake. The only witness whose evidence has any bearing on the point is Harakumar Chakravarti. He was clerk to Messers. Sen & Co., who were the Plaintiff's Attorneys at the time, and drew up the mortgage, and he witnessed its execution by Mani Mohan and the admission of that execution before the Sub Registrar. He does not refer to the matter in his examination-in-chief, but in cross-examination he says that he did not himself enquire about the house No. 25 Raja Gurudas Street, but sent the broker to ascertain the boundaries of the house which shows that it was the above description of the house that he relied on, and that it was a house so described that was intended by the parties to be included in the mortgage. But with regard to this house he makes some very serious admissions. He says :—

"I do not know whether there is such a house as No. 25 Raja Gurudas Street. I did not keep any original title deed respecting this property. I did not see any original title deed regarding 25 Raja Gurudas Street, before or after the mortgage."

Considering that he was acting on behalf of the mortgagee, the fact that he took no steps to ascertain whether the mortgagor had any title in this property points strongly to the knowledge of the mortgagee that the entry was a fictitious one. Coupling this with the fact that neither this witness nor the Plaintiff gave any evidence as to there being any mistake or as to their knowledge and belief as to the existence of the property at the date of the mortgage (although these issues were plainly raised in the pleadings of both the Defendants), their Lordships decline to accept the suggestion that there was a mistake on the part of the mortgagee any more than that there was a mistake on the part of the mortgagor. The fact that neither the mortgagee nor the mortgagor gave evidence in support of the suggestion of a mistake has great weight with their Lordships. The Defendants having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in Parcel 28 was property of strangers in which the mortgagor had not and never had any interest had proved all that was necessary to throw upon the Plaintiff the burden of showing that the entry of this parcel was not a fictitious entry. He might have done this by showing mistake or otherwise, but he did not do so, but abstained from giving any evidence whatever on the subject, although both he and Mani Mohan were available to give evidence, and were the persons who could establish the facts of the case. Taking all these matters into consideration, their Lordships can come to no other conclusion than that Parcel No. 28 was to the knowledge of the parties to the deed a fictitious entry probably designed to give to the deed the appearance of relating to property situated in Calcutta and therefore within the jurisdiction of the Sub-Registrar and the Calcutta High Court, so that registration could be obtained and actions brought in Calcutta.

It was strongly contended before their Lordships that a Subordinate Judge had found that it was a mistake, and that the

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High Court had accepted his finding so that the principle of two concurrent findings of fact would apply.

But their Lordships are of opinion that the principle of concurrent findings of fact does not apply to such a case as the present inasmuch as it is a case of no evidence, and according to the well-known principles of our law a decision that there is no evidence to support a finding is a decision of law. The issue is that the existing description of the parcels was inserted by mistake. A mistake means that parties intending to do one thing have by unintentional error done something else. There is no evidence whatever here that the error was unintentional or indeed that there was any error at all, and their Lordships are therefore free to set aside the finding without in any way departing from their practice regarding concurrent findings of fact.

It is perhaps necessary in this connection to point out that the document upon which the Subordinate Judge based his finding of mistake was not evidence between the parties nor relevant to the issue. In some other mortgage deed of later date and to other mortgagees Mani Mohan had apparently purported to mortgage the same property by the same description, and had been compelled by the mortgagees to consent to rectification. Such a fact was wholly irrelevant, and it is extraordinary that it should have been allowed to be proved at the trial.

It remains to consider the effect of their Lordships' finding. It may be looked at in two ways. In the first place the property, 25 Gurudas Street, purporting to be mortgaged, is a non-existing property, and therefore no portion of the property mortgaged is situated in Calcutta. The deed, therefore, could not be registered there, nor had the Court of Ordinary Original Jurisdiction of Fort William in Bengal any jurisdiction to entertain the suit upon the mortgage bond, and its decree is of no validity. The Plaintiff therefore has no title to maintain the suit and it must be dismissed.

But the point may be put in another way upon broader grounds. Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta, if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item. The same considerations apply to the question of jurisdiction of the High Court of Fort William in Bengal in its Ordinary Original Jurisdiction. No such fictitious item inserted to give a colourable appearance of the deed relating to property in Calcutta when in reality such is not the case could bring the deed within the limited jurisdiction of the Court. For the same reasons, therefore, as have been stated above, the Plaintiff's case fails.

Their Lordships therefore will humbly advise His Majesty that this Appeal should be dismissed with costs.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors : *Messrs. Watkins and Hunter* for the Respondents.

B. D. *Appeal dismissed with costs.*

[FULL BENCH REFERENCE.]

APPEAL FROM APPELLATE DECREE No. 1913 OF 1911.

JENKINS, C. J.
STEPHEN, J.
WOODROFFE, J.
HOLMWOOD, J.
D. CHATTERJEE, J.

1914,
Heard, 20 and 21, April.
Judgment, 24, April.

MIDNAPORE ZEMINDARY CO., LD., Plaintiffs, Appellants,
v.
HRISHIKESH GHOSH and another, Defendants, Respondents.

Non-occupancy holding, if heritable—Bengal Tenancy Act (VIII of 1885), sec. 20 (3).

The holding of a non-occupancy raiyat is (apart from possible exceptions) heritable.

This was an Appeal from a decision of S. K. Ghose, Esq., Offg. District Judge of Murshidabad, dated the 21st of April 1911, reversing a decision of Babu Uma Nath Ghosal, Subordinate Judge at Berhampur, dated the 1st of June 1910.

The facts of the case were briefly as follows :—

The land in suit which is described in the plaint as the "*diara chur* reformation in *situ*" of a *putni* mehal belonging to the Plaintiffs was settled in 1300 B. S. with two persons Kali Ghosh (the father of Defendant No. 1 Hrishikesh) and Umaruddi Mandal. They were, according to the Munsif, "let into the *chur* land for an indefinite term with power to annex new accretions to their holding" on condition of paying additional rent for the land so added at a rate stated in their *doul*, dated 28th Bhadra, 1300 B. S. In 1308 B. S., Kali Ghosh died and his son Defendant No. 1 continued in possession of the moiety share of the *jote* of his father. Umaruddi appears to have sold his share of the *jote* to Defendant No. 2 Tarini Prosad Dhar. The Plaintiffs instituted this suit on 25th March 1909 for ejectment of the two Defendants, alleging that the *jote* was neither heritable nor transferable and that in consequence the two Defendants were trespassers.

The Munsif held that Kali Ghosh and Umaruddi were mere non-occupancy raiyats in 1308, and that in the absence of any plea or proof of custom, their rights were neither heritable nor transferable. Both Defendants being, therefore, in his opinion, trespassers, the Munsif decreed the suit with costs and mesne profits.

On appeal, the Officiating District Judge held that Hrishikesh succeeded to his father's interest under sec. 20 (3) of the Bengal Tenancy Act, and as to Defendant No. 2's purchase "parting with possession of a portion of a holding by a non-occupancy raiyat was not a ground of forfeiture." In this view the Judge reversed the decree of the Munsif and dismissed the suit with costs.

The Plaintiffs preferred this Second Appeal which, coming on before Mookerjee and Beachcroft, JJ., was referred to a Full Bench.

The ORDER OF REFERENCE was as follows :—

MOOKERJEE AND BEACHCROFT, JJ.—One of the questions in controversy in this appeal is, whether the right of a non-occupancy raiyat in his holding is heritable. In *Karim Chaukidar* v. *Sunder Bewa* (1) a Division Bench of this Court held that the right of a non-occupancy raiyat wa not heritable. In the reference to the

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Full Bench in the case of *Arip Mondal* v. *Ram Ratan Mondal* (4) the contrary view was indicated, and, in the reference to the Full Bench in the case of *Lakhan Naran Das* v. *Jai Nath Pandey* (3) the Referring Judges were inclined to the view that the case of *Karim Chaukidar* v. *Sunder Bewa* (1) had not been correctly decided. When the case came to be heard by the Full Bench, there was divergence of opinion amongst the Judges and the point was left undecided. It was further observed in the case of *Udoy Chandra Das* v. *Hari Das Bairagi* (5) that the state of authorities on the question, whether the right of non-occupancy raiyat is heritable, is not satisfactory. In view of this conflict of authority, we refer to a Full Bench of this Court the question, whether the right of a non-occupancy raiyat is heritable. As the question arises in an Appeal from Appellate Decree, under the Rules of Court, the whole Appeal will be referred for disposal by the Full Bench.

Babu Jogesh Chandra Ray (with him *Babus Rajendra Chandra Guha* and *Sitaram Banerjee*) for the Appellants submitted that the Full Bench in *Lakhan Narain Das* v. *Jai Nath Panday* (3), at least decides this that there is nothing in the Bengal Tenancy Act to make a non-occupancy holding heritable.

[THE CHIEF JUSTICE.—Refers to cl. (3) to sec. 20.]

"Heir" in that clause does not mean heir for the purpose of the holding, but the heir generally. Besides, the clause has operation only "for the purposes of the section."

Moreover, in this case the land is *diara* and so under sec. 180, sec. 20 (3) does not apply.

[THE CHIEF JUSTICE.—Has not the saving in sec. 180 reference rather to the identity of the land than to the identity of the holder ?]

The language clearly suggests identity of the person also.

[THE CHIEF JUSTICE.—There would be no reason for excluding the operation of sub-sec. (3). It was meant to exclude sub-sec. (2) only.]

Supposing the original tenant dies after six years and his son continues in possession for the remainder of the term he will acquire occupancy right, if only the landlord has recognised him as a tenant by receipt of rent or otherwise. The heir too must hold as tenant in order to be entitled to add up his father's term to his.

As to *chur* lands, *Beni Pershad v. Chaturi Tewary* (6) holds that some of the clauses of sec. 20 at any rate do not apply to *churs*

[HOLMWOOD, J.—It excludes sub-sec. (7).]

[THE CHIEF JUSTICE.—That sub-section defines a rule of proof. It does not deal with rights. Is not sec. 20 the general section, sec. 180 only modifying its operation in respect of some classes of land ?]

Submits that the question is whether sub-sec. (3) is to be so interpreted as to give the general heir of the tenant right to add his period of holding to the tenant's irrespective of recognition by the landlord.

Unless recognised by the landlord, the heir would be a trespasser, if the father

(1) I. L. R. 24 Cal. 207 (1896).
(3) 11 C. W. N. 626 : s. c. I. L. R. 34 Cal. 516 (1907).
(4) I. L. R. 31 Cal. 757 (1904).
(5) 10 C. L. J 608 : s. c. 13 C. W. N. 937 (1909).
(6) I. L. R. 33 Cal. 444 at p. 448 (1906).

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did not hold for 12 years. If he did, the heir would inherit under sec. 26.

Cl. (1) expressly says the land must be held as a raiyat.

[HOLMWOOD, J.—Suppose the son continues in possession for the required number of years without the landlord knowing it, would he not acquire occupancy right ?]

To hold that would be to hold that non-occupancy raiyat's right is heritable contrary to the Full Bench decision.

[THE CHIEF JUSTICE.—The Act may not have conferred this right—it may have only recognised it as already existing. Besides, if Act VIII of 1885 treats raiyati rights as property, they would be heritable under the general law.]

The Act specifically recognises the heritability of permanent tenures (secs. 10, 15, 16), of raiyati tenures held at fixed rents or rates of rent and of occupancy rights. This is not done in regard to non-occupancy holdings; cl. (3) of sec. 20 does not occur in the chapter dealing with non-occupancy raiyats.

[THE CHIEF JUSTICE.—Where is the provision in the Act which makes permanent tenures heritable? It is heritable apart from the Act and the Act only recognises it or assumes their character of heritability? Sec. 26 *was necessary* to make occupancy right heritable.]

I submit there is not even that recognition of heritability of non-occupancy holdings. Further I say that in the case of permanent tenures, the Legislature *declared* them to be heritable. If the heritable character of permanent tenures was common knowledge, there would be no necessity for such a declaration. It *makes* them heritable.

[STEPHEN, J.—Does the Code contain all the incidents of permanent tenures ?]

No. But the Code does not merely register old law. It determines the incidents of the various classes of tenures.

[HOLMWOOD, J.—Do you admit that non-occupancy right was heritable before the Act ?]

No. Mr. Justice Banerjee's decision—the only one on the point—is against that.

[THE CHIEF JUSTICE.—Asks whether *paikast* raiyats would not have a heritable holding under Reg. VIII of 1793 ?]

Refers to *Jatee Ram* v. *Mungloo Surmah* (7).

[THE CHIEF JUSTICE.—Rights of *khudkast* raiyats were recognised as heritable.]

The tenant here was not a resident of the village. The *doul* shows that. Non-occupancy raiyats have no higher rights than *paikasts*, and here the tenant is a non-resident non-occupancy raiyat.

[THE CHIEF JUSTICE.—Suppose he was a non occupancy *khudkast* raiyat. Could he be ejected ?]

Under the Act he could.

[THE CHIEF JUSTICE.—Has not the heir of the non-occupancy raiyat a right to hold the land as against the world other than the landlord ?]

That exception will serve my purpose.

[THE CHIEF JUSTICE.—No, it would be property and so heritable under the general law.]

See Field's Regulations, pp. 25, 40, as to *paikast* raiyats. The distinction between occupancy and non-occupancy raiyats was the creation of Act X of 1859. Non-occupancy raiyats are temporary tenants; sec. 6, Act X of 1859 and sec. 6 of Act VIII (B. C.) of 1867.

[HOLMWOOD, J.—Where is it said in Act X of 1859 or Act VIII of 1867, B. C., that non-occupancy raiyats are tenants-

(7) 8 W. R. 60 (1867).

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at-will? S.c. 6 seems to suggest that tenancy does not cease by death.]

A *paikast* tenant's holding was not heritable apart from the Act.

My points are:—

(1) Non-occupancy rights in general are not heritable.

(2) Non-occupancy rights in *chur* land are not heritable.

(3) *Paikast* non occupancy raiyat's rights are not heritable.

Non-occupancy right is the lowest kind of *raiyati* right, per Banerjee, J.

[HOLMWOOD, J.—What is his authority for that proposition?]

Sec. 25 of Act X of 1859 and sec 40 of Field's book.

[WOODROFFE, J.—Refers to sec. 44 and asks under what provision of the law is the heir to be ejected.]

Sec. 44 does not apply to the heir, as the heir is not a non-occupancy raiyat.

[HOLMWOOD, J.—If the general law makes it heritable, the Act does not make it non-heritable.]

[THE CHIEF JUSTICE.—Asked what would happen if, as Banerjee, J. puts it, the heir was "allowed" to complete the term without recognition.]

That would imply recognition or it would not, with the consequences I have stated.

Cl. (3) of sec. 20 really does not convey more than sec. 6 of Act X of 1859 or sec. 6 of Bengal Act VIII of 1869.

[HOLMWOOD, J.—Act X of 1859 is stronger. It supposes heritability]

[D. CHATTERJEE, J.—You did not turn out the tenant the moment his father died.]

No. I have brought this suit within 12 years and that is all that the law requires.

[THE CHIEF JUSTICE.—The tenancy in this case was not for a definite term and so was one from year to year. Therefore the heir would be entitled to hold it at least till it was terminated by notice. The Bengal Tenancy Act gives the heir the further privilege of acquiring occupancy right.]

[D. CHATTERJEE, J. Suppose the tenancy was for a term of 9 years and the raiyat died in the middle of it. Cannot the heir hold the land for the remainder of the term?]

If he can, it would be under the general law.

[D. CHATTERJEE, J.—Suppose none of the circumstances contemplated by sec. 44 happens after the tenant's death; how is the heir to be ejected?]

As a trespasser.

Babu Ram Chandra Majumdar (with him *Babu Chandra Sekhar Banerjee*) for the Respondent submitted that the reference was not necessary as the lease in this case was a lease in perpetuity. It is like the lease in *Sheikh Elahi* v. *Sheikh Hukum* (8). *See* also Colebrook's Bengal Husbandry.

It is at least a lease from year to year, so that at the tenant's death his heir had something to inherit.

Urges that there is a finding of fact that Hrishikesh held as raiyat from 1901 to 1906, after his father's death, so that he did acquire occupancy right even upon the interpretation of sec. 20 (3) submitted on behalf of the Appellant.

[THE COURT.—After consultation intimated that they would decide the question referred to the Full Bench, without prejudice to the arguments raised as to the tenant's status being a higher one than that of a non-occupancy raiyat.]

As to the argument that sec. 180 excluded the operation of sec. 20, sub-sec. 3), sec. 180 makes an exception only with

(8) 18 C. W. N. 39 (1913).

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reference to the identity of the land. The case in *Beni Pershad* v. *Chatuni Tewary* (6), if correctly decided, only holds cl. (7) inapplicable. Other clauses would apply. In *Jasimuddin* v. *Beni Madhab* (9) sub-sec. (3) was applied to *diara* land; Ch. VI has been made inapplicable only to *uthandi* lands, not to *chur* and *diara* lands.

On the question referred, reads sec. 5 (2) which speaks of "successor in interest;" Inheritance precedes recognition. Heritability cannot be made to depend on the landlord's will. If it is not heritable, there is nothing to recognise on tenant's death. Chap. III nowhere specifically says permanent tenures are heritable. Ch. IV also says nothing regarding the heritibility of holdings of raiyats at fixed rates. Sec. 20, cl. (3) in Ch. IV evidently means to confer raiyati status on the heir. In neither case is the right expressly made heritable. But there is in all these provisions a clear recognition of heritability.

The argument addressed on behalf of the Appellant would suggest that a landlord has 12 years from the death of the tenant to sue in ejectment, whereas sec. 20 sub-sec. (3) is intended to secure the heir in his possession of the holding immediately the raiyat died. If he is an heir, he succeeds in spite of the landlord who has got to recognise him as raiyat. If recognition was necessary, it would be withheld in every case, and where conceded, there would be a new tenancy and sec. 20, sub-sec. (3) would not apply.

Suppose the recognition was withheld for the rest of the term and then made.

Act VIII of 1885 was an amending and consolidating legislation. From Act X of 1859 up till now the object of this legislation has been to protect tenants from eviction.

Refers to secs. 42, 43 and in particular to sec. 44, cl. (a) of which has to be read with sec. 89 and sec. 66. If the tenant pays up the arrears decreed within the time fixed, he remains; cl. (b) is qualified by sec. 155. The right to eject under cl. (c) exists only for 6 months. Sch. III, Art. 1 (a), cl. (d) is subject to sec. 46. Are not these substantial rights? In 90 per cent. of cases the raiyat is not liable to eviction and once the 12 years is completed, he acquires occupancy. The intention of the Legislature could hardly have been to make non occupancy holdings life-leases.

Ch. IX, secs. 76, 78, 79. These improvements may involve heavy outlay. Did the Legislature intend that the tenant's heirs would be deprived of them? Sec 82 entitles the tenant to receive compensation for improvements by his predecessor in interest. Sec. 160 (c) protects the right of the non occupancy raiyat to hold for five years and not for five years or until the tenant's death whichever period is shorter; sec. 178, sub sec. (3), cl. (d) preserves right to "transfer or bequeath" if sanctioned by local usage, because succession by heritance did not need providing for.

The right of occupancy was specifically made heritable by sec. 26, because being the creation of statute, there were reasonable doubts as to its transmissibility on death; *Ajodhya Persad* v. *Imam Bundi Begum* (10), *Jatee Ram* v. *Mungloo Surma* (7), *Karim Chaukidar* v. *Sunder Bewa* (1).

No other case of eviction of a non-occupancy raiyat's heirs can be found in the

(6) I. L. R. 33 Cal. 444 at p. 448 (1906).
(9) 17 C. W. N. 881 (1913)

(1) I. L. R. 24 Cal 207 (1896)
(7) 8 W. R. 60 (1867).
(10) 7 W. R. 528 (1867).

reports. The treatment of the question by Banerjee, J. is very meagre. If the maxim *expressio unius est exclusio alternius* were applied, even permanent tenures would have to be deemed non-heritable; Maxwell, p. 467. Banerjee, J. quite overlooked the fact that even temporary tenants, if they were *khudkasts*, had heritable interest; *paikast* raiyats were not tenants-at-will and however precarious their rights originally were, the Legislature has pursued a settled policy of placing them as nearly as possible on the footing of *khudkast* raiyats. *See* Referring Order in *Arip Mondal* v. *Ram Ratan Mondal* (4), also Referring Order in *Lakkan Narain Das* v. *Jai Nath Panday* (3); for other authorities as to division of raiyats into *khudkast* and *paikast*, Philip 12, 19, 21, 22. The latter again either had heriditary tenancies or tenancies not heritable; Baillie's "Land Tax in India" (which is a translation of a portion of the Futwa Alamgir) (1853), Introduction, p. 30, speaking of the state of things in Mahomedan times. He says, "it is admitted that a raiyat's right descended to his children," though it was doubtful as to whether it was transferable. Fifth Report of Sir John Shore, p. 192, para. 225; p. 205, para. 389; p. 206, para. 406; p. 207, para. 407; p. 236. As to *khudkast* rights being hereditary, *see* Harington's Analysis, Vol. 3, p. 423.

Throughout the Regulations, from 1793 to 1833, there is no reference to *paikast* raiyats except in Reg. 51 of 1795, which applied only to Behar. Reg. VIII of 1793, sec. 59 provides for raiyats in general. *See* also secs. 60, 61. Under Reg. 44 of 1793, sec. 2, engagement with raiyats was to be for 10 years, the period of Decennial Settlement. Under Reg. 4 of 1794, the landlord was bound to renew the term. Up to 1812, the landlord could not evict even the *paikast*; he was bound to renew the engagement. *See* Reg. 5 of 1812, sec. 3. In sec. 11, cl. (3) of Reg. 8 of 1819, *khudkast* raiyat is defined as a resident heriditary cultivator. In Reg. XI of 1822, the expression is *khudkast kadimi* raiyat, meaning a resident hereditary cultivator having a prescriptive right of occupancy. The distinction between *khudkast* and *paikast* had disappeared, special privileges being reserved only for *khudkast kadimi* raiyats. Act XII of 1841 also mentions *khudkast kadimi* raiyats. Act I of 1845 speaks of *khudkast kadimi* raiyats or raiyats holding at fixed rents or rates.

Act XI of 1859 (following Act X) speaks of raiyats with rights of occupancy and holding at fixed rents or rates of rent; From 1819 to 1859 *khudkasts* and *paikasts* are on the same footing; *Thakooranee Dassi* v. *Bisheswar Mookerjee* (2).

The intention of the Legislature was to declare existing rights and not to create new rights.

[HOLMWOOD, J.—That is what the Preamble to Act X of 1859 says.]

Right of occupancy was made claimable independently of residence in the village, provided 12 years' possession was proved.

See Trevor, J's. judgment, pp. 214-215 in the *Great Rent case* [*Thakooranee Dassi* v. *Bisheswar Mookerjee* (2)]. The necessity of residence dwindled in importance. Once admitted as a resident, even a *paikast* became *khudkast*. The transition was easy and all *paikasts* became owners of hereditary rights. If *khudkast* raiyats'

(3) 11 C. W. N. 626; s. c. I. L. R. 34 Cal. 516 (1907).

(4) I. L. R. 31 Cal. 757 (1904).

(2) B. L. R. F. B. 202, 259; 3 W. R. (Act X) 29 (1865).

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rights only were heritable, sec. 6 must be understood to have cut down some of their rights in the case of raiyats of this class who had no occupancy rights.

[THE CHIEF JUSTICE.—You suggest that the distinction between *khudkast* and *paikast* originally was that between tenants who cultivated their own land and tenants who cultivated under rights derived from contracts. The distinction between these two tended to disappear and now it has disappeared; and that it is but reasonable to suppose that the Legislature would not revive the *paikast*.]

Babu Jogesh Chandra Ray in reply said the judgments of Brett and Mitra, JJ. in the Full Bench case contained nearly all the arguments against him The Regulations drew a distinction between *khudkast* and other holdings. Only *khudkasts* were recognised as having a heritable interest. Their solicitude is confined to *khudkast* or resident hereditary cultivators. The Regulations hardly sustain the theory that all raiyati rights were heritable.

[THE CHIEF JUSTICE.—The point of the distinction was that one was a right of property and the other a contractual right. The former was a descendible interest. If the raiyat's right is now admitted to be property, it would be descendible.]

Refers to Reg. VIII of 1819, sec. 13 cl. (3).

[THE CHIEF JUSTICE.—Certainly the position of the *paikast* was then precarious. But owing to economic causes, their position has changed.]

But could their status change without the intervention of the Legislature?

[THE CHIEF JUSTICE.—The rights of *paikast* raiyats were contractual. As the nature of the contract varied, they began to acquire property rights. Refers to Whinfield on Landlord and Tenant.]

Replied, on the provisions of the Regulations cited on behalf of the Respondents.

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

The question referred for the decision of the Full Bench is whether the right of a non-occupancy raiyat is heritable. In *Karim Chaukidar* v. *Sunder Bewa* (1), it was held by a Division Bench that the right of a non occupancy raiyat (who does not hold under any express agreement) in his holding is not heritable. In arriving at this conclusion, Mr. Justice Banerjee says that "under the law as it stood before the Bengal Tenancy Act was passed, non-occupancy raiyats not holding under express engagements were treated as tenants-at-will or as tenants from year to year (*see* Act X of 1859, sec. 25, *see* also the observations of Mr. Justice Field in his Introduction to the Bengal Regulations, p. 40 and those of Mr. Justice Trevor in *Thakooranee Dassi* v. *Bisheswar Mookerjee* (2). Under the old law non-occupancy raiyats were the lowest class of raiyats and if the Respondent's contention be correct, it would follow that all raiyati holdings were transferable. But this would be somewhat inconsistent with certain provisions of law, such as Regulation VIII of 1819, sec. 11, cl. (3) which speak of hereditary raiyats."

Any opinion of Mr. Justice Banerjee is entitled to respect, but the passage we have cited is open to question.

It is not accurate to speak of non-occupancy raiyats under the old law.

(1) I. L. R. 24 Cal. 207 (1896).
(2) B. L. R. F. B. 202; 3 W. R. (Act X) 29 (1865).

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The expression "non-ocupancy raiyat" first apears in the Bengal Tenancy Act and the holding of non-occupancy raiyats is not the exact counterpart of any holding under the old law, by which we understand the learned Judge to mean the law prior to 1859. For the present purpose it is sufficiently accurate to say that raiyats in early days were either *khudkast* or *paikast*. It is unnecessary to discuss the several kinds of these two classes of raiyats, but contrasting one class with the other it may be said that the position of the *khudkast* was unquestionably superior to that of the *paikast*.

The *khudkast* was, speaking generally, a man of the village in which his holding was situate, and it is, we think, conclusively established that his holding ultimately was hereditary.

The *paikast* was not a man of the village where the land cultivated by him was situate : he was an immigrant.

There is reason to think that originally he was a tenant-at-will, but until the demand for land exceeded the demand for cultivation, this probably was of no great moment.

But as this economic position was reversed, the inconveniences of tenancies-at-will became apparent, and so we find they gradually gave way to tenancies of a more fixed character, either from year to year or for a greater interest. (Whinfield on Landlord and Tenant).

While the tenancy was at will, it obviously could not be heritable, for it would of necessity be terminated by the raiyat's death. But with the greater fixity of later times this would no longer be so, and on the raiyat's death there would be an interest that could devolve on his heir, even though the tenancy was from year to year. So matters stood, when Act X of 1859 was passed. That Act and the Bengal Act of 1869 and the Bengal Tenancy Act of 1885 have deprived the division of raiyats into *khudkast* and *paikast* of its importance, and under the Bengal Tenancy Act we find raiyats grouped as (*a*) raiyats holding at fixed rates, (*b*) occupancy raiyats and (*c*) non-occupancy raiyats (sec. 4). In sec. 20 mention is also made of "settled raiyats," a class largely composed of, but not identical with occupancy raiyats, for though every settled raiyat has occupancy rights, some raiyats who have occupancy rights are not settled raiyats.

These several classes of raiyats, where the Bengal Tenancy Act governs, have taken the place of the *khudkast* and *paikast* raiyats with which the practical lawyer has no concern except in order to trace the growth of raiyati rights. The result then is that (apart from possible exceptions with which we have no concern in this case) when these Acts were passed, a tenancy-at-will had ceased to be the measure of any raiyati rights and so all had interests that were capable of descent.

More than that, we think (apart from the possible exceptions to which we have referred) the holdings of raiyats were heritable, and this is distinctly recognized by the Bengal Tenancy Act. Thus the meaning ascribed to raiyat by sec. 5, cl. (2) includes successors in interest ; sec. 20, cl. (3) identifies the heir of a raiyat with his predecessor for the purpose of acquiring the status of a "settled raiyat" ; sec. 44 bestows on a non-occupancy raiyat a fixity of tenure that points to heritability : Ch. IX contemplates improvements which it would be unreasonable to expect in a tenancy not heritable, and entitles a raiyat to compensation for improvements made by his predecessor-in-interest (sec. 82) ;

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and certain rights of non-occupancy raiyats are "protected interests" under sec. 160.

Much has been made of sec. 26, on which it is sought to build up the argument referable to the maxim *expressio unius est exclusio alterius*, but this maxim is at best an uncertain guide to the true meaning of a statute. Here it seems to us to have no application. Sec. 26 deals with the devolution of a right of occupancy, not of a holding pure and simple, and as this right of occupancy is a creature of the statute and a doubt had been expressed as to the heritability of a right of occupancy under Act X of 1859 there was good reason for making this provision in relation to a right of occupancy which would not apply to the ordinary holding of a raiyat which is not a creature of the Act though some protective provisions are applied to it which make for fixity of tenure.

It is true, in *Lakhan Narain Das* v. *Jainath Panday* (3) the question now under consideration was referred to a Full Bench of this Court.

But no conclusive answer was given, for while two of the learned Judges refrained from expressing any opinion as to whether or not a non-occupancy right was heritable before the passing of the Bengal Tenancy Act, one, Mr. Justice Geidt held that it was not, and the remaining two, Mr. Justice Brett and Mr. Justice Mitra held that it was.

It is the inconclusive result of that case that has necessitated the present reference.

It is unnecessary to recapitulate the reasons severally advanced by Mr. Justice Brett and Mr. Justice Mitra in support of their view that a non-occupancy holding is heritable, for we are in complete accord with the opinion expressed by them.

(3) 11 C. W. N. 626 : s. c. I. L. R. 34 Cal. 516 (1907).

The answer then that we give to the question referred to us is that, apart from possible exceptions, with which we have no present concern, the holding of a non-occupancy raiyat is heritable.

As the question has arisen in an Appeal from Appellate decree under the Rules of the Court, we must dispose of the whole appeal.

The question of heritability affects only a moiety of the land in suit and the opinion we have expressed is decisive against the Plaintiff's claim to that moiety.

The claim to the other moiety manifestly cannot be supported.

The result is that the decree of the lower Appellate Court must be confirmed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER
No. 328 OF 1913 WITH COURT'S ORDER
No. 4822 OF 1913.

WOODROFFE, J. CARNDUFF, J. 1914, Heard, 7, April. Judgment, 8, April.

SREEMUTTY ANNAPURNA DASSY, Petitioner, Appellant, *v.* NALINI MOHAN DAS and anr., Objectors, Respondents.

Succession Certificate Act (VII of 1887), sec. 4—Debt, part of, certificate in respect of, if may be granted—Multiplicity of suits.

A certificate under Act VII of 1887 (Succession Certificate Act) can be granted in respect of a portion of a debt. The principle of law, which prohibits a multiplicity of suits, is in no way affected by the grant of certificates in respect of fractional shares of a debt.

MUSAMMAT BIBEE BOODHUN *v.* JAN KHAN (1), MUHAMMAD ALI KHAN *v.* PUTTAN

(1) 13 W. R. 265 (1870).

SREEMUTTY ANNAPURNA DASSY *v.* NALINI MOHAN DAS.

BIBI (2), BISMILLA BEGAM *v.* TAWASSUL HUSSAIN (3), GHAFUR KHAN *v.* KALANDARI BEGAM (4), AKBAR KHAN *v.* BILKISARA BEGAM (5), IN THE MATTER OF THE PETITION OF GHANSHAM DAS (6), MOHAMED ABDUL HOSSEIN *v.* SARIFAN (7) *referred to.*

This was an Appeal from an order of M. Smither, Esq., District Judge of Dacca, dated the 23rd of June 1913.

The facts of the case will fully appear from the judgment.

Mr. S. P. Sinha, Dr. Rash Behary Ghose and *Babu Upendra Lal Ray* for the Appellant.

Mr. B. C. Mitter and *Babu Bepin Chandra Mullick, Mr. B. Chakravarti* and *Babu Suresh Chandra Das* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—This Appeal arises in connection with an application which has been made for a succession certificate.

The deceased Sanatan Das died leaving Government Promissory Notes and Bank of Bengal shares, on which Rs. 4,000 odd were due for interest at the time of his death, and, since his death, over Rs. 75,000 as further interest has fallen due. The application is by his widow for a certificate which will enable her to realise interest and dividends due up to the date of her husband's death, but not the interest and dividends falling due after his death, or the principal. The object of the application apparently is that the applicant may thereby be exempted from finding a large security which she would have to find, if a certificate were applied for in order to recover the principal, interest and dividends accruing both before and after the death of her husband.

The learned Judge was of opinion that the certificate as asked for, could not be granted. He says : "The law intends that in fit cases security should be taken to protect such claims. The present peculiar limitation is intended to evade the giving of any such security. I am not prepared to make the limited grant prayed for. In the absence of any valid objection by the objector, whom I have not yet heard, I am prepared to make a grant in the ordinary way of power to realise dividends and interest, not limited to a particular date, but generally, such as fall due, on proper security being given. I find nothing to indicate that it was intended that power should be given to realise dividends for a very short period only ; the provisions are for granting power to realise dividends. And practically, apart from question of law there is no good reason for so limiting a grant. I decline to make the limited grant prayed for, in all the circumstances. Subject to what I may hear from the other side, I will make a grant in the ordinary way, on proper security being given, and not one to enable the applicant to draw Rs. 4,000 odd with security, and Rs. 75,000 odd at present, and more in the future without security."

A preliminary objection has been taken by the Respondent that no appeal lies on the ground that the order which I have just read was not a final order from which an Appeal would lie. In my opinion, however, there is no force in this contention. There was a final order, namely, that portion of the order in which the

(2) I. L. R. 19 All. 129 (1896).
(3) I. L. R. 32 All. 335 (1910).
(4) I. L. R. 33 All. 327 (1910).
(5) All. W. N. for 1901, p. 125.
(6) All. W. N. for 1893, p. 84
(7) 16 C. W. N. 231 (1911).

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Judge says that he declines to make the grant prayed for. It is true that he went further and said that he would be prepared to make another grant different from that which he had refused, but that was an expression of opinion as to what he was prepared to do under different circumstances and did not affect the finality of the order which was passed. He refused to grant the application prayed for, merely adding as a rider, which in effect was unnecessary, that if another application was made in a different form, he would consider it. In my opinion, therefore, the preliminary objection fails, and an appeal lies.

The question we have to consider is as to the merits of this application. There is a ground which has been taken in Appeal that the learned District Judge should have held that Act VII of 1889 had no application to the interest and dividends falling due after the death of the Appellant's husband, it being contended in such ground that such interest and dividends were a debt not due to the deceased, but due to his widow, the present applicant and that therefore the petitioner was not bound to include the interest and dividends in the present application. On the other hand, it has been contended that the principal sum was a debt due to the deceased, even though it may have been payable after his death and that the rule governing the grant of a certificate to recover such principal applies not only in respect of the interest earned by such principal before the death of the deceased, but also after his death. It is, however, unnecessary in the present case to consider this point, because I think that the Appeal may be dealt with upon the other grounds to which I am now about to refer.

The question which we have to decide is whether a certificate can be granted for the recovery of a part of a debt. It appears to be well established that a separate certificate may be granted in respect of separate debts, and that there is nothing in law which compels the applicant for such a certificate to apply for a certificate in respect of all the debts due to a deceased. But the question which is now before us is this, whether assuming that to be so, we can go further and hold that as regards one single debt, a certificate can or cannot be granted for the purpose of enabling the applicant to recover a portion of that debt. The word 'debt' is a comprehensive term which should receive a liberal construction, The object of the Act is to protect the debtors of a deceased person, but there is nothing in law which prevents a debtor from making payment of his debt without the production of a certificate, if he so chooses. Now, the first point from which the matter may be looked at is that of authority, it being contended by both sides in this appeal that the case law supports the respective contentions which they have placed before us, and there are decisions which may be cited in support of either of these contentions.

The earliest decision to which we have been referred is *Musammat Bibi Mudhun* v. *Jan Khan* (1). In that case Musammat Bibi Mudhun appealed against an order granting Jan Ali a certificate to collect five-sixths of the debts due to the estate of Zuhur Ali and the learned Judges say, "Now, we observe at the outset of the case that this order is irregular. Act XXVII of 1860, that is, the old Succession Certificate Act, does not contemplate a division of a certifi-

(1) 13 W. R. 265 (1870).

SREEMUTTY ANNAPURNA DASSY v. NALINI MOHAN DAS.

cate, or a power to collect fractional shares of debts." This passage favours the Respondent's contention, and indeed goes the whole way which he desires us to go; but the statement there made was a mere expression of opinion. It does not appear to have been the subject of discussion or argument, and was unnecessary, seeing that the suit in which it was given was not heard, but was compromised.

In the case of *Muhammad Ali Khan* v. *Puttan Bibi* (2), it was held by Sir John Edge, C. J. and Burkitt, J. that a certificate for collection of debts under Act VII of 1889 may be given for the collection of any one or more separate debts of the deceased, but not for the collection of part only of a debt. The ground upon which the learned Judges appear to have based their decision was that a contrary view might lead to a multiplicity of suits and the harassment of debtors.

This case was followed by that of *Bismilla Begam* v. *Tawassul Hussain* (3), in which it was held that no certificate could be granted to one of the heirs of a Muhammadan lady who had died leaving a dower debt unrealised, for collection merely of a part of the dower debt of the deceased. It was also followed by the decision in *Ghafur Khan* v. *Kalandari Begam* (4) in which it was held that no certificate could be granted to one of the heirs of a Muhammadan lady who had died leaving her dower debt unrealised, for collection merely of a part of the dower debt of the deceased. There again, the decision was based on the ground that a debtor ought not to be harassed more than once for one debt and a multiplicity of suits in respect of one cause of action should be discouraged; and on the ground that the word 'debt' must be taken to mean the whole of the debt due to the deceased and not a portion or share of such debt. It has been considered that the latter view was opposed to the scheme of the Act, which had been enacted to afford protection to debtors and had nothing to do with the convenience of the applicant or his right to, or share in, the debt.

Previous, however, to this, there appears to have been a conflict even in the Allahabad High Court on this point; for, in the case of *Akbar Khan* v. *Bilkisara Begam* (5) Chamier, J. doubted the correctness of the decision in *Mahammad Ali Khan* v. *Puttan Bibi* (2) and was of opinion that the word 'debts' in sec. 6 (*f*) of the Succession Certificate Act means debts due, *i.e*, alleged to be due from debtors to the person applying for the certificate.

Further, in *In the matter of the petition of Ghansham Das* (6), Blair, J. gave a decision which directly supports the contention of the Appellant before us holding that there was nothing in the Succession Certificate Act of 1889 to preclude a Judge from granting a certificate for partial collection of the debts of a deceased person, security being furnished by the applicant of proportionate amount. He, therefore, says, "There seems to be no practical objection to the issue of a certificate for partial collection inasmuch as the Act itself contemplates the addition to a certificate of debts to which it did not originally apply."

Further, the latest case, and it is one in our Court, supports the view which we have been asked to accept by the Appel-

(2) I. L. R. 19 All. 129 (1896).
(3) I. L. R. 32 All 335 (1910).
(4) I. L. R. 33 All. 327 (1910).

(2) I. L. R. 19 All. 129 (1896).
(5) All. W. N. 1901 p. 125.
(6) All. W. N. 1893 p. 54.

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ant. The case is *Mohamed Abdul Hossain* v. *Sarifan* (7), and was decided by Mookerjee and Carnduff, JJ. There the Court dissented from the decision in *Ghafur Khan* v. *Kalandari Begam* (4), and held that sec. 4 of the Succession Certificate Act does not require that the certificate should cover the whole of the debt, if the heirs do not seek to realise the whole. This was a case in which one of several heirs of a deceased Muhammadan lady sued her husband for a portion of the share of the deferred dower due by the Defendant to the deceased, relinquishing the balance. It was held that in respect of the deferred dower, each of the heirs of the deceased had a distinct right enforceable by himself, though all might jointly sue and that it was open to each to relinquish a portion of the claim : It was also held that an application by the Plaintiff for a succession certificate in respect of the amount claimed by her in the suit, was properly granted. No doubt, the circumstances of that case were not exactly the same as those before us ; but the principle upon which the decision proceeds seems applicable to the present circumstances ; for the debt due to the deceased was one debt, and yet it was held that a partial certificate might be granted to one of several of the heirs to recover the portion of that debt which he claimed, and if this may be done, I do not see in principle why a person may not, as in this case, apply for a certificate to enable him to recover a portion of a debt due to the deceased. The matter appears to be one which rather affects the question of revenue than anything else. But there does not appear to me to be, as Mr. Justice Blair points out, any practical objection to the grant of such a certificate which may be, as in the present case, a distinct convenience to the applicant.

(4) I. L. R. 33 All. 327 (1910).
(7) 16 C. W. N. 231 (1911).

As regards the objection, which has been taken that such a procedure may lead to a multiplicity of suits, the answer appears to me to be two-fold. In the first place, if the debt be due and the debtor be honest and solvent, he will pay on the production of the certificate; for the grantee of the certificate can give him a valid discharge to the extent indicated by the instrument. There will then be no necessity for a suit and the question of multiplicity upon which the learned Judges of the Allahabad High Court proceed, will not arise at all. Nextly, if there is such a suit, it by no means follows that, because a certificate may be given to recover a fractional share of a debt, the principle of law which prohibits multiplicity of suits, is in any way affected ; we must distinguish between two separate things—one is the grant of a certificate and the other is the institution of the suit. We are not here concerned with the frame of a suit, but whether a certificate should be granted, and it may well be that though a certificate may be granted to recover a fractional share of a debt, yet if the person to whom the certificate was granted were to sue for a portion of a debt, which he might have sued for in a previous suit, his claim would be barred under the provisions of the Civil Procedure Code.

I am of opinion, therefore, that, both on the ground of principle and of the authorities to which I have referred and which support the contention of the Appellant, this appeal should succeed. I therefore would reverse the order of the District Judge, rejecting the application

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Calcutta Weekly Notes.

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NOTES

Constitution of Benches.

The following constitution of the Courts and the distribution of business amongst them takes effect from date.

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GROUP II.—The Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Richardson.

GROUP III.—The Hon'ble Mr. Justice D. Chatterjee and the Hon'ble Mr. Justice Walmsley.

GROUP IV.—The Hon'ble Mr. Justice Woodroffe and the Hon'ble Mr. Justice Coxe.

GROUP V AND THE PRIVY COUNCIL DEPARTMENT.—The Hon'ble Chief Justice and the Hon'ble Mr. Justice N. R. Chatterjea.

GROUP VI.—The Hon'ble Mr. Justice Stephen and the Hon'ble Mr. Justice Mullick.

CRIMINAL BUSINESS.—The Hon'ble Mr. Justice Sharfuddin and the Hon'ble Mr. Justice Teunon.

THE DEFENDED ADMITTED CRIMINAL APPEALS AND CAPITAL SENTENCE CASES.—The Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice Chapman.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Chitty, the Hon'ble Mr. Justice Chaudhuri and the Hon'ble Mr. Justice Imam, sitting singly.

Bengal Chamber of Commerce Arbitration Judgments.

The judgments delivered last Thursday by Chaudhuri, J., on the Original Side of the High Court in respect of three awards filed by the Bengal Chamber of Commerce are likely to interest business circles, and inasmuch as the judgments were delivered *extempore* and cannot be published until they are transcribed from shorthand notes and signed by the Judge, we shall give their substance as understood by us.

These were on Jute contracts containing the following Arbitration clause :—

"Any dispute arising out of this contract shall be referred to the Bengal Chamber of Commerce whose decision shall be accepted as final and binding on both parties to this contract."

This clause, it will be noticed, is different from the Arbitration clause in the cases of *Ram Narain Gunga Bissen* v. *Liladhur Lowiee*, I. L. R. 33 Cal. 1237, *Hardwary Mull* v. *Selaji*, 13 C. W. N. 63 and the *Bombay Co.* v. *The National Jute Mills Co., Ltd.*, I. L. R. 39 Cal. 669 which ran as follows :—

"Any disputes whatsoever arising on or out of this contract shall be referred to Arbitration *under the rules of the Bengal Chamber of Commerce applicable for the time being* for decision and such decision shall be accepted as final and binding on both parties to this contract."

In the former clause there is no reference to the rules of the Chamber of Commerce, while in the latter the reference is to the Arbitration of the Chamber under their rules applicable for the time being.

In the case of *A. H. Ghuznavi & Co.* (Petitioners) v. *The Budge-Budge Jute Mills Co., Ltd.* (Respondents), His Lordship held that the Petitioner was aware of the rules of the Chamber when he submitted to their Arbitration. He stated his case to them in answer to the case put before the Chamber by the Respondents and the dispute was—(1) whether a portion of the claim was, or was not outside the scope of the contract; (2) about the rate and the date of the breach. With regard to both the grounds his Lordship held that the Arbitrators had acted within the scope of their authority and the Petitioners were not entitled to challenge their award; that being aware of the rules, the Petitioners could not be heard to say that they were inoperative. The Petitioners had made suggestions of the possibility of fraud and collusion, without stating any grounds at all, and the Court rejected them as unworthy of consideration, as the Petitioners had ample opportunity of making a definite case, if they had any.

His Lordship further held that no rules of the Chamber had been contravened and that objections in the nature of after-thoughts to discover

irregularities and to find objections should not be encouraged. The application to set aside the award was therefore dismissed with costs.

In the matter of *Nobin Chandra Shaw* (Petitioner) v. *Sinclair Marray & Co.* (Respondents) which was of a similar nature, His Lordship held that as the Petitioner had not said that he was not aware of the rules of the Chamber, and as his petition rather indicated that he knew them, and as also he had not taken notice of any of the notices sent to him by the Registrar of the Chamber, namely, about the Court having been constituted and that in the event of his not submitting his case, the Court would proceed *ex parte*, there was no weight to be given to the ground urged by him that the Arbitrators had proceeded *ex parte*. His Lordship also held that inasmuch as the Petitioner had sought legal advice when he received such notices and yet did nothing, it was to be taken, having regard to the other facts, that he was content to allow the Arbitration to proceed *ex parte*, without protest. He had made no endeavour to present his case, nor had he expressed a desire to do so, and in those circumstances his objections that the names of the Arbitrators had not been disclosed, and that no time or place of meeting had been notified to him, were of no avail.

The award could not be assailed on those grounds, but inasmuch as the Arbitrators had allowed a larger sum against the Petitioner than that claimed by the Respondents in their difference bills, the Arbitrators had exceeded their authority. In a suit in Court the Plaintiff is not allowed a decree for a larger sum than his claim. It was urged on behalf of the Respondents that a plaint could be amended in Court, but there was no such procedure before Arbitrators. His Lordship held that Arbitrators had the same power of amendment and referred to *In re Crichton* (1910), 2 K. B. 738. The learned Judge said that it was reasonable to suppose, that the dispute about the rate was not that the claim made by the Respondents was too low, or that they should have asked for more. Therefore the award which gave a larger sum, was in excess of jurisdiction. The matter was thereupon referred to the Arbitrators for reconsideration in view of the findings of the Judge. In this case each party was directed to bear his own costs.

In the third matter, that of *Jagathari Bepin Bihary Poddar* (Petitioner) v. *Moran & Co.* (Respondents) there was also a similar application. The facts were different from those in the other cases. The original contract between the parties was for delivery of 1,000 bales of a certain specified class of jute within November 1913, 300 out of which were delivered and accepted, but 700 bales delivered on the 27th November were, however, rejected by the buyers as of inferior quality. The buyers had in the meantime made an advance for the jute contracted for. Some time after that, namely, on the 5th of January 1914, the sellers proposed to deliver a fresh lot, which they agreed to take back, if not approved by the buyers. This offer was accepted with the further term that a person named by the buyers was to inspect the jute as to its quality. Disputes thereafter arose about taking back the old lot of jute which had been delivered in November, and also the fresh lot, the sellers alleging that the two lots had been mixed up and were rendered incapable of identification. The buyers demanded the return of the advance made by them and the sellers required return of the lots delivered. The sellers were the first to ask the buyers to refer the matter to the Chamber, who apparently then demurred, but finally the buyers asked for the Arbitration of the Chamber. The sellers protested and said that they were willing to go to Arbitration, if the Chamber first decided the question whether it was practicable to identify the second lot. Considerable correspondence ensued and finally the Registrar of the Chamber asked the sellers to state their case in full "pending decision of the point raised,"—referring to the preliminary question raised by the sellers as to whether the second lot was capable of identification.

The sellers then stated their case in detail under protest and they heard nothing further until the award was made, which they challenged on the following amongst other grounds:—

(1) That there was a new contract on the 5th of January, which was not covered by the Arbitration clause in the original contract.

(2) That they were not aware of the rules of the Chamber and were not bound by them. That they did not even get a copy of the rules when they applied for it, as the Registrar said that he was *functus officio* after the award had been made.

(3) That the rules were in various respects *ultra vires*, against public policy and the elementary principles of justice, inasmuch as amongst other things, the parties had no right to know the names of the Arbitrators, or to attend their sittings; some of the rules also took away the statutory rights of the parties and were said to be to that extent bad.

(4) That the Arbitrators had used an affidavit which they asked the buyers to put in. This was done without notice to the sellers, and without giving them an opportunity to test its truth or state their case on oath against the allegations therein contained.

His Lordship held that the contract of the

5th of January was a new contract after the old contract had expired, and that the buyers had a complete cause of action against the sellers thereunder which they could at once enforce. The new contract therefore could not be treated as part of the original contract. It was in every sense a fresh contract and created new rights and liabilities. His Lordship, however, held that inasmuch as the sellers had asked for an Arbitration and submitted a case before the Arbitrators, they were bound to the extent that they had submitted to them. This submission was in the first instance expressly limited to the preliminary point raised by them, and inasmuch as the Arbitrators had gone beyond, and made their award without notice, it was outside the scope of their authority.

The preliminary point raised by the sellers was of considerable importance from their point of view, and in deciding that point, the Arbitrators had *without the knowledge of the sellers* used an affidavit and no opportunity was given by them to the Petitioners to meet it. This amounted to legal misconduct and was by itself enough to render the award invalid, even if it were conceded that the whole matter was properly before the Arbitrators It was urged that under the rules of the Chamber, no ground other than that of fraud or collusion was available to set aside an award, but His Lordship held that it was necessary to show that the parties had *so agreed*. The Arbitration clause *did not say that it was to be under the rules* of the Chamber. In this case the Petitioners denied that they knew the rules. There was nothing to show that they knew them. It was perhaps open to the parties to agree that certain things were not to be treated by them as misconduct, but such agreement must be shown.

The submission in this case was silent about the matter. The Arbitration Act showed that the provisions of its schedule were to be operative, unless a different intention was expressed in the submission. "Expressed" does not mean "implied." It had been held in *Green and Bedford, Williamson & Co.* (63, L. T. R. 97, 325) amongst other cases that *if the parties to a submission were to be deprived of any legal right they might have, the submission must plainly say so.* The Arbitration Act provided a procedure, and the contract to refer to the Bengal Chamber of Commerce could be fully given effect to, without any special procedure of their own. *It was open to the parties to agree to a different procedure*, if it did not violate the law and the elementary principles of justice, *but such agreement had to be proved.* It could not be implied. Reference was also made to the London Stock Exchange case of *Perry* v. *Barnett* (15 Q. B. D. 397) & [1912] A. C. 1 & 9 T. L. R. 697.

His Lordship declined to discuss any thing in connection with the rules, not immediately relating to the case before him, as he thought it extremely undesirable to do so. The duty of the Court was merely to decide upon the questions before it, and only such of them as disposed of the matter before it. When it had done that, its duty ended. It should not be betrayed into entering into a general discussion of the nature or character of the rules attacked which might embarrass the Chamber in the discharge of an onerous public duty which was being so well done by them. As it seemed to the Court that the disputes were upon the fresh contract, and the use of the affidavit illegal, it was not a fit case for remission to the Arbitrators, and the award was set aside with costs.

It is clear from the Judgments that what was held was that *the parties would have been bound, generally speaking, if the Arbitration clause referred to the rules, that the form of the clause was defective, and that the proper form was that in the cases above referred to. That to take away legal rights such as are given to the parties under sec. 14 of the Arbitration Act, an agreement to that effect between them has to be shown. That the Arbitration Act provided a procedure. If that was to be departed from, it must be shown that it was so agreed.* We do not think that the Judgments go beyond the above.

We may point out that under sec. 7 of the Arbitration Act a reference to an Arbitrator or Arbitrators to be appointed by the President or Registrar of the Chamber of Commerce would be quite valid If the form of the Arbitration clause took that into account, vexatious questions of lists, or the disclosure of names in them would not arise. We have seen that the substance of the rules is printed in some forms of contracts. It is a commendable practice, which obviously prevents trouble.

Arbitrations serve a very useful purpose and Judges invariably try their best to uphold them, but as Lord Selborne said in Privy Council, *the Court would hesitate to hold that Arbitrators could disregard all law and be arbitrary in their dealings with parties.*

The Government of Bengal and Juvenile Offenders.

The Resolution of the Bengal Government on the Report on the Administration of the Jail Department in the Bengal Presidency for the year 1913, which appears in the current Calcutta Gazette, possesses special interest by reason of its

references to the new measures adopted by Government concerning juvenile offenders. So far as Jail administration is concerned, special juvenile wards have been opened in Calcutta and some of the larger District Jails, and a depôt for the reception of young female offenders has been opened in the Midnapore Central Jail, whilst at Alipore a special ward has been opened for the accommodation of juvenile offenders undergoing trial. The Resolution also foreshadows the institution of a House of Detention for Juvenile Offenders in Calcutta and a Juvenile Offenders' Court to be located in a part thereof and to be presided over by selected Honorary Magistrates. In another column will be found Government Notifications published in the same Gazette for the establishment of the House of Detention and the Juveniles' Court.

The reference in the Resolution to Juvenile Offenders is in the following terms :—

A very satisfactory feature of the year's work is the continued attention that is being devoted to the problem of juvenile criminality. The "Star Class" system in force in the Juvenile Jail at Alipore which was describ d in the last year's report, continues to give good results · the boys receive elementary education and instruction in some trade to enable them to obtain employment on their release A gratifying advance has been made by the opening of a special ward in the Juvenile Jail for the accommodation of juvenile offenders undergoing trial. Progress is not confined to Calcutta, as all Central Jails and some of the larger District Jails are provided with special juvenile wards ; while a depôt for the reception of young female offenders has been opened in the Midnapore Central Jail. The Inspector-General remarks that boys are and can be improved by the care and discipline of Juvenile Jails ; but that, to ensure real good, such effort requires to be supplemented by an agency like the Borstal Committe or "After Care" Association, which will take charge of the boys and find suitable employment for them. The Governor in Council is in hearty agreement with the Inspector-General on this subject. The effort to increase the reformative character of the treatment of juvenile criminals by means of probation and supervision and tne Borstal system of confinement in a special institution have been the most successful features of prison reform in other countries ; and His Excellency in Council awaits with interest the forthcoming report of the Juvenile Offenders' Committee. Comprehensive efforts, it is hoped, may yet be made to extend and systematize the methods of dealing with the young offender. Meanwhile an institution in charge of a Superintendent will shortly be opened in Calcutta, to be used as a House of Detention for Juvenile Offenders. A number of ladies and gentlemen will be appointed visitors, and in the building will be located a Juvenile Offenders Court composed of selected Honorary Magistrates.

Juvenile Offenders' Court.

With regard to the constitution of the Juvenile Court, we think the proposal to place selected Honorary Magistrates in charge of this Court has much to commend it. It need hardly be said, however, that the success of the experiment will depend ultimately upon the individuals selected. In Calcutta, Government need have no difficulty in picking out the kind of men best fitted to discharge the semi-paternal functions of a Juvenile Court Judge. If the experiment proves successful, as we have no doubt it will, its extension to the Mufassal would only be a question of time.

Convicted and Under-trial Prisoners.

The Resolution notes that "the daily average strength of convicted prisoners in confinement" "has risen from 10,091 to 10,611," comparing the figures with those to which they had fallen as the result of the release of prisoners on the occasion of the celebration of the Imperial Durbar at Delhi on 12th December 1911. The number of prisoners in jail at the close of the year increased by 769, the increase being shared by both convicts and under-trial prisoners. As to these latter the daily average for the year was 1,452 as against 1,214 in the previous year—a difference which cannot, of course, be attributed to the Durbar and which can be accounted for only on the supposition that the provisions of law authorising the release of under-trial prisoners have not been sufficiently availed of by the trying Courts. "The average period of detention of under-trial prisoners before the Courts," the Resolution proceeds, "was on the whole slightly less than in 1912 : bu it was excessive at Midnapore and in Sessions cases at Krishnagar, Khulna and Mymensingh." All these certainly point to the necessity of greater care on the part of Magistrates and Judges in disposing of bail applications.

THE LAW OF PROBATE AND ADMINISTRATION AND ITS INDIRECT EFFECT ON HINDU LAW.

What we endeavoured to show in our previous article (18 C. W. N, No. 22, p. cxxvi) as regards the distinction between legal and equitable estates in India, was that it is no longer a moot point : it is a well established fact.

In the recent case of *Bank of Bombay* v. *Ambalal Sarabhai* [(1900) I. L. R. 24 Bom., 350], Their Lordships of the Bombay High Court have recognized the distinction and have given effect to it in very clear terms and most unmistakably. In that case, certain shares of the Bank of Bombay stood in the name of one Sarabhai, after whose death his minor son applied to the Bank to have those shares transferred to his name as the sole surviving coparcener. The question was whether such shares could be transferred without letters of administration. It was held, that regard being had to the provisions of sec. 23 of the Probate and Administration Act, and inasmuch as "the legal title to the shares did not survive, though the beneficial interest did," letters of administration were necessary in support of the

representative title of the Applicant, Ambalal. Here, therefore, we have two kinds of interest, the legal and the beneficial, the former passing to and vesting in the legal representative (executor or administrator), and the latter devolving upon the survivor. These two kinds of interest are separate and distinct, and they appertain to the same subject-matter or property. In arriving at the above conclusion, Their Lordships had no discretion to exercise. They were bound to recognize the distinction and give effect to it. For, in pursuance of what the Legislature have, from time to time, enacted in the Companies Act, almost every company in its articles of association has a provision to the effect that "The executors or administrators of a deceased sole holder of a share shall be the only persons recognized by the company as having any title to the share," and this being so, in conducting its business the company cannot but enforce this provision, and in administering the law the Judges are bound to give effect to it. Thus it is clear that the introduction of legal and equitable estates as distinct and separate interests, in the transactions of this country, is a growing necessity—a necessity which was created by the Legislature long before the Probate, and Administration Act came into being (*see* Act XIX of 1857, Act X of 1866, Act VI of 1882 and Act VII of 1913).

It may be supposed that the necessity created by the Legislature having reference to purely personal property, the creation or introduction of legal and equitable estates is also referrable only to the same, so that landed interests are free from the effect and operation of the rule laid down in the above-mentioned case of the Bank of Bombay. But that cannot be the case. Under sec. 4 of the Probate and Administration Act, all the property of the deceased person, whether moveable or immoveable, real or personal, vests in the executor or administrator. But such property also vests in the heir and devisee or legatee of the deceased; and these vestings take place simultaneously and immediately on the death of the testator or intestate both according to English as well as the Hindu law. So far as the English law is concerned, we have it, on the authority Mr. Joshua Williams, that "the heir still succeeds (under Land Transfer Act, 1897) immediately upon his ancestor's death to the beneficial interest in the lands held by the ancestor in fee simple: but at law the estate of the deceased vests at once in his executors, if he should have left a Will appointing executors" (Williams' Real Property, 20th Ed. p. 85). And where the deceased dies intestate, or testate, but without appointing executors, his estates "vest in his administrator so soon as appointed" (*Ibid*). As regards Hindu law, it is a well established rule, that immediately on the death of a person all his properties moveable or immoveable devolve upon and vest in his heir. Now, what do these vestings indicate and how are they distinguishable? The vesting in the heir is not the same as the vesting in the executor or administrator. They cannot be the same. The vesting in the executor or administrator is entirely a foreign matter. The very introduction of this vesting, or what is the same thing, the very promulgation of the law of Probate and Administration, has brought in its train numerous technicalities of English law whereof those involved in the distinction between *law* and *equity* or legal and equitable estates, seem to the be most prominent. According to English law, as seen above, the deceased's estate vests in the executor or administrator *at law*, so that the estate of an executor or administrator is a *legal estate* as distinguished from an *equitable* or *beneficial estate or interest* which vests in the heir. And as the law of Probate and Administration is English law, pure and simple, it is natural that these vestings in India should be governed by that law; and as a matter of fact they are being governed by it, there being no other law.

That the property of a deceased Hindu should vest in his executor or administrator and at the same time also in his heir and devisee or legatee is an undesirable fact. What the vesting in the executor or administrator means and how it operates—what rights and privileges he derives from such vesting and what are his powers, duties and liabilities thereunder—are laid down in detail in the Probate and Administration Act. But there is nothing in that Act or elsewhere to show what the vesting in the heir or legatee results in. It is noteworthy, however, that the Madras High Court has very lately thrown a good deal of light on this point. In *Ramanuja Ammal* v. *Sawmi Pillai* (22 Mad. L. J. 228), their Lordships of that Court said:—"An heir or a legatee may not be entitled to possession of what he inherits or is bequeathed to him except in the proper course of administration, but that does not mean that he acquires no interest till then."

Thus it appears that though the vestings are simultaneous and take place immediately on the death of the deceased, they are not of the same character, nor do they lead to the same result. As seen above, the vesting in the executor is *at law* and the title derived thereform is legal, and that in the heir or legatee is *in equity* giving rise to what is called beneficial or equitable title. In other words, the estate of the deceased vests in the executor *in possession* and in the heir or legatee *in interest*, with the result that, as held in *Ramanuja* v. *Sawmi Pillai*, the heir or legatee becomes entitled "to what he inherits or is be-

queathed to him" only in due course of administration. That is to say, the title of the executor is complete and perfect, but that of the legatee inchoate only, to be completed and perfected by the assent of the executor. The title derived by the heir is of a more precarious nature than that of the legatee or the devisee, for he comes last of all in the course of administration—after all the debts and legacies have been paid. In the result, therefore, it comes to this that the title of the executor *as a representative* is superior to all, that of the heir or legatee being of a subordinate nature although they are beneficiaries.

The conclusions that appear to flow from the foregoing are the following :—

(1) That the law by virtue of which the property of a deceased Hindu vest's in executors or administrators and in consequence of which they become the only representatives of the deceased person, to the exclusion of his lawful heir (according to Hindu Law), materially modifies the Hindu Law of succession and inheritance.

(2) That the introduction of the said law is equivalent to the introduction of the English Law of personalty, either in its entirety or at least in its leading principles.

(3) That the introduction of the doctrine of representation as distinguished from or rather opposed to succession, which is the essential feature of the law of Probate and Administration and its only object, must in its ultimate consequences, be to a great extent subversive of the Hindu Law notions of succession.

(4) That if the "great object of the law" (which, as formulated by the Law Commissioners appointed in England) is "ultimately to introduce one uniform system applicable to all classes," be fulfilled, it must tend to destroy the rigid exclusiveness of the Brahmin laws which are still supreme.

(5) That, without doubt, the Probate and Administration Act, or more properly, the Indian Succession Act, has been effecting a silent revolution of incalculable magnitude affecting directly only its law of property, but indirectly its social, religious and political conditions as well.

MAJUMDAR.

CURRENT INDIAN CASES.

(CRIMINAL.)

Indian Penal Code, sec. 498.—Fact and legality of marriage, proof of.

EMPEROR *v.* NAZIR KHAN, I. L. R. 36 All. 1.

The fact and the legality of the marriage are material elements in a case under sec. 498, I. P. C. They must be proved as strictly as any other material facts and not in any particular way.

Ryves, J. in the course of his judgment observed "my attention has been called to the following rulings : *Emperor v. Pitambur Singh*, I. L. R. 5 Cal. 566. In that case Garth, C J. in delivering the judgment of the Full Bench said that "the fact of the marriage must be strictly proved in the regular way." That ruling was followed by this Court in *Empress of India v. Kallu*, I. L. R. 5 All. 233 in which the evidence to prove the marriage was set out and held to be sufficient. The next case referred to was *Queen-Empress* v. *Santok Singh*, All. W. R. 1898 p 186. In that case also the whole of the evidence with reference to the marriage is set out and there too it was held to be sufficient The next case cited was *Queen-Empress* v. *Dal Singh*, I. L. R. 20 All. 166. There a Division Bench of this Court held that "the Court should require some better evidence of the marriages than the mere statement of the complainant and the woman"

What I think was meant in all these cases is that as the fact and the legality of the marriage are material elements in a case under sec 498, they must be proved as strictly as any other material facts, as for instance, the enticing away of a woman with the intention mentioned in the section. I do not think rulings lay down that the fact of the marriage can be proved only in some particular way. . . . . As pointed out in *Queen-Empress* v *Subbarayan*, I. L. R. 9 Mad. 9, "even a marriage in England may be proved by any person who was actually present and saw the ceremony performed ; it is not necessary to prove its registration or the licence or publication of the bans.

Correspondence.

THE INCORPORATED LAW SOCIETY OF CALCUTTA.

A largely attended meeting of the members of the Society presided over by the Hon'ble Mr. C. H. Kesteven, Solicitor to the Government of India, the President of the Society, was held at the Society's Library in the High Court on Saturday the 23rd May 1914.

Mr. F. M. Leslie, the Honorary Secretary of the Society, addressing the President said, "Mr. President, before we commence the business of this meeting, which is to elect a representative of the Society on the Governing Body of University Law College, it is my pleasing duty to ask you to present the Robert Belchambers Gold Medal to the successful candidate for the same at the last final examination for the admission of Attorneys. I need not now say much about the origin of this medal. It is unnecessary for me to say more than that the medal is intended to encourage the study of law amongst articled clerks and to commemorate one whom we will never forget. Babu Jitendra Nath Dutta has won the medal on this occasion and has to his credit the splendid performance of having obtained 675 marks out of a possible maximum of 720. Speaking as one of the Examiners I am free to say that his paper was the best that I examined and that this opinion was shared by the other Examiners is vouched for by the marks he obtained. I hope that his present success is an indication of his future success in life I now ask you to present the Robert Belchambers Gold Medal to Babu Jitendra Nath Dutta.

The President in handing the medal to Babu Jitendra Nath Dutta congratulated him upon his success and wished him on behalf of the Society a continuation of good things in life.

The meeting then proceeded to elect a representative of the Incorporated Law Society on the Governing Body of University Law College and Mr. M. N. Chatterjee, M. A., B. L., a member of the Committee of the Society was unanimously elected to that honour.

The Chairman then addressing the meeting said there was another matter which was not strictly the business of the meeting, but one which he was glad to be able to mention. It had been suggested by Babu G. C. Gunder that we should express to His Excellency the Chancellor of the Calcutta University our gratitude at his having appointed a member of our Profession, a member of our Society, to be the first Non-official Vice-Chancellor of the Calcutta University, and if the meeting approved of it, he would place before them a Resolution which had been handed to him and which was to this effect: "That this meeting desires to place on record its deep sense of gratitude to His Excellency the Chancellor of the University of Calcutta at the honour done to the Society by the appointment of one of its valued members to be the first Non-official Vice-Chancellor of the Calcutta University and the Honorary Secretary be directed to forward a copy of this Resolution to the Private Secretary of His Excellency."

The Resolution was carried by acclamation.

With a vote of thanks to the chair the meeting closed.

ATTORNEYS' LIBRARY,
HIGH COURT, CALCUTTA.
Dated the 29th May 1914.

FROM

F. M. LESLIE, ESQ.,
Hony. Secy., Incorporated Law Society of Calcutta,

TO

THE EDITOR,
Calcutta Weekly Notes

DEAR SIR,

I thank you for publishing in your last issue a copy of the Registrar's letter to me with reference to the Peremptory Cause Lists and the Transfer of Cases from one list to another. The Hon'ble the Chief Justice was kind enough to grant the Committee of the Incorporated Law Society a personal interview with reference to the proposals contained in that letter.

I have now the pleasure to send you a copy of a letter received from the Registrar placing on record the result of that interview which I trust you will kindly publish in the next issue of Calcutta Weekly Notes. I feel sure that the Profession generally will do all that can be done to justify the assurance given to the Chief Justice and mentioned in the enclosed letter.

Yours faithfully,
F. M. LESLIE,
Hony. Secy.

29th May, 1914

FROM

MAURICE REMFRY, ESQ.,
Offg. Registrar, High Court, Calcutta, Original Jurisdiction,

TO

F. M. LESLIE ESQ.,
Honorary Secretary, Incorporated Law Society, Calcutta.

Before:
The Hon'ble Sir Lawrance Hugh Jenkins, K. C. I. E.,
Chief Justice of Bengal.

SIR,

I am directed to place on record the result of the interview which the members of your Committee had with His Lordship the Chief Justice in regard to the number of cases to appear on the Peremptory Cause Lists. Having regard to your representation the Chief Justice was pleased to direct that for the present the Peremptory List before each Judge on the Original Side should not consist of more than 15 cases, but that when the rules as to the Prospective Lists get into full working order the number of cases for the Peremptory List before each Judge shall be reduced to 12.

The proposal that all cases appearing on the Peremptory List shall be liable to compulsory transfer to the Peremptory List of another Judge will be dropped in view of your assurance that members of your profession will do all in their power to facilitate the transfer, whenever possible, of cases from one Judge's Peremptory List to that of another Judge whose own list has been finished.

As it appeared from the remarks of a member of your deputation that a doubt exists as to whether cases now on the Remanent List can be transferred to the Prospective Lists under the new Rules, it will greatly facilitate the working of these lists if you could convey to your members the information that cases can be and are being so transferred.

I have the honour to be,
SIR,
Your most obedient servant,
(Sd.) MAURICE REMFRY,
Offg. Registrar.

Government Notifications

I.—HOUSE OF DETENTION.

No. 4911P.—The 22nd May 1914.—In exercise of the power conferred by section 541, sub section (*1*) of the Code of Criminal Procedure, 1898 (Act V of 1898), the Governor in Council is pleased to direct that the premises No. 85 Lower Circular Road, Calcutta (hereafter to be called the "House of Detention"), shall, with effect from the 1st June 1914, be a place for the confinement of persons liable to be imprisoned or committed to custody under the said Code within the town of Calcutta, who are at the time of such liability under the age of fifteen.

Calcutta.

II.—JUVENILE OFFENDERS' COURT.

No. 4913P.—The 22nd May 1914.—The following rules have been made by the Chief Presidency Magistrate, Calcutta, in exercise of the power conferred by sub-section (*1*) of section 21 of the Code of Criminal Procedure, 1898 (Act V of 1898), and with the sanction of the Governor in Council, to regulate the conduct of business and the practice in the Juvenile Offenders' Court in Calcutta, and are hereby published for general information.

Calcutta.

Rules.

1. In these rules "juvenile offender" means any person who abets, commits or attempts to commit, within the town of Calcutta any offence within the meaning of the Code of Cri-

Definition of "juvenile offender."

minal Procedure, 1898, and who is under fifteen years of age at the time when such offence is committed or attempted, but does not include any such person when charged jointly with any other person who is over fifteen years of age.

Location of Court.

2. The Court for the trial of juvenile offenders shall be loca'ed in such place as may be appointed by the Local Government, from time to time, by notification in the *Calcutta Gazette* and in one or more of the local newspapers.

Constitution of Court.

3. (*1*) Every juvenile offender shall be ordinarily tried by a Bench, consisting of three Presidency Magistrates (other than the salaried Presidency Magistrates) authorised to sit singly for the trial of cases, the senior of whom shall act as Chairman.

(*2*) If one of the members of the said Bench is unable to attend any sitting thereof, the other two members shall proceed with the work of the Court, without the absent member.

(*3*) If two of the members of the said Bench are unable to attend any sitting thereof, the third member present may, in his discretion, either proceed with the work of the Court, as a Magistrate authorised to sit singly for the trial of cases, without the absent members, or may apply to the Chief Presidency Magistrate to appoint a substitute or substitutes under sub-rule (*4*).

(*4*) If two, or all, of the said members are unable to attend any sitting of the said Bench, the Chief Presidency Magistrate may appoint substitutes to perform the functions of the absent members, at that sitting, or until further orders.

(*5*) Nothing in this rule shall be held to empower any Magistrate to give a decision in any case unless he has heard the whole of the evidence.

Magistrate when sitting singly to discharge functions of Bench

4. When any member of the said Bench sits singly, he may discharge all or any of the functions given to the said Bench or any of its members under these rules.

Court may be cleared of public during trial.

5. During the trial of any juvenile offender, the Court may, if the Bench thinks fit, be cleared of the public.

Hours of attendance.

6. The said Bench of Magistrates shall ordinarily sit from midday till 5 P. M., on all days that are not gazetted holidays, in accordance with the *roster* to be drawn up by the Chief Presidency Magistrate:

Provided that a Special Bench may be convened by the Chief Presidency Magistrate for any day or hour.

Recording of evidence and judgment.

7. The Chairman shall ordinarily record the evidence and judgment (in all cases where a record of evidence and judgment are necessary) with his own hand, provided that such duty may, with his consent, be performed by any of his colleagues.

Rights of members of Bench in determining points, finding and sentence.

8. (*1*) Every member of a Bench shall be entitled to give his opinion on the determination of all points arising in any case before the Bench, and in respect of the finding and sentence; but the decision of the majority of the members of the Bench with regard to such points, finding and sentence, shall prevail.

(*2*) In a Bench composed of two members, the opinion of the Chairman shall prevail on all points, except the finding. In the event of disagreement as to the finding, the case shall be referred to the Chief Presidency Magistrate.

Application for process, to whom to be made.

9. Every application for a process against a juvenile offender shall be made to a Bench appointed to try such offenders. Every Bench issuing a process against a juvenile offender shall proceed to try and dispose of the case in which it has previously issued process.

Form of application for process.

10. (*1*) Every application for a process (including an application to summon a person to give evidence or to produce any document or other thing), shall be made in writing on foolscap, which must be properly stamped, when necessary.

(*2*) Every application to summon any person to give evidence, or to produce any document or other thing, must show, if possible, the father's name as well as the address, of such person, unless he be a European British subject.

Signing of process and summons.

11. Every such process or summons shall be signed by one of the members of the Bench issuing such process or summons.

Whipping.

12. Where a juvenile offender has been sentenced to be whipped, the sentence shall be executed in the presence of the members forming the Bench which passed such sentence either at the conclusion of the case in which such sentence has been passed, or at the rising of the Court, on the day on which such sentence has been passed.

for a certificate in the terms prayed for by the Appellant, and remand the case to him for a re-hearing.

The Respondents will pay the Appellant's costs of this appeal which we assess at ten gold mohurs.

CARNDUFF, J.—I agree.

Appeal allowed.

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

LORD MOULTON.	CHIDAMBARAM
LORD SUMNER.	CHETTIAR, Appellant,
SIR JOHN EDGE.	*v.*
MR. AMEER ALI.	SRINIVASA SASTRIAL
1914,	AND OTHERS,
4, March.	Respondents.

*Moveable property—Transfer in fraud of creditors—Transfer for consideration—*Bonâ fides, *need of—Principle of Transfer of Property Act (IV of 1882), sec. 53—Validity, if maintainable as to part.*

Held (by the Madras High Court)—*That a deed is void against creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor or the consequence of his act, it is not sufficient to render a deed valid that it should have been made upon good consideration. It must be shewn to have been taken* bonâ fide. *Such a deed being wholly invalid cannot be supported as to a part and set aside as to the rest:*

Held (by the Privy Council)—*That the decision of the High Court, setting aside the two assignments in question in the appeal as having been made in fraud of creditors, was correct.*

These were Appeals from a judgment of the Madras High Court which is reported in I. L. R. 30 Mad. p. 6.

The facts of the case shortly are as follows :—

A sum of Rs. 14,000 was held in deposit by the Court of the Subordinate Judge at Kumbukonam to the credit of Sami Aiyar as decree-holder in Original Suit No. 12 of 1899. Sami Aiyar was indebted to various persons and some of them obtained decrees against him for various sums. On 20th March 1900, Sami Aiyar assigned the decree in Original suit No. 12 of 1899 to Annamalai Chetty, who with himself and one Chidambaram Chetti were all paramours of a dancing girl, Balamani, and on friendly terms with each other. Annamalai was one of Sami Aiyar's decree-holders to the extent of Rs 4,390, and he discharged that decree as also some decrees obtained by other decree-holders, but with regard to about Rs. 7,000 (nearly a half of the consideration money stated in the assignment deed) the Courts in India concurrently found that that sum was never paid, but was in fact kept for the benefit of the assignor or of persons in whom he was interested and who were not his creditors. The major portion, about Rs. 6,000, was alleged to have been paid to Balamani and Rs. 1,000 to Chidambaram Chetti, the other paramour of Balamani in discharge of debts stated to have been due to them, but both the Courts in India were of opinion that neither Balamani nor Chidambaram were Sami Aiyar's creditors.

The Appellant claiming through Annamalai Chetti applied on the basis of the assignment deed to be brought on the record as transferee decree holder in place of Sami Aiyar under secs. 232 and 250, C. P. C, but on objection by various parties who had attached the decree in Original Suit No. 12 of 1899, his petition was dismissed. The Appellant then

brought Original Suit No. 2 of 1902 to establish his claim as assignee of the decree. That suit was dismissed on the ground that the Appellant should have appealed against the order dismissing his petition under secs. 232 and 250, C. P. C.

Two separate Appeals were preferred to the High Court against the orders passed respectively in the execution proceeding and in the Original suit. The High Court (Subrahmania Aiyar and Benson, JJ.) dismissed both Appeals by one judgment in the course of which they observed :—

"Having regard to the fact that at this time Sami Aiyar, Annamalai and Chidambaram Chetti were all paramours of the dancing girl Balamani and on friendly terms with each other, we cannot doubt that the arrangement was, to the extent we have stated, a device intended to defeat Sami Aiyar's other creditors.

"In this view, the next question for decision is whether the assignment to Annamalai is valid as against the Respondents.

"The property sought to be assigned, not being immoveable property, sec. 53 of the Transfer of Property Act has no direct application, and we must decide the question by a reference to general principles of justice, equity and good conscience. As observed by the Judicial Committee of the Privy Council in *Corlett* v. *Radcliffe* (1), 'Each case must depend upon its own circumstances, and in all the question is one of fact, whether the transaction was *bonâ fide*, or was a contrivance to defraud creditors.' It may, however, be stated, generally that a deed is void against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor, or the consequence of his act, it is not sufficient to render a deed valid that it should be made upon good consideration ; for as it is said in *Twyne's* case (2), 'a good consideration does not suffice if it be not also *bonâ fide*.' This statement of the law is sufficient to support the conclusion of the Subordinate Judge, that the assignment was invalid. As however, Mr. Krishnasami Aiyar, on behalf of the Appellant, strongly contended that the last paragraph of sec. 53 of the Transfer of Property Act, as interpreted by this Court in *Ramasamia Pillai* v. *Adinarayana Pillai* (3), warrants a different view being taken, we will briefly deal with his contention. In effect his contention is that wherever there is any real consideration, however small, for the transfer, the question of intention is immaterial and the transaction must be held to be one entered into in good faith and therefore not invalid as against creditors either under the Statute of 13 Elizabeth, C. 5 or under sec. 53 of the Transfer of Property Act, even though it was in fact intended to delay or defeat creditors and had the intended effect. This contention is, we think, on the face of it unsustainable for the simple reason that under both enactments good faith as well as consideration is made, in terms, an essential condition of the validity of the transfer. This has been pointed out again and again both in the decisions of the Courts and by the text-writers referred to by Mr. Sivasami Aiyar in his reply for the Respondents. [*Corlett* v. *Radcliffe* (1)] already cited ;

(1) 14 Moo. P. C. O. 121, 136 : s. c. 15 English Reports 257 (1860).

(1) 14 Moo. P. C. O 121, 136 ; s. c. 15 English Reports 257 (1860).
(2) 2 Co Rep. Pt. III 80
(3) I. L. R 20 Mad. 465 (1897).

CHIDAMBARAM CHETTIAR *v.* SRINIVASA SASTRIAL.

Bott v. *Smith* (4), *In re Johnson: Golden* v. *Gillam* (5), *Ex-parte Chaplin: In re Sinclair* (6), per Fry L. J, Smith's Leading Cases, Eleventh Edition, Vol. I, pages 16 and 17, May's Fraudulent Transfers (May on Fraudulent and Voluntary Dispositions of Proper y), pages 85, 87; *Ranchhodas Hargovandas* v. *Chunilal Balmukunddas* (7).

"As regards the passage at page 466 of the case *Ramasamia Pillai* v. *Adinarayana Pillai* (3) the Judges appear to have merely intended to repeat the language of Thesiger L. J, in *Ex parte Games* (8), which again refers to *Allen* v. *Bonnett* (9). In neither of these two cases was the statement intended to give an exhaustive explana ion of the term *bonâ fide* in connection wi'h such transactions. In both the Judges were dealing with mortgages, and what they said was that, where a mortgage was granted for a sum really due, the transaction could not be impeached except upon the ground that the transaction, though in form a mortgage, was in truth, a trust in favour of the debtor, and thus a mere cloak to secure an advantage to him. In effect, they were referring to the condition of things which was dealt with by Lord Coke in *Twyne's* case (2) when he said thus: 'If a man be indebted to five several persons in the several sums of £20, and hath goods of the value of £20, and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor or some other person for him or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bonâ fide* within the said proviso, for the proviso saith on a good consideration *and bonâ fide*, so a good considera ion doth not suffice if it be not also *bonâ fide*.'

"It is scarcely necessary to add that there is nothing in the Sta'ute of Elizabe h or in sec. 53, Transfer of Property Act, to prevent a creditor giving a preference, provided nothing more is done by the transaction either with reference to the transferor or transferee so as to injuriously affect the creditors of the former.

"Another argument of Mr. Krishnasami Aiyar for the Appellant was that to the extent of payments made by Annamalai on behalf Sami Aiyar's creditors, the assignment should be held good, and the Appellant should be allowed to execute the decree as if he were a joint creditor with Sami Aiyar. We cannot accede to this argument. The transaction being entirely invalid as against the creditors, we cannot allow it to be treated as partly valid. It is open to the Appellant to protect himself by discharging the claims of Sami Aiyar's other creditors, at whose instance the transaction is voidable."

Hence these Appeals, which were heard *ex parte*.

Mr. L DeGruyther, *K. C.*, and *Mr. Brown* for the Appellant submitted that the assignments were not fraudulent and that the assignee took the assignment in good faith without notice of any fraudulent intention. In any view, it should have been held that the Appellant was entitled as assignee to the decretal money in Court less aggregate sum which was not payable in discharge of debts due by Sami Aiyar.

(2) 2 Co. Rep. Pt. III 80.
(3) I. L, R. 20 Mad. 465 (1897).
(4) 21 Beav. 511 (1856).
(5) L. R. 20. Ch. D. 393 (1881).
(6) L. R. 26 Ch. D. 319 (1884).
(7) 5 Bom. L. R. 213 (1903).
(8) L. R. 12 Ch. D. 314 (1879).
(9) L. R. 5. Ch. App. Cas. 577 (1870)

CHIDAMBARAM CHETTIAR v. SRINIVASA SASTRIAL.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—Their Lordships are of opinion that the two decisions appealed against are correct; that the High Court acted rightly in setting aside the two assignments, the one to Annamalai and the other to Chidambaram, and that no valid proceedings can therefore be based on either of those assignments. The question whether any of the parties can establish rights based, not on the assignments, but on other grounds, such as the actual payment of debts, is a point which was, in their Lordships' opinion, not before the Courts below, and is not before their Lordships and on that point therefore they pronounce no opinion.

Their Lordships will, therefore, humbly advise His Majesty that these Appeals should be dismissed.

Solicitor: *Messrs. Chapman Walker & Shephard* for the Appellant.

B. D. *Appeals dismissed.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SHAW.	
LORD MOULTON.	
MR. AMEER ALI	CHUNILAL PARVATI-
1913,	SHANKAR, Appellant,
Heard, 3, 10 and	v.
19, December.	BAI SAMRATH,
1914,	Respondent.
Judgment,	
17, March.	

Hindu Law—Will, construction of—Executory devise—Time of distribution, death of testator if—Event happening after testator's death, gift over of to take effect on—Principles of interpretation.

Where a Hindu by a Will, not governed by the Hindu Wills Act, purported to give his properties in equal shares to two of his sons named, with a proviso that "should either of these two sons die without leaving any male issue, the survivor is to take the whole of the property appertaining to the share of the deceased son who may leave no male issue, after undertaking to defray the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters:"

Held—*That the words clearly contemplated survivorship whenever it should occur—whether before the testator's death or after—and that on the death, without leaving male issue, of one of the two sons both of whom survived the testator, the share bequeathed to him passed to the surviving son, subject to the obligations specified.*

It has for many years been a settled principle that words of this class being in general terms must receive their full and not a restricted meaning, though there may be older cases warranting a suggestion that the terms employed in this Will should be limited to death occurring before the death of the testator himself.

There is nothing specifically either English or Indian in the idea that a Will of a testator must be construed on that principle which would enable Courts of law most fully to give effect to the intention expressed by his words. It may be that if the words he employs are voces signatæ *they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole Will,* i.e., *the whole of the words employed by the testator must be looked at together so as to determine his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general meaning and*

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subject them to limitations which the words do not necessarily imply.

The period of distribution to which an executory devise will be referred, will be the period of the death of the first taker, unless there are other circumstances and directions in the Will which are inconsistent with that supposition.

O'MAHONEY *v.* BURDETT (1) *followed.*

This was an appeal relating to the construction of a Will which was in the following terms :—

1. I had an eldest son named Surajlal who died at Rajkot about twenty years ago. One son of his (i.e.) my grandson named Dhirajlal aged about 20 years is alive this day.. After I got my son Surajlal educated &c and married at a cost of hundreds of rupees and after he was made clever he was got employed in the Engineering Department at Rajkot by the recommendation of one of my kind friends (*viz.* Revd. Mr. Wilson. My said son Surajlal acquired much wealth in the said (service and at the time of his death he left (behind him) property worth about eighty thousand Rupees. When I went to Rajkot to see) my son Surajlal at the time of his illness (of which) he (ultimately) died I found that Parsan the wife (? widow) of my said son Surajlal acted under the advice of two (or) four bad characters and consequently the said Parsan said to me "What concern have we with you? We are separate (from you) and therefore I am the guardian of my son." She began to act in such and other very impertinent ways Really speaking my son Surajlal was joint with us, but as I was in a good condition I did not take even a single pice from my (said) son Surajlal With a view to satisfy and convince me my son Surajlal used openly to write to me in (his) letters which he wrote to me as follows for the purpose of showing that he was joint with me:—"(Dear) father the whole of whatever you have got and whatever I have got belongs to all of us three brothers" But after the death of my son Surajlal when Surajlal's widow Parsan prevented me from touching, the property of my son Surajlal by alleging separation (from me) a dispute arose between me and Surajlal's widow Parsan. We appointed arbitrators for (the purpose of) settling the said dispute. I had produced as evidence before the said arbitrators letters in the handwriting of my (son) Surajlal for establishing joint (family) The said letters were stolen away from there. I had proved before the said arbitrators by evidence other than the said letters that when a son named Dhirajlal was born to my son Surajlal we being first at Karamsad the said son Dhirajlal was sent to Karamsad at my place for offering obeisance when I have got two (or) four ornaments made for the said boy Dhirajlal who is my grandson. We both the parties had appointed (*a*) Rajeshri Nagindas Vijbhukhandas Kaji, (Rao Saheb) Gopalji Surbhai Educational Inspector and Navalrambhai Head Master of the Training College—these three gentlemen—arbitrators for settling the dispute between my son Surajlal's widow Bai Parsan and myself. Two gentlemen out of them decided against me after my said evidentiary letters were stolen that my deceased son Surajlal was separate from me whereas one gentleman decided in my favour that though the letters were stolen away joint (family) had already been proved therefrom. Thus majority being on the side of Bai Parsan, Bai Parsan the widow of my deceased son Surajlal appropriated the property and effects, that is, estate of the value of about Rupees eighty thousand which my son Surajlal had at the time of his death As the said Bai Parsan acted under the advice of bad persons she has wasted some portion of the said property. Still this day she has got property of the value of Rupees forty thousand at the least After the death of my son Surajlal the said Bai Parsan lived for some years at Bassein with her son Dhirajlal and then they have gone (? went) to reside at Surat where they have been (residing) up to this day. In accordance with the desire of my son Surajlal if his widow Parsan had remained joint with me even after his death and had handed over to me the whole of the property of my son Surajlal I would have joined (? added) the whole of that (property) to my property and preserved the same and would have given equal rights therein to each of my three sons in the dispositions which I would have made (to come in force) after my death At that time I would have given the right of my son Surajlal to the said Surajlal's son and my grandson Dhirajlal. But taking into consideration all the circum-

(1) L. R. 7 H. L. 388 (1874).

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stances (*viz.*) that the widow of my deceased son Surajlal has appropriated the whole of her husband's property as stated) above and that in addition thereto she and her son Dhirajlal both of them are quarrelling with and acting impertinently towards me up to now I have decided not to give even a single pie out of my property to my deceased son Surajlal or to my deceased son Surajlal's son Dhirajlal and (? or) to the said Surajlal's widow Parsan that is to say I have excluded (disinherited) my son Surajlal his widow Parsan and his son Dhirajlal and I have not kept (? given) them any right whatever in my self acquired property nor do I keep (? give) any hereafter. Should my deceased son Surajlal's widow or son Dhirajlal or both of them file any suit &c of any nature whatever against my property or against my heirs and executors for any reason whatever the same shall be duly null and void by virtue of this will.

2 I appoint my two sons named Shambhuprasad and Chunilal who are alive executors, heirs and owners of the whole of my property.

3 The immoveable property which I possess is very little that is as to the two houses which belong to me, the particulars thereof are as folows

(1 One house situated in Ranchhoddas Vakil's Street in Vadifalia in the City of Surat in the sub-district of Surat, District Surat, measuring about 196 square yards in length and breadth and bearing Tiko E. No. 4 is as described in Sanad No. 195 in the Survey Register. To the east thereof there is the street passage, to the west a lane, to the north building bearing Survey No. 196 and to the south there is the house of Thakorbhai Chunibhai Chakavala. This house was sold by public auction on the 18th day of June 1892 under Darkhast No. 10 of 1892 in Civil Suit No. 141 of 1891 of the Court of the First Class Subordinate Judge of Surat. Therein my last bid (for the same) was for Rs. 6,875 The same having been sanctioned, the said Court passed an order to sell the house of the above description to me, and the sale certificate (in respect thereof, dated the 23rd of August 1892, which I accordingly got is extant with me, and the said house is in my possession under the said sale certificate

(2) One house situated on the road leading from Kelapith to Lindachowk in Rahia Soni's Chakla (street) in the City of Surat, sub-district Surat District Surat (measuring) about 76 square yards in length and breadth, bearing Tiko E No. 26 is as described in Sanad No. 32 in the Survey Register, to the east thereof there is the house of the sons of Fakirchand Jivan, to the west there is the house of Ganesh Dayaram, to the north there is the main road and to the south there is the passage of the lane. This house was sold by public auction on the 7th day of December in the year 1895 under Darkhast No 215 of 1895 in Civil Suit No. 175 of 1890 of the Court of the First Class Subordinate Judge of Surat. Therein my last bid was for Rs. 1,100 The same having been sanctioned the said Court passed an order to sell the house of the above description to me and the certificate of sale, dated the 10th of February 1896 which I accordingly got is extant with me. The said house has come in my possession under the said certificate of sale

4. As to the two houses of the description mentioned in the above third paragraph and as to whatever immoveable property other than the said two houses which I possess my two sons named Shambhuprased and Chunilal are to duly divide and take a moiety in equal shares of the whole of the said immoveable property after my life-time (? death. I have not kept (given any) right with regard to my immoveable properties to any person whatever other than my said two sons Shambhuprasad and Chunilal

5 I myself and Chunilal Balmukanddas with me both (of us) having contributed Rs 3,099-8-0 each, have on the 27th day of April 1889 kept in mortgage three pieces of the below mentioned lands for Rs. 6,199 in all from Mohandasji Guru Maharaj Gopaldasji the managing owner of the Gadi of the Acharya Maharaj (Spiritual Preceptor, of the Pranami Religion.

(1) One plot of land (bearing) Survey No. 14 (measuring) acres 5 gunthas 14, situated at Moje Tunki, a village of the Chorasi Taluka.

(2) One plot of land (bearing) Survey No. 52 (measuring) 2 acres 23 gunthas, situated in the same village.

(3) One plot of land (bearing) Survey No. 486 (measuring) 2 acres 10 gunthas, situated in Moje Katargam, a village of the Chorasi Taluka.

In the said mortgage deed I have caused the name of my younger son Chunilal to be entered as

mortgagee in my stead along with (that of) Chunilal Balmukanddas. The same is (caused to be) entered with the object that I have given my right to the extent of Rs 3,099-8 annas in the said mortgage deed as a gift to my younger son Chunilal. I have not even kept (? reserved) my right thereto. Consequently my younger son Chunilal has already become entitled to the s id claim of Rs. 3,099-8 annas No other person shall have (any) right or claim therein, and the right of recovering the said dues belongs to my younger son Chunilal along with Chunilal Balmukanddas.

6 As to some of my dues advanced on the security of property kept in mortgage, situated in the Gaikwadi villages of Gijrin, Dhamrod, Mahnej, and Nandav and in the village of Kosam within British limits, and as to whatever other (sums) may be due to me on personal security, my two sons Shambhuprasad and Chunilal are to recover all the said dues together, and as to the expenses which may be incurred in recovering the same, my two sons Shambhuprasad and Chunilal are to bear ? pay) the same in equal shares. These two sons Shambhuprasad and Chunilal are also to duly divide and take in equal shares whatever (amount) may be realized, and any other person) shall have no right or claim with regard thereto.

7. As to the moveable property which I possessed, I have during my life-time divided the same between my two sons Shambhuprasad and Chunilal according to my wishes and have made over the same in their possession. But as to gold and silver ornaments which I possess, I have entrusted the said ornaments to my wife Bai Jadav with particulars as to how the same are to be divided between and given to my two sons Shambhuprasad and Chunilal. Consequently my said wife Jadav is to divide the said ornaments between and give (the same) to my two sons Shambhuprasad and Chunilal agreeably to my directions, whenever she may like. At that time neither of my said two sons Shambhuprasad and Chunilal shall raise any dispute or objection whatever against by wife Bai Jadav.

8 As to the property which may not be mentioned in this my last will, that is, as to such of my property as I may not have disposed of by my will, both of my sons Shambhuprasad and Chunilal are to divide the whole of my said property (between them) and take (the same) in equal shares.

9. I have divided between and given to my two sons Shambhuprasad and Chunilal the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (' leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters. But under these circumstances the heirs of my deceased son Surajlal shall not get any right whatever.

10. Lastly I state my views briefly as follow.—My eldest son Surajlal is dead. The said Surajlal's son named Dhirajlal and widow Bai Parsan these two persons are alive as heirs to my son Surajlal I do not mean to give them anything whatever out of my property, nor has any direction been given in this my will for giving (any thing to them). The reasons thereof I have stated above in detail, and I state again that I have got self-acquired properties, which I have absolute authority to bequeath to anyone I may like. * Both of my two other sons named Shambhuprasad and Chunilal are alive. Though they live jointly with me, I have not taken even a single pice appertaining to the earnings of the said two sons Shambhuprasad and Chunilal. I kept both these sons Shambhuprasad and Chunilal with me, educated, trained, and got them married at my expense, and I myself have been defraying and do (still) defray all expenses relating to them I have no (other) heirs except the said two sons Shambhuprasad and Chunilal, and I have no affection for any one else than my said two sons Shambhuprasad and Chunilal. Consequently I have, of my free will divided the whole of my property between, and given (the same to my said two sons Shambhuprasad and Chunilal as mentioned above, and have given directions for (the same) being divided and given (to them). As to that having regard to the ways and manners and conduct of both my said sons Shambhuprasad and Chunilal I have, of my free will, given some more benefit out of my property to my younger son Chunilal. My elder son Shambhuprasad should not, therefore, become sorry or disappointed in any way, but should act and behave peacefully and harmoniously with his younger brother Chuni-

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lal, and it is my advice that no quarrel or dispute about anything should be allowed to arise."

The testator died on 4th July 1901, leaving his two sons Shambhuprasad and Chunilal surviving him. Shambhuprasad died on 2nd January 1903, leaving a widow (the Defendant in this suit) and a daughter. The surviving son Chunilal instituted the present suit for construction of the Will, for declaration of his rights and injunction.

The Subordinate Judge allowed the Plaintiff's claim. He held that the property was self-acquired. He further held that the provisions of the 9th clause of the Will under which the sons took only life estates liable to be defeated by the death of either of them without male issue, were valid and operated upon the whole estate. But he held that the Plaintiff was only entitled to the declaration prayed in respect of so much of the property left by the deceased Shambhuprasad as could be identified as having come to his share at the partition. Both parties appealed against the said decree to the District Court of Surat, and on the 31st July 1908, the said Court delivered judgment dismissing the appeal of the Defendant and modifying the decree of the first Court in the Plaintiff's favour. The Defendant's appeal was allowed by the High Court.

Sir Basil Scott, C. J. and Batchelor, J. in the course of their judgment said as follows:—

"Now that (*i.e.*, cl. 9) appears to us to be a provision for the event of the distribution as provided by the previous clauses of the Will being impossible in consequence of the death without male issue, of one of the devisees. The period of distribution contemplated by the testator is clearly the period of his death, and under these circumstances the event which may interfere with that distribution and give rise to the necessity for other arrangements must be an event occurring prior to his death. This conclusion is strengthened by the last words of the clause which provide that in the event mentioned in the clause the heirs of his deceased son Surajlal should not get any right whatever. They were not to get any right under the preceding clauses of the Will, but if any portion of the testator's property were undisposed of by lapse in consequence of the death of one of his legatees, the heirs of his deceased son would be entitled to succeed by inheritance, if they were not excluded by the express terms of the Will. This is the conclusion which we have arrived at from a discussion of the terms of this clause apart from authority, English or Indian.

"It is, however, some satisfaction to find that the conclusion is in accordance with the rule adopted in England expressed by Lord Hatherley in *O'Mahoney* v. *Burdett* (1), where he says 'where the Court has found upon the face of the Will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the Will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's Will to say that he directed on the one hand that the money shall be absolutely

(1) L. R. 7 H. L. 388 at p 403 (1874).

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paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any further trust, and on the other hand that a subsequent event, namely, a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and re-call that money which he has paid in order to hand it over to those who would take under the executory devise.'

"We reverse the decree of the lower Court and dismiss the Plaintiff's suit with costs throughout."

Hence this appeal.

Mr. L. DeGruyther, *K. C*, and *Mr. J. M. Parikh* for the Appellant submitted that under cl. 9 of the Will the Appellant was entitled to Shambhuprasad's estate. The words "died without having had any male issue" ought to be construed in their natural, ordinary and grammatical meaning. They meant dying *at any time*, whether before or after the testator's death. The testator was an old man and was paralyzed and infirm. It was unreasonable to suppose that he was contemplating the death of one of his sons in his lifetime. There were no rules of construction applicable to the case. The Indian Succession Act, the Hindu Wills Act and the Probate and Administration Act did not apply. The literal meaning of the words ought not to be refused, unless the words in the Will clearly shewed otherwise. The testator had in his mind events which would occur *after* his death.

The Appellant was entitled to sue for a declaration of title only under sec. 42 of the Specific Relief Act, because he was already in possession of the property in dispute. We know of no other prope of the testator except what is specified in the plaint. Reliance was placed on the following authorities:—*The Queen* v. *Joykissen Mookerjee* (4), *Gurusami Pillai* v. *Sivakami Ammal* (5), *Radha Prosad Mullick* v. *Ranimoni Dassi* (6), *Bhagabati Barmanya* v. *Kali Charan Singh* (7). The case of *O'Mahoney* v. *Burdett* (1) does not apply to the facts of this case. *Edwards* v. *Edwards* (2) did not lay down any new rule of construction. There were several indications in the Will which shewed that English principles of construction were inapplicable. It was repugnant to the ideas of the Hindus to give an absolute estate to daughters, whereby it would pass into another family. The testator expected the surviving brother to maintain the widow and perform the marriages of the daughters.

Mr. Lowndes for the Respondent submitted that the principle of sec. 111 of the Indian Succession Act ought to be applied. The Hindu Wills Act adopted that section and it was applicable to the Presidency town of Bombay. The Mofussil in the Bombay Presidency was sufficiently civilized and there was no reason for refusing to extend the principle of sec. 111 to the Mofussil. *Edwards* v. *Edwards* (2) was good law in India. The testator intended Sambhuprasad to take an absolute interest. In Bombay Presidency daughters of Hindus took absolute interest. They are a favoured class, and there was no reason for the argument that the testator intended to keep the property

(1) L. R. 7 H. L. 388 at p. 403 (1874).
(2) 15 Beav. 357 (1852).
(4) 9 Moo. I. A. 169, 193 (1862).
(5) L. R. 22 I. A. 119 at p. 128 (1895).
(6) L. R. 35 I. A. 118 at p. 128 : s. c. 12 C. W. N. 729 (1908).
(7) L. R 38 I. A. 54 : s. c. 15 C. W. N. 393 (1911).

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in his own family. The presumption was in favour of early vesting, *O'Mahoney* v. *Burdett* (1). The provisions of the Will shew that it was an absolute gift which could not be cut down. Reliance was placed on *Tripurari Pal* v. *Jagat Tarini Dasi* (8). The vernacular word translated as 'owner' was probably 'malik' which meant absolute owner; *Musammat Surajmani* v. *Rabi Nath Ojha* (9). In any case the testator had made a complete gift and division of the moveables during his lifetime. He made an entry in his books to that effect before making the Will.

Mr. DeGruyther in reply.—There was no distinction in India between moveable and immoveable property for purposes of devise. English rules of construction do not apply to Hindu Wills. Reference was made to *Hunooman Persand Panday* v. *Babooee Munraj Koonweree* (10), *Mukhun Lal* v. *Imtiazood Dowlah* (11), Mayne's Hindu Law, p. 573. Further, in India an absolute gift and a subsequent defeasance thereof was recognised. *Bhoobun Mohini Debya* v. *Hurrish Chander Chowdhry* (12), *Kristoromoney* v. *Norendro Krishna* (13), *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (14). *O'Mahoney* v. *Burdett* (1) relates to cases of executors in whom the estate vests and does not apply to India where trustees are rarely appointed. The Will applied to the whole estate including the moveables as well. Both the Courts below had found that the moveables had not been actually handed over by the testator to the legatees.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal from a decree of the High Court of Judicature at Bombay, dated the 20th July 1910, reversing a decree of the Court of the District Judge, Surat, dated the 27th August 1908, which had affirmed with modifications a decree of the Court of the first class Subordinate Judge, Surat, dated the 4th February 1907.

The only question for determination in the Appeal relates to the construction of a Will, dated the 20th August 1899, made by a Hindu named Parvatishankar Durgashankar. He was a resident of Surat in the Bombay Presidency; and it may be at once stated that it was admitted by both parties at their Lordships' Bar that the Hindu Wills Act, Chap. 21 of the year 1870, did not apply to this case, which falls to be determined not by the law operative within the territories subject to the Lieutenant-Governor of Bengal or the local limits of the Ordinary Original Civil Jurisdiction of the High Courts at Madras and Bombay. It may well be that the sections of that Act upon interpretation would yield the same result as has been arrived at in the present case. But no decision on that topic is given: and the case is treated as one applying in the Mofussil, and therefore to be dealt with on ordinary legal principles. It must also be stated that the various terms employed in the particular will are special, and that no general rule can be said to be precisely applicable in its construction except that the Court must

(1) L. R. 7 H. L. 388 at p. 403 (1874).
(8) L. R. 40 I. A. 37 at p. 38: S. C. 17 C. W. N. 145; I. L. R. 40 Cal. 274 (1912).
(9) 12 C. W. N. 231: S. C. L. R. 35 I. A. 17 (1907).
(10) 6 Moo. I. A. 393 at p. 411 (1856).
(11) 10 Moo. I. A. 362 at p. 360 (1865).
(12) L. R. 5 I. A. 138 (1878).
(13) L. R. 16 I. A. 29 at p. 39 (1888).
(14) L. R. 24 I. A. 76: S. C. 1 C. W. N. 387 (1897).

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make its best endeavour to extract the intention of the testator.

Parvatishankar, the testator, died on the 4th July 1901. He left surviving him two sons, Shambhuprasad (who died on the 2nd January 1903, leaving a widow, the Respondent in this Appeal, and a daughter) and Chunilal, the Appellant. A third son of Parvatishankar, Surajlal, had predeceased his father, but had left one son. Surajlal had separated from his father many years previous to his death; the other sons were in family with him.

The Will was executed about two years before the testator's death and it purports to dispose of the whole of his property. By cl. 2 he appointed his two sons executors, heirs and owners of the whole. In various other clauses details as to the immoveable property are given, and directions that his sons are to divide and take in equal shares the whole of it with certain exceptions. In cl. 7 there is a declaration as follows:—

"As to the moveable property which I possessed, I have during my lifetime divided the same between my two sons, Shambhuprasad and Chunilal, according to my wishes and have made over the same in their possession."

A certain enumeration with directions is also given as to gold and silver ornaments in his possession. By cl. 8 the testator gives each of his said two sons a half of his estate not specifically disposed of by his Will.

It is clear up to this point in the Will that the one predominant desire of the testator was that his two sons should have his property between them.

It was in the course of the case, however, found in fact that he had not accomplished, or completely accomplished this desire. And the Will accordingly falls to be appealed to as the governing instrument in regard to the distribution.

The question of survivorship as between these two sons was not dealt with until cl. 9 of the Will was reached, and it is in the following terms:—

"I have divided between and given to my two sons Shambhuprasad and Chunilal the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters. But under these circumstances the heirs of my deceased son Surajlal shall not get any right whatever."

Various issues were raised in the case, including whether the estate in question was self-acquired. This was answered in the affirmative, and that answer is not now disputed. As stated, the one question remaining in the case has reference to the construction of cl. 9 above quoted. The learned Judges of the High Court of Bombay have held that—

"The period of distribution contemplated by the testator is clearly the period of his death, and under these circumstances the event which may interfere with that distribution and give rise to the necessity for other arrangements must be an event occurring prior to his death."

As already mentioned, Shambhuprasad survived the testator. And the result of the judgment is that one-half of the property now to be disposed of is held to have vested in him *a morte testatoris* and that the whole provision of cl. 9 with reference to survivorship falls, in the events which have occurred, to the ground. The effect of the learned Judges' decree is that the clause must be read as if the survivorship there provided for was limited to survivorship as at the testator's death.

Their Lordships are clearly of opinion

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that this judgment cannot be maintained. There is nothing specifically either English or Indian in the idea that the Will of a testator must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by his words. It may be that if the words he employs are *voces signatae* they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole Will, that is, the whole of the words employed by the testator, must be looked at together so as to determine his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply. It may be true that there is a body of older cases which would warrant a suggestion that the term employed in this Will, namely, "should either of these two sons die without having had (leaving) any male issue" should be limited to such death occurring before the death of the testator himself, but the Will does not say that, and it has for many years been a settled principle that words of this class, being in general terms, must receive their full, and not a restricted, meaning.

The leading authority on the subject is, of course, *O'Mahoney* v. *Burdett* (1) and two sentences of Lord Hatherley's opinion may be here repeated. He refers to the duty of the Courts always to consider carefully the whole Will.

"and, having regard to all the various clauses contained in it, to see what is the full and complete and perfect intention of the testator."

(1) L R. 7 H. L. 388 (1874).

He corrects the case of *Edwards* v. *Edwards* (2) and makes the statement of the principle run thus:

"that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the Will which are inconsistent with that supposition."

If it did not appear presumptuous to say so, one might comment on the case of *O'Mahoney* v. *Burdett* (1) as one which emerged through a thicket of technical decisions to a ground of plain and preeminent good sense. It was also, of course, fortified by authority, and notably by the case of *Farthing* v. *Allen* (3), the fullest report of which was given by Mr. Jarman in his work on "Wills." (6th Ed., p 2160)

But so far from the language employed in the present Will leaving any serious ambiguity as to the intention of the testator, their Lordships are of the opposite opinion. In their view the words clearly point to survivorship whenever it should occur. When Shambhuprasad, having, with his brother Chunilal, survived his father, died, leaving a widow and a daughter, the language employed to cover such a situation seems exact and clear.

"Should either of these two sons," it says, "die without having had (leaving) any male issue, the survivor . . . is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue."

And, as if this were not sufficient, the Will proceeds to lay upon the surviving brother a duty in the event of that survivorship in the following language:

"after undertaking (to defray) the expenses in connection with the maintenance of his widow and

(1) L. R. 7 H. L. 388 (1874).
(2) 15 Beav. 357 (1852).
(3) 2 Madd. 310 (1817).

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the maintenance and marriage of his minor daughters."

It seems to their Lordships that it would be a strained construction of a Will in that form (which manifestly contemplates death occurring at any time—with the receipt of property by way of survivorship, on the one hand, and the duties to be laid upon the survivor at any time, on the other hand) to say that the whole of these provisions fall to the ground, although Shambhuprasad had in point of fact left no male issue, because he did not die in that situation before the testator himself. The testator, in their Lordships' opinion, had clearly in view a much wider and more general provision, and they think that the events which have in fact occurred, *viz.*, the survival of the testator by his two sons and the death of one of these sons leaving a widow and daughters but no male issue are events to which the will has operative application. They accordingly do not doubt that Chunilal, the surviving son, is, as such survivor, entitled to the estate conveyed by this clause, and that the correlative obligation resting upon him comes into play.

Their Lordships desire to put on record an admission made by Counsel for the Appellant to the effect that he had no knowledge of any property of the deceased testator in possession of the Respondent, Shambhuprasad's widow, and that, if the Respondent came into possession of such property under arrangements made in the lifetime of her husband with his brother the Appellant, the present Judgment would not be used to disturb such an arrangement.

Their Lordships do not feel themselves able to give effect to the argument presented under sec. 42 of the Specific Relief Act or to interfere with the judgment of the District Judge on this question of procedure.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed, and that the cause be remitted to the High Court in order that, upon provision being made and security being given to its satisfaction for the maintenance of the Respondent and for the maintenance and marriage expenses of the minor daughter, a declaration and injunction be given in terms of the Plaint. In view of the special difficulties in the construction of the Will, the Appellant will pay to the Respondent all costs incurred by her before this Board and in the Courts below.

Solicitors: *Mr. E. Dalgado* for the Appellant.

Solicitors *Messrs. T. L. Wilson & Co.*, for the Respondent.

B. D. *Appeal allowed.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

CHAUDHURI, J. 1913, 14, July. } In the matter of MUSSTT. HURUNNESSA BIBEE, an infant.

Guardianship—Guardians and Wards Act (VIII of 1890)—Mahomedan infant—Mahomedan Law—Maternal uncle if a proper guardian—Sister's husband, if qualified—Prohibited degrees of relationship—Adverse interest.

Under the Mahomedan Law no male has a right to the custody of a female child, unless he is a Mahram, that is, one who stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her.

A maternal uncle may be appointed as a guardian to a Mahomedan minor girl.

When the girl was married to a person below her station in life, the Court ordered

a governess to be appointed to stay with her until puberty, the husband not to have access to her meanwhile, so that the girl might have liberty to repudiate the marriage if she liked just on the attainment of puberty.

An application was made by one Golam Kadir for the appointment of himself as the guardian under the Guardians and Wards Act of Hurunnessa Bibee, a Mahomedan infant of considerable means. Golam Kadir is the husband of her sister. As against him another application was made by the infant's maternal uncle for such appointment. Her step-father (mother's second husband) also offered to be appointed guardian, but did not put himself forward as an applicant.

Mr. B. C. Mitter (with him *Dr. A. Suhrawardy*) for the applicant, materna uncle.

Mr. A. Rasul for the step-father.

Mr. C. R. Das (with him *Mr. Akbari*) for Golam Kadir. The arguments are noticed in the judgment.

The JUDGMENT OF THE COURT was as follows:—

CHAUDHURI, J.—These are two applications for the guardianship of the person and property of a Mahomedan infant of the name of Hurunnessa Bibee. I shall first deal with the application of Golam Kadir, the husband of the minor's sister.

The Guardians and Wards Act provides that in appointing the guardian of a Mahomedan, no appointment shall be made inconsistent with the Mahomedan Law. The point for me to decide is whether the appointment of Golam Kadir, the husband of the infant's sister, would be consistent with the Mahomedan Law. I am clearly of opinion that it would not. The Rt. Hon'ble Mr. Ameer Ali, in his Mahomedan Law, Vol. II, p. 239 (3rd Ed.) says, "No male has a right to the custody of a female child, unless he is a Mahram, that is, stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her."

It is contended on behalf of Golam Kadir that there is no authority for the statement "cannot under any circumstances marry her" in the passage I have quoted. In this connection I was referred to the case of *Aizunnessa Khatoon* v. *Karimunnessa Khatoon* (1), in which a question arose whether under the Mahomedan Law marriage with the wife's sister, who was legally married, was void or not. It was held that the children of such marriage were illegitimate and could not inherit. In dealing with the question then before the Court, their Lordships referred to the passage I have quoted, but I do not find any authority or sanction for the contention that the words, "cannot, under any circumstances marry her" have been wrongly introduced by the learned author.

Wilson's Mahomedan Law, p. 205, sec. 108 (2nd Ed.) was also referred to and Mr. Rahim's book on Mahomedan Law and Mr. Tyabji's, but they throw no light on the point.

Now it is conceded that the mother of a Mahomedan infant girl loses her right of guardianship by marrying a stranger. In the case of *Yakub Sheikh* v. *Nafrujai Bibee* (2) it is stated, as seems to be the correct law, that the mother is not disqualified, if she marries one related to the minor within the prohibited degrees. It would be very curious that if the mother were disqualified by marrying a stranger, that a sister would not be thus disqualified,

(1) I. L. R. 23 Cal. 130 (1895)
(2) 11 C. L. J. 633 at p. 634 (1910).

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and that a stranger marrying her would be qualified for appointment as guardian. Learned Counsel appearing on behalf of the maternal uncle has placed certain original texts before me with translations, which were circulated among the parties to test their correctness. The texts and translations have not been challenged.

I.

The woman entitled to the custody of a child loses her right by marriage with a person not within the prohibited degrees to it, *i.e.*, the minor. (*Durr-al-Mukhtar*, Vol. II, p. 656, ed. Cairo.)

II.

"By marriage with a person not within the prohibited degrees to it" —*i.e*, whether the marriage is consummated or not. The author [of the *Durr-al-Mukhtar*] should have said, "a person not within the prohibited degrees* on the ground of consanguinity. For, one within the prohibited degrees on the ground of fosterage is like a stranger as regards her loss thereby [marriage] of the right to the custody of the minor." (*Radd-al-Mukhtar*, Vol. II, p. 656, ed Cairo.)

III.

"With a person not within the prohibited degrees":—*i e.*, on the ground of consanguinity. So if he is one within the prohibited degrees not on the ground of blood-relationship (*e g.*, a foster paternal uncle), or a relation on the ground of consanguinity but within the prohibited degrees on the ground of fosterage (*e.g.*, the child's uncle's son on the ground of consanguinity, but its uncle by fosterage), he is like a stranger. (*Radd-al-Mukhtar*, Vol II, p. 651, ed. Cairo.)

IV.

Then if there be no agnates, [the guardianship] belongs to uterine relations. So it [the child] should be handed over to the uterine brother, then to his son, then to uterine paternal uncle then to full maternal uncle and then to uterine maternal uncle. (*Radd-al-Mukhtar*, Vol. II, p. 656, ed. Cairo.)

V.

A minor girl should not be handed over to an agnate not within the prohibited degrees (*e. g*, an emancipated slave; the son of a paternal uncle), so long as there is a non agnate within the prohibited degrees like the maternal uncle. She should rather be handed over to the maternal uncle to guard against mischief. (*Inayah*, Vol. IV p. 187, ed. Cairo).

VI.

If she [woman entitled to guardianship] dies or marries, then the full sister; then if she [full sister] dies or marries, then the uterine sister. . . . . . . The right to guardianship which belongs to these women is lost by marriage when they marry a stranger. But if they marry a blood-relation of the child standing to it within the prohibited degrees, *e. g.*, its grand-mother [mother's mother] marries its grandfather [father's father] or if the mother marries the paternal uncle of the child, then, the right to guardianship is not lost. Thus it is laid down in the *Fatawa Qadi Khan* (*Fatawa Alamgiri*, Vol. I, p. 728-729, ed. Cal.).

VII

When the minor girl has no agnate, she should be handed over to the uterine brother; then to his son, then to uterine paternal uncle, then to full maternal uncle, then to consanguine maternal uncle, then to uterine maternal uncle. (*Fatawa Alamgiri*, Vol I, p. 729, ed Cal)

These texts supply clear authority for the proposition that a brother-in-law not within the prohibited degrees is not entitled to be appointed guardian. That being so, I hold that the brother-in-law Golam Kadir is not entitled to be appointed guardian specially in the presence of a person who is competent under the Mahomedan Law, *viz*, the maternal uncle Syed Mahomed Yakub who is the other applicant.

The step-father also appeared and stated through his counsel that though he considered he had no right and was not in Court for the purpose of asserting any right in himself, yet he submitted that if the Court so desired, he was willing to be appointed. The maternal uncle has been examined and cross-examined before me. There were certain charges made against him in the affidavit of the step-father and both the step-father and brother-in-law

were allowed to cross-examine him in order to help the Court to consider whether he was eligible or not. I do not think that any of the charges made against the maternal uncle has been substantiated. The only ground for alleging that he is a man of dissolute habits is that some years ago he went to a questionable quarter of the town, and heard some music with his brother-in-law in the house of a woman of bad repute. Nothing else is alleged against him. It is also strenuously contended that inasmuch as he instituted certain proceedings in the Police Court challenging the marriage of Khaja Golam Kadir, and because he subsequently withdrew from the prosecution and consented to Golam Kadir being appointed guardian of the person of his wife, stating that he was convinced that they had been legally married, showed that he was a person in whom the Court could not place any confidence, that he had by his conduct shown that he was disqualified from acting as the guardian of the infant. It was said that he had extorted Rs 2,500 to give his consent as above and that he might utilise this occasion also for extorting some money from the young man, the son of a tailor, to whom the infant had been married. It appears that Syed Mahomed Yakub was promised payment of his costs in the Police Court and of the High Court in respect of the criminal proceedings, when the matter was amicably settled. He was not paid the amount, but that subsequently His Lordship Mr. Justice Imam who arbitrated for the parties in certain matters took evidence, allowed him Rs. 2,500 out of Rs. 3,500 which had been promised to be paid by Khaja Golam Kadir. His Lordship allowed Rs. 1,000 thereout to be paid to the wife. Even if the facts were as alleged by the other side, I could hardly have held that this man was disqualified. He is now living with his wife who is 18½ years old; a girl of that age is competent in this country to look after her own household. Mr. Rasul on behalf of the step-father urged that it was necessary in the interest of the minor that she should repudiate her marriage with the tailor's son on attaining puberty, as it was a marriage below her station in life and altogether undesirable. It is said that the repudiation must be at the exact moment of time that she attains puberty, and that some female ought to be present at that time, competent to ascertain that critical moment. Therefore some woman, preferably a female relative, ought to be placed near her so that at that very moment she might repudiate the marriage if so inclined, otherwise according to the Mahomedan Law the present marriage would become valid. The applicant's wife, I think, is quite capable of discharging this function. The applicant says, he disapproves of the marriage, and there is no reason to suppose that he will prevent the repudiation. It has been suggested that he is on friendly terms with this tailor's son. He denies it, and I have no reason to disbelieve his statement. I, however, think that having regard to the bitter feeling between the parties and the manner in which this matter and cognate matters are being fought out, some provision should be made for providing a governess, if possible, for the infant and that the guardian whom I intend to appoint—the maternal uncle, *i.e.*, the applicant Syed Mahomed Yakub—should be put on terms.

Mr. Rasul states that there is a Mahomedan lady of position who is keeping a school and that if an application be made to

her, she may be in a position to help the guardian of the infant in finding a governess for her. It appears that Babu Panna Lal Dey, the Attorney for the applicant, went and visited this lady and a letter from her has been placed before me that she can recommend a lady of the name of Hamedunnessa Khatun as governess for the infant. It is stated that she will be able to stay with the girl at her house except from 11 A.M. to 4 P.M., when she has to attend the *Pardanashin* Madrassa, as teacher and that she is able to get this governess on a pay of Rs. 15 a month with free board and lodging. The applicant through his counsel undertakes to appoint her, or failing her, a proper person who would be able to remain with this girl and assist her with her studies and live with her as a companion. The property of this infant yields an income of about Rs. 150 a month; she can well afford to pay for a suitable governess. I also make it a condition that the applicant will at all convenient times allow the female relatives of the infant to visit her and also such male relatives as the custom of the country and the custom of the family may allow, that he will offer no difficulties in the way of their communicating with her, or coming to see her. I appoint him guardian of the person and property of the infant on the above conditions. The guardian will have to give proper security to the satisfaction of the Court.

It was said that in respect of certain properties belonging to the infant's paternal estate, the applicant's interest was adverse. The applicant explained that certain properties were acquired by the father of the minor in the applicant's name and that thereafter he made a deed of gift of these properties to him. The matter has been adjudicated upon in the administration proceedings, and I do not think that his interest in these properties is such as to disqualify him from being the guardian of the property of the infant upon his furnishing proper security. The Court has ample jurisdiction, should sufficient ground be made out to change the guardian, when necessary in the interests of the infant. For the present, I see no reason to disallow the application.

Mr. B. C. Mitter.—I am entitled to my costs.

CHAUDHURI, J.—Yes, out of the estate.

Mr. B. C. Mitter.—The brother-in-law should pay the costs.

CHAUDHURI, J.—The costs of the applicant Syed Mahomed Yakub of this application will be paid out of the estate of the infant on taxation. The costs of the applicant in meeting the application of the brother-in-law will be paid by the brother-in-law, such costs to be taxed as costs of an application. His own application for guardianship will be treated as a hearing and will be assessed as such. The guardian will allow the minor to go and see her sister, should she so desire. If on any occasion the sister desires to stay with her elder sister for a day or so, such permission will be granted. The guardian also undertakes not to allow Abu Syed, the tailor's son, to come to the house or to communicate with the girl until she attains puberty.

Mr. Akbari.—She will be allowed to go and see her step-father.

Mr. B. C. Mitter—Objects.

CHAUDHURI, J.—No, only her sister. I will not make any special order about visits to the step-father. I feel sure that the guardian will not raise objections to any visit that the girl may intend to pay to her relatives.

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The letter produced by Babu Panna Lal Dey about the governess will be kept on the file and the texts incorporated as part of this judgment.

Babu Panna Lal Dey, Solicitor for the maternal uncle.

Mr. K. C. Bural, Solicitor for Golam Kadir.

A. K. G.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos 865 AND 1046 TO 1084 OF 1911.

COXE, J.	MITARJIT MAHTON
D. CHATTERJEE, J	and others, Plaintiffs,
1914,	Appellants,
Heard, 26 and	*v.*
27, January.	SHEIKH LEAKUT
Judgment,	HOSAIN, Defendant,
27, January.	Respondent.

Transfer of Property Act (IV of 1882), secs 107, 116—Oral lease for a year, with delivery of possession—Renewal every year by annual oral leases—Leases if valid—Non-delivery of possession—Holding over.

Where a lessee, to whom possession of the demised land was delivered under an oral lease for one year, continued to hold the land under successive oral leases each of one year's duration:

Held—*That even if these later leases be invalid on the ground of non-delivery of possession* [*Sibendrapada* v. *Secretary of State* (1)], *there was a holding over by the lessee with the lessor's assent, within the meaning of sec. 116 of the Transfer of Property Act.*

A series of successive leases each for one year is quite different from a lease from year to year.

These were appeals preferred on the 12th of April 1911, against the decrees of J. C. Twidell, Esq., District Judge of Bhagalpur, dated the 21st of December 1910, reversing the decrees of Babu Digambar Lal, Munsif of Jamui, dated the 30th July 1910.

The Appellants who were Plaintiffs in the suits for rent out of which these appeals arose were proprietors of a 14 as. share in the mouzas in which the tenant's lands were situate and claimed to be the lessees of the remaining 2 as. share under annual oral *thika* leases commencing from 1313 onwards. This 2 as. share formed part of a *waqf* property of which Nawab Nisar Ali was the mutwali. The tenants Defendants took various pleas in defence on the merits and also challenged the title of the Plaintiffs to this two annas share. The Munsif overruled the Defendants' pleas concerning the merits, but held that the oral leases of the 2 as. share for the years in suit not having been accompanied by delivery of possession passed no title to the Plaintiffs in that share. He disallowed the claim of the Plaintiffs to a proportionate share of rent, and passed a decree in their favour for 14 as. of the amount claimed.

On appeal the District Judge agreed with the Munsif in holding that the Plaintiffs' title to the said 2 as. share was not established, and as it did not appear that the Plaintiffs ever collected a 14 as. share of the rent separately, he was of opinion that the whole suit should fail.

Hence these Second Appeals.

In No. 865

Dr. Rash Behary Ghosh and *Maulvi Muhamad Ishfaq* for the Appellants.

Babu Ganesh Dutt Singh and *Maulvi Syed Enayet Karim* for the Respondents.

In Nos. 1046 to 1084

Maulvi Muhamad Ishfaq and *Babu*

(1) I. L. R. 34 Cal. 207 (1907).

MITARJIT MAHTON *v.* SHEIKH LEAKUT HOSAIN.

Chunder Sekhar Proshad Singh for the Appellants.

Syed Enayet Karim and *Babu Biraj Mohan Majumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—These appeals arise out of suits for rent. The Plaintiffs claim to be the landlords of the whole property. With regard to 2 annas of it they say that they are *thikadars* under one Nisar Ali Khan who leased it to them for the year 1316, which is the year in suit, by a verbal agreement and that "previous to this also, temporary settlements for one year all along used to be obtained from the mutwali under a verbal agreement." The words "all along" mean, we are informed, the period from the year 1313. The Munsif found that a *thika* lease of these two annas had been given to the Plaintiffs for the year 1316. But he held that it was invalid, because it was not accompanied by delivery of possession and that there was no delivery of possession, because the Plaintiffs had been in possession of this interest of two annas from a long time before. The Plaintiffs appealed to the District Judge on the ground that the finding of the Munsif that the lease was invalid was incorrect. The learned District Judge agreed with the Munsif on the strength of the decision in *Sibendrapada* v. *Secretary of State* (1). It was held in that case that sec. 54 of the Transfer of Property Act must be construed strictly and that it could not be presumed that there was any delivery of property when the vendee had been in possession of it for a long time before the date of the sale. It has been argued before us that that was a decision under sec. 54 and has therefore no application to the present case which come under sec. 107 of the Transfer of Property Act, 1882. But in my opinion there is no real or substantial difference between the terms of the two sections and if the view taken in that decision is right, it must be held that the oral lease of the two annas in 1316 was not accompanied by delivery of possession and was, therefore, invalid. This is not the view which was taken by the Madras High Court in the case of *Kannan* v. *Krishnan* (2), and I feel some difficulty in agreeing with the view of the learned Judges of the practical consequences of so strict a construction of the section. It does not appear to me, however, that this decision need be discussed further, because accepting it as a correct statement of the law, the Plaintiffs would still, in my opinion, be entitled to succeed. For if this lease of the two annas is invalid, I do not see how the Defendants can escape the effect of sec. 116 of the Transfer of Property Act. That section provides that if a lessee remains in possession after the determination of the lease, with the lessor's assent, the lease is deemed to be renewed from year to year. This section has of course no application when the lessee is holding under a subsisting lease; but when the existing lease goes out, then the lessee, if he remains in possession with the assent of the lessor, is entitled to be regarded as a lessee from year to year under the section.

It has been argued that really this was all along a lease from year to year, that, therefore, it could be made only by a registered instrument and that sec. 116 would have no application. This, however, is not the case. It is stated in the plaint and appears to be found by the Courts below, that temporary settlements for one year each have all along been given.

(1) I. L. R. 34 Cal. 207 (1907).

(2) I. L. R. 13 Mad. 324 (1890).

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The result of these successive leases may be very similar to the ultimate effect of a lease from year to year for the whole period, but a series of successive leases is evidently quite different from a lease from year to year. Successive leases for one year each are terminable without notice, but a lease from year to year is only terminable by six months' notice. It seems perfectly clear that in 1313 a valid lease was given to the Plaintiff by an oral lease for one year, accompanied by delivery of possession. Since then if the subsequent leases are invalid, the Plaintiffs must be regarded as entitled to the benefits of sec. 116. In this view of the case, they are entitled to the whole of the rent, and the other question raised by the District Judge does not arise, namely, whether a landlord who sues for the whole rent and fails to prove that he is the 16 annas landlord is entitled to succeed in part. All the other points have been found by both the Courts below in favour of the Plaintiffs.

The result is that the appeals and the suits must be decreed with costs throughout.

D. CHATTERJEE, J.—I agree. I think that upon the facts found, sec. 116 of the Transfer of Property Act is a complete answer to the defence.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES Nos. 63 AND 81 OF 1911.

FLETCHER, J.
N. R. CHATTERJEA, J.
1914,
Heard, 3, February.
Judgment, 17, February.

HIRENDRA NATH DUTT and others, Appellants,
v.
HARI MOHAN GHOSH and others, Respondents.

Mokurari *tenure specially registered under Act XI of 1859 granted by the zemindar—Subsequent grant of* putni *by the zemindar—Purchase of* putni *and* mokurari *by the same person—Merger—Transfer of Property Act, secs.* 2 (c), *111* (d), *117.*

Where a mokurari *tenure has all along been treated as a distinct sub-tenure, there was no merger by the acquisition of a* putni *tenure and the* mokurari *tenure by the same person, apart from the provisions of the Transfer of Property Act.*

WOOMESH CHANDER GOOPTO *v.* RAJ NARAIN ROY (1), THOMAS SAVI *v.* PUNCHANON RAY (2), PROSUNNO NATH ROY *v.* JAGAT CHUNDER PUNDIT (3) *referred to.*

JIBANTI NATH KHAN *v.* GOKOOL CHUNDER CHOWDHURY (4) *followed.*

SURJA NARAIN MANDAL *v.* NANDA LAL SINHA (5), ULFAT HOSSAIN *v.* GAYANI DASS (7) *distinguished.*

Where a person acquires the superior and the subordinate interests piecemeal at different times, but ultimately the entire interest of the lessor and the lessee are vested in the same person at any point of time, there is a merger of the two interests in any case to which the provisions of sec. 111 (d) *of the Transfer of property Act are applicable.*

A mokurari *was created before the passing of the Transfer of Property Act and a* putni *was granted of the zemindary within which the* mokurari *was created. Afterwards in 1886 the entire* putni *and the entire* mokurari *were acquired by the same person:*

Held—*That the provisions of sec. 111* (d) *of the Transfer of Property Act do not*

(1) 10 W. R. 15 (1868).
(2) 25 W R. 503 (1876).
(3) 3 C. L. R. 159 (1878).
(4) I. L. R. 19 Cal. 760 (1891).
(5) I. L. R. 33 Cal. 1212 (1906).
(7) I. L. R. 36 Cal. 802 (1909).

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apply and there was no merger of the mokurari *interest in the* putni *interest.*

PROMOTHO NATH MITTER *v.* KALI PROSONNO CHOWDHURY (8) *followed.*

ULFAT HOSSAIN *v.* GAYANI DASS (7) *explained.*

In a putni kabuliyat *there was the following provision for abatement of rent . . . 'if you obtain remission in the* sudder jama *from the Government in respect of lands taken up for culverts, embankments or roads, I shall also get from you reduction of* jama *on account of all the said remissions in the* jama *of this* putni.'

Held, *on a construction of the agreement, that the* putnidar *was to get the same amount of remission which the zemindar would get in the Government revenue*

Held, *also, that the words 'culverts, embankments or roads' in the agreement were illustrative and not exhaustive.*

These were Appeals preferred on the 4th of March 1911, against the decree of Arthur Goodeve, Esq., Special Land Acquisition Judge of 24-Perganas, dated the 26th of September 1910.

The facts of the case will sufficiently appear from the judgment.

Babus Dwarkanath Chuckerbutty, Nogendra Nath Mitter and *Amulya Charan Banerjee* for the Appellants.

Mr. B. C. Mitter, Babus Provash Chunder Mitter and *Ambica Pado Choudhury* for the Respondents.

The JUDGMENT OF THE COURT was delivered by

N. R. CHATTERJEA, J.—The questions involved in these Appeals relate to the apportionment of the compensation money awarded under the Land Acquisition Act, in respect of certain lands acquired under that Act. The claimants No. 1 represent the zemindary interest, while the claimants No. 2 represent the *putni* and *mokurari* interests in the land acquired.

By a petition filed in the Court below, the rival claimants agreed that if the Court found the *mokurari* (referred to in the proceedings as *thika*) had not become merged in the *putni*, the claimants No. 1 will pay claimants No. 2 Rs. 4,000 out of the total compensation which they will receive in full settlement of their entire claim as *mokurraridar*, but if the Court found that the *mokurari* had become merged in the *putni*, the claimants No. 2 will receive from the claimants No. 1 only Rs. 1,000 in settlement of the claim.

The first question therefore is whether the *mokurari* merged in the *putni*. It appears that on the 29th July 1855, the zemindars granted a *mokurari* lease in respect of 2,000 bighas of lands at a rent of Rs. 6,000 to one Nobin Chandra Ghose who got the tenure specially registered under the provisions of Act XI of 1859. Subsequently the zemindars granted a *putni* lease of the entire zemindary to certain persons called the Dutts and these Dutts on the 15th February 1865 purchased the *mokurari* interest from Nobin Chandra Ghose, so that both the *putni* and the *mokurari* interests came into the hands of the Dutt family in 1865. The Dutts however appear to have dealt with the two interests separately. Some of them mortgaged their shares both in the *putni* and the *mokurari* to one Kristo Kishore Ghose, who purchased the shares at a sale held on the 8th April 1868 by the Official Assignee. After the death of Kristo Kishore his widow Barnomoyee Dasi (the predecessor of the claimants No. 2) brought a suit for recovery of pos-

(7) I. L. R. 36 Cal. 802 (1909).
(8) I. L. R. 28 Cal. 744 (1901).

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session of the shares so purchased, and obtained a decree for possession of a 4 annas share of the *putni* and the *mokurari*, respectively. The *putni* mahal was subsequently sold under Reg. VIII of 1819 and was purchased by Barnomoyee on the 13th May 1880. This sale of the *putni* however did not affect the *mokurari*, because as already stated, the *mokurari* was specially registered under the provisions of Act XI of 1859. Barnomoyee therefore became the owner of the entire *putni*, and of a 4 annas share of the *mokurari* in 1880. She purchased the remaining shares in the *mokurari* in 1886, so that the entire *putni* and the entire *mokurari* came into the hands of Barnomoyee in 1886 and eventually passed into the hands of the claimants No. 2 by partition with their co-sharers. It has been found that the *mokurari* and the *putni* interests have been kept separate all along The finding has not been challenged and could not be challenged on the evidence.

Now, the question is whether under these circumstances, the *mokurari* merged in the *putni* interest, and the question will have to be considered (*i*) apart from the provisions of the Transfer of Property Act and (*ii*) with reference to the provisions of the Transfer of Property Act.

The authorities on the question, how far the doctrine of merger, apart from statutory enactment on the point, is applicable to lands in the Mofussil in this country, do not seem to be uniform. In the case of *Woomesh Chander Goopto* v. *Rajnarain Roy* (1), Sir Barnes Peacock C. J. said, "My own impression is that the doctrine of merger does not apply to lands in the Mofussil in this country. "I believe it is the practice in this country for zemindars to purchase and keep on foot *putni* talooks without the necessity of adopting the practice which is followed in England of purchasing such talooks in the name of a trustee to prevent the merger of them. If the doctrine of merger applies, a zemindar could not purchase and hold a *putni* tenure in Khas possession." The other learned Judges (Loch and L. V. Jackson, JJ) concurred with the Chief Justice, but the question was not decided in that case. The same view was taken in *Thomas Savi* v. *Punchanon Ray* (2). In *Prosunno Nath Ray* v. *Jagat Chunder Pundit* (3). however, where the *putnidar* of a village which formed a portion of a zemindary purchased the zemindary right in that village, and from the date of his purchase did dot pay rent as *putnidar*, it was held by Markby and Prinsep, JJ. that he could not set up his title as *putnidar* against his co-sharer zemindars in a suit brought by them for contribution. In the later case of *Jibanti Nath Khan* v. *Gokool Chunder Chowdhury* (4) Pigot and Banerjee, JJ. said, "no authority has been shown to us for holding that the doctrine of merger applies to such cases as this in India, that is, that a *putni* interest must merge in the zemindari interest, if they came into the same hands, and we do not think that we should for the first time as far as we are aware apply the doctrine to such a case." So that in 1891 it was taken to be settled law that the doctrine of merger did not apply to the case of a *putni* interest coming into the same hands as the zemindary interest. The case of *Prosunno Nath Ray* v. *Jagat Chunder Pundit* (3) does not appear to have been cited before them, but the

(1) 10 W. R. 15 (1868).

(2) 25 W. R. 508 (1876).

(3) 3 C. L. R. 159 (1878).

(4) I. L. R. 19 Cal 760 (1891).

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decision in that case apparently proceeded upon the ground that the *putnidar*, after his purchase of the zemindary did not treat the *putni* as a subsisting tenure.

In a subsequent case, *Surja Narain Mandal* v. *Nanda Lal Sinha* (5), the learned Judges (Geidt and Ormond, JJ) relying upon a passage in the judgment of the Judicial Committee in *Kishen Dutt Ram* v. *Mamtaj Ali Khan* (6) held that a *mokurari* interest merged in a superior *shikmi* interest. The passage relied upon runs as follows:—"Again what followed on the purchases? Had they been made by or on behalf of a talookdar holding under an absolute title, as distinguished from a mortgage title, the tenures would as a matter of course have merged in the talook." But the decision of the Privy Council proceeded upon the respective rights of the mortgagor and the mortgagee with reference to accessions to mortgaged property. And apart from that, the tenures which were dealt with in that case were certain *birt* tenures which had been purchased by the mortgagee in possession of a talook taking advantage of his position as mortgagee, and who did not take any steps to keep them alive as distinct sub-tenures for his own benefit. In describing the nature of the tenures, their Lordships pointed out that "they were sometimes resumable, and when resumed, would fall into the parent estate." The tenures therefore were in their nature entirely different from a *putni* or a *mokurari* tenure which is not resumable. That the tenures were treated as different from *putni* or *mokurari* tenures will be apparent from the following passage in which their Lordships observed:—"It may well be that when the estate mortgaged is a zemindari in Lower Bengal, out of which a *putni* tenure has been granted, or one within the ambit of which there is an ancient *mokurari istemrari* tenure, a mortgagee of the zemindari, though in possession, might purchase with his own funds and keep alive for his own benefit that *putni* or *mokurari*. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may therefore be held entitled equally with a stranger, to make it for his own benefit. In such cases also the *putni*, if the *putnidar* failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindari would always have been subject to the *mokurari*." We do not think, we are pressed by the decision in *Surja Narain Mandal's* case (5), and that for several reasons, *first*, because the tenures to which the observations of the Privy Council were applicable were in their nature wholly different from a *mokurari* tenure, *secondly*, the *mokurari* does not appear to have been kept alive as a distinct sub-tenure, and, *lastly*, the decision might have been based solely, and was in fact ultimately based upon the ground that the *mokurari* interest was an accession to the mortgaged property under sec. 70 of the Transfer of Property Act, and apart from any question of merger. *Surja Narain Mandal's* case (5) was followed in the recent case of *Ulfat Hossain* v. *Gayani Dass* (7), by Stephen and Vincent, JJ. and the same observations (except the last) apply to that case also. In the present case the *mokurari*

(5) I. L. R. 33 Cal. 1212 (1906).
(6) I. L. R. 5 Cal. 198 (1879).

(5) I. L. R. 33 Cal. 1212 (1906).
(7) I. L. R. 36 Cal. 802 (1909).

has all along been treated as a distinct sub tenure, and we are accordingly of opinion that apart from the provisions of the Transfer of Property Act there was no merger.

The next question is whether the provisions of sec. 111, cl. (*d*) of the Transfer of Property Act are applicable to the present case.

It has been contended on behalf of the Respondents that sec. 111, cl. (*d*) is inapplicable, because Barnomoyee Dasi acquired a 4 annas share of the *mokurari* before the passing of the Transfer of Property Act, and the remaining 12 annas share after the passing of the Act, and that the entire *mokurari* therefore did not vest in her at the *same time*. We are of opinion that there is no force in this contention. A person may acquire the superior and the subordinate interests piecemeal at different times, but if ultimately the entire interests of the lessor and the lessee are vested in the same person at any point of time, we think there is a merger of the two interests at that particular point of time, in any case to which the provisions of sec. 111, cl. (*d*) are applicable. We do not agree with the Court below in holding that the *mokurari* lease was a lease for agricultural purposes within the meaning of sec. 117 of the Transfer of Property Act. A *putni* lease was held in the case of *Promotho Nath Mitter* v. *Kali Prosonno Chowdhury* (8) not to be a lease for agricultural purposes. The *mokurari* in the present case is described as a talook, and was registered as a talook under Act XI of 1859, and having regard to the evidence and circumstances bearing on the point we are of opinion that it was not a lease for agricultural purposes. But the *mokurari* was created before the passing of the Transfer of Property Act, and the question therefore arises, whether the provisions of sec. 2, cl. (*c*) prevent the operation of sec. 111, cl. (*d*) of that Act. Sec. 2, cl. (*c*) enacts "nothing herein contained shall be deemed to affect any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability."

In the case of *Promotho Nath Mitter* v. *Kali Prosonno Chowdhury* (8), the *putni* interest was created after the passing of the Transfer of Property Act, and it was held by Maclean, C. J. and Banerjee, J. that the *putni* interest was determined on a purchase of the same by the zemindar even at a sale held in execution of a decree. With reference to the case of *Jibanti Nath Khan* v. *Gokool Chunder Chowdhury* (4) where it was held that there was no merger of the *putni* in the zemindari, Banerjee, J. observed that the case was decided without any reference to the Transfer of Property Act, and was a case to which the provisions of the Transfer of Property Act were inapplicable by reason of cl. (*c*) of sec. 2 of that Act, the *putni* lease in that case having been granted, and the *putni* having been created before the Transfer of Property Act came into operation.

A contrary view, however, has been taken by Stephen and Vincent, JJ. in the case of *Ulfat Hossain* v. *Gayani Dass* (7). The learned Judges were of opinion that sec. 2, cl. (*c*) did not prevent the operation of sec. 111, cl. (*d*) of the Transfer of Property Act, although the *mokurari* was

(8) I. L. R. 28 Cal. 744 (1901).

(4) I. L. R. 19 Cal. 760 (1891).
(7) I. L. R. 36 Cal. 802 (1909).
(8) I. L. R. 28 Cal. 744 (1901).

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created before the Transfer of Property Act came into operation.

The learned Judges observed that were it not for paragraph (*d*) of sec. 2, they should be inclined to hold that the section only saved the effect of the repeals that it enacts in the cases specified, and that the word 'herein' meant 'in this section' and not 'in this Act,' but did not decide the point. We do not agree with this view of the section, but it is unnecessary to discuss the matter as there was no decision upon the point in that case. The learned Judges then observed as follows :—"The right or liability which the Respondent desires to set up is the right of the original *mokuraridar* Waliuddin to hold his *mokurari* unaffected by sec. 111 (*d*) of the Act, if the *mokurari* and the parent estate both came into his hands, and this right, he contends, must be passed on to Rai Radha Kissen the purchaser of the *mokurari*. This is, in our opinion, an incorrect view. The right in this case to which cl. (*e*) must apply, if it applies at all, is the right of Radha Kissen to the same effect, and it was constituted by his legal relation to the Defendants in the mortgage suit at the time of the mortgage sale which took place after the passing of the Transfer of Property Act. We hold therefore that there is nothing to prevent sec. 111 (*d*) of the Act from applying and that a merger has taken place."

With great respect for the learned Judges we are unable to agree in this view. A legal relation might have been constituted at the time of the mortgage sale which took place after the passing of the Transfer of Property Act, but it cannot be denied that a legal relation was constituted when the *mokurari* was created before the passing of the Act. And if the right of the *mokuraridar* was to hold the *mokurari* unaffected by sec. 111, cl. (*d*) of the Act, on the *mokurari* and the parent estate coming into his hands (as we think it was), such right by reason of the express provisions of sec. 2, cl. (*c*) could not be affected by any of the provisions of the Act, and the subsequent legal relation constituted after the passing of the Act could not affect the right arising out of the legal relation constituted before the Act. If the view taken in *Alfat Hossain's* case (7) be correct, every lease created before the passing of the Act would be governed by the provisions of the Act, irrespective of the rights arising out of the legal relation constituted before the Act. We are unable to construe sec. 2, cl. (*c*) in this manner, and are of opinion that the view, taken by Banerjee, J in the case of *Promotho Nath Mitter* v. *Kali Prosonno Chowdhury* (8) of the effect of the Act upon a lease created before the passing of the Act, is correct. Had the decision in *Ulfat Hossain's* case (7) been based upon the provisions of the Transfer of Property Act, it might have been necessary to refer the matter to a Full Bench, but the learned Judges in that case held that there was a merger apart from the provisions of the Transfer of Property Act. It is unnecessary therefore to refer the question to a Full Bench. We are of opinion that there was no merger of the *mokurari* in the *putni* apart from the provisions of the Transfer of Property Act, because the *mokurari* was kept alive as a separate sub-tenure from the *putni*, and the provisions of the Act did not apply, as the *mokurari* was created before the passing of the Act.

(7) I. L. R. 36 Cal. 302 (1909).
(8) I. L. R. 28 Cal. 744 (1901).

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It is unnecessary to consider whether, having regard to the fact that the *mokurari* was treated as a subsisting sub-tenure, there could be a merger even if the provisions of the Act were applicable.

The next question is whether the claimants No. 1 are entitled to any portion of the compensation awarded for the trees. The trees are part of the *putni* talook and we are of opinion that the Court below is right in holding that the claimants No. 1 are not entitled to any portion of the compensation awarded for the trees.

We also agree with the Court below in holding that the claimants No. 1 are not entitled to share in the amounts awarded to the tenants in cases No. 810, 815 and 817, to which claimants No. 2 became entitled by purchasing the rights of the tenants, after the award had been made in their favour. The amounts were awarded to the tenants, and the claimants No. 2 are entitled to the same not as *putnidars*, but by virtue of their purchase from the tenants.

The last question is what is the amount of the remission which the claimants No. 2 are entitled to get in the *putni* rent on account of the lands acquired. The Court below has held that they are entitled to get a proportionate abatement on the principles laid down in the cases referred to in its judgment. But these principles cannot apply where, as in the present case, there is an agreement between the zemindar and the *putnidar* on the point. The agreement contained in the *putni kabuliat* as translated in the paper-book runs as follows :—"Neither I nor my successors will ever get any remission in rent on the score of inundation, drought, fallow, failure of crops, construction of culverts and embankments, and diluvion of lands by rivers, etc., but if you obtain from Government any remission in revenue on account of lands acquired by it for construction of culverts, embankments and roads, a proportionate amount of remission will be obtained by me from you in respect of the rent payable to you on account of this *putni*."

The words "a proportionate" do not occur in the original, and the concluding portion literally translated runs as follows :—"but if you obtain remission (*lit.* the amount of remission or the extent of the remission which may be obtained by you) in the *sudder jama* from the Government in respect of lands taken up for culverts, embankments or roads, I also shall get from you reduction of *jama* on account of all the said remissions in the *jama* of this *putni*." The language is ambiguous, but it appears to us upon a proper construction of the agreement as a whole that the *putnidar* is to get the same amount of remission which the zemindar would get in the Government revenue, and this is the construction which the parties themselves placed upon the agreement in a previous suit. It appears that in a suit for rent brought by the zemindars against Barnomoyee Dasi (the predecessor of claimants No. 2) so far back as 1894, she claimed remission in the *putni* rent for the same amount which the zemindar was entitled to get remission of in the Government revenue on account of certain lands acquired for the construction of the Budge-Budge Railway in 1888, and the Court granted remission accordingly. The lands in the present case were not acquired for construction of "culverts, embankments or roads," but we agree with the learned Judge in holding that these words are merely illustrative and not exhaustive. We are accordingly of opinion that the

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claimants No. 2 are entitled to an abatement in the *putni* rent only for Rs. 310, *i.e.*, the amount which the zemindar will get abatement of in the Government revenue. To this extent the decree of the Court below will be varied, and in all other respects the appeals will be dismissed. In the circumstances, we make no order as to costs.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1372 OF 1913.

CARNDUFF, J.
RICHARDSON, J.
1914,
Heard,
26, January
Judgment,
28, January.

MOHESH CHANDRA KOONDOO and others, Defendants, Petitioners,
v.
AMAR CH. KOONDOO, Plaintiff, Opposite Party.

Civil Procedure Code (Act V of 1908), Sch. II para. 20, cl. (2)—Private award, application to file—Forum of institution and appeal, if depends on value of award or value of matter in dispute—Change of law.

When an award has been made on a reference to arbitrators without the intervention of the Court, the amount of the award and not that originally in dispute between the parties determines the forum in which an application to file the award is to be made and the Court to which appeal shall lie from the order passed on the application.

NARSINGH DAS *v.* AJODHYA PROSAD SUKUL (1) ***not followed in view of the change in the law.***

This was a Rule granted on the 17th of November 1913, against the order of Mr. P. E. Cammiade, District Judge of Backergunj, dated the 24th of September 1913.

By that order the District Judge returned for presentation to the High Court an appeal preferred against an order of the Subordinate Judge directing an award passed by an arbitrator on a reference made by the parties without the Court's intervention to be filed.

(1) I. L. R. 31 Cal. 203 (1903).

The material portion of the order of the District Judge was as follows :—

"The Respondents have raised a further objection to the effect that as the subject matter of the award exceeded Rs. 5,000, no appeal lies to this Court. It would appear from the statement filed before the arbitrators that the Respondents claimed from the Appellant far more than Rs. 5,000, as the items in which specific sums have been named carrry their claim to over Rs. 10,000. In support of their contention, the Respondents refer to *Narsingh Das* v. *Ajodhya Prosad Sukul* (1) and *Subraya Prabhu* v *Manju Nath Bhakta* (2). Both these cases, which relate to the filing of an award made at an arbitration without intervention of Court, bear out the contention of the Respondents that in cases of this nature, the value of the entire matter referred to arbitration and not the amount awarded to any party decides the forum of the suit, and from this it follows that it also decides the forum of the appeal. The Appellant refers me to the case of *Gulab Khan* v. *Abdul Wahab Khan* (3), and to the Full Bench Decision in the case of *Ijjatulla Bhuiyah v. Chandra Mohan Banerjee* (4), which relate to claims for mesne profits where the amount to be decreed is left to be ascertained by the Court. There are material differences between the two classes of cases, which have been pointed out in *Narsingh Das's* (1) case, and

(1) I. L. R. 31 Cal. 203 (1903).
(2) I. L. R. 29 Mad. 14 (1905).
(3) I. L. R. 31 Cal. 365 (1904).
(4) 11 C. W. N. 1133 (1907).

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it is impossible to follow in a case like the present the principles laid down by their Lordships in the cases cited by the Appellants.

"It is accordingly ordered that the memorandum of appeal be returned to the Appellant for presentation before the High Court."

Dr. Sarat Chandra Bysack and *Babu Bepin Chandra Bose* for the Petitioners.

Babus Dwarka Nath Chackrabartty and *Gunada Charan Sen* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF J.—The Petitioner, Mohesh Chandra Kundu, claimed Rs. 6,000 odd as the balance due to him on various transactions in respect of the purchase and sale of jute from the Opposite Party, Nandakumar Kundu. The opposite party, on the other hand, claimed that there was a balance of Rs. 5,000 odd due to him on the transactions. The dispute was referred to an arbitrator without the intervention of the Court, and the arbitrator eventually awarded Rs. 2, 005 as due to the Opposite Party from the Petitioner. The Opposite Party then applied to the Subordinate Judge at Barisal under paragraph 20 of the Second Schedule to the Code of Civil Procedure to have the award filed in Court. The Subordinate Judge allowed the application. The petitioner thereupon appealed against this order under sec. 104, sub-sec. (1), clause (*f*) of the Code to the District Judge, who held by an order passed on the 24th September last, that the appeal lay to the High Court. Accordingly the memorandum of appeal was returned and was presented to this Court as soon as it re-opened after the long vacation. It was then out of time and the Petitioner obtained from us the present Rule, by which the Opposite Party was called upon to show cause why the time for filing the Appeal in this Court should not be extended, or, in the alternative, why the order of the District Judge should not be set aside and the Appeal remanded to him for re-hearing.

Two questions thus arise, namely, *first* whether the District Judge was right, and, *secondly*, if so, whether the time for appealing to this Court should be extended under sec. 5 of the Indian Limitation Act, 1908.

As regards the first point, sec. 21, sub-section (1) clause (*a*) of the Bengal, Agra, and Assam Civil Courts Act, 1887 provides that an Appeal from a decree or order of a Subordinate Judge shall lie to the District Judge where the value of the original suit in which, or in any proceeding out of which, the decree or order was made, did not exceed five thousand rupees.

Para. 20, cl. (2) of the Second Schedule to the Code provides that an application for filing an award shall be numbered and registered as a suit between the Applicant as Plaintiff and the other parties as Defendants, and para. 21 provides that where the Court is satisfied that the matter has been referred to arbitration and that an award which is not impeachable except on certain grounds has been made thereon, the Court shall order the award to be filed and shall proceed to pronounce judgment according thereto.

The position, then, seems, to be this: By reason of his application to have the award in his favour filed in Court the Opposite Party is to be regarded as a Plaintiff suing the Petitioner in the Court applied to for the amount of the award, that is, for Rs. 2,005. That Court had nothing whatever to do with the merits of

the case or the subject-matter of the original dispute, but had merely to decide, with reference to the provisions I have just quoted, whether there had been an arbitration and an award. Had it found that there had not been such an arbitration or award, the parties would, I presume, have been relegated to the position which they occupied before the reference to arbitration and would have had to begin again *de novo*. But, as the matter stands, it seems to me that the value of what may be called the suit was simply Rs. 2,005. In this view, the District Judge was wrong and he ought to have tried the appeal. An argument has been founded on the language of para. 20 of the Second Schedule to the Code, under which the forum is made to depend in the first instance on the "subject-matter of the award." It is contended that, as was held in *Narsingh Das* v. *Ajodhya Prosad Sukul* (1) under the corresponding provisions of sec. 525 of the Code of 1882, that what is meant is the dispute referred to arbitration. But I am inclined to think that there is a difference between the words "the matter to which the award relates", which were employed in the old Code, and the phrase "the subject-matter of the award", which is used in the new. And, having regard to the change of language, to what an award is, and to the context, I am of opinion that the Legislature in 1908 must have intended to make the value depend on the thing awarded rather than on the matter originally in dispute. As I have already pointed out, the Court asked to file the award has nothing to do with the merits of the original dispute, and, that being so, I fail to see any reason for making the forum depend on the value of the whole dispute.

(1) I. L. R. 31 Cal. 203 (1903).

In the result, I would make this Rule absolute, set aside the order of the District Judge, dated the 24th September 1913, and direct that the appeal be heard by him. I would make the costs of this hearing costs in the cause, and assess the hearing fee at two gold mohurs.

Let the records of both the Rule and the Appeal be sent down at once.

RICHARDSON, J.—I agree though with some hesitation as to the true meaning of the expression "subject-matter of the award", which occurs in r. 20 of the Second Schedule of the Civil Procedure Code.

Rule made absolute.

[CRIMINAL REFERENCE.]

No. 128 OF 1913.

IMAM, J. CHAPMAN, J. 1913, Heard, 7, September. Judgment, 21, September.	GULLI SAHU and anr., *v.* KING-EMPEROR.

The Indian Extradition Act (XV of 1903), sec. 10, sub-secs. (1) and (2), secs. 15, 18—Order extraditing accused—Treaty between British and Nepal Governments—Non-compliance with statutory provision—Jurisdiction of High Court to revise extradition order.

Where the Subdivisional Magistrate made an order under the Indian Extradition Act directing the surrender of the accused to the Nepal authorities, purporting to act under sec. 10 of the Act, but without following the provisions of sub-secs. (1) and (2):

Held—*That sec. 15 of the Act ousts the jurisdiction of the High Court to enquire into the propriety of a warrant issued under Chap. III of the Act, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived*

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from the law, but is in fact without jurisdiction not being sanctioned by it, it must be assumed that the Magistrate acted in his general jurisdiction, and as such his order is revisable by the High Court and liable to be set aside at the instance of the party whose liberty is affected by it.

EMPEROR v. HUSSAINALLY NIAZALLY (1) & IN THE MATTER OF AHADYER (2) *followed.*

This was a reference under sec. 438, Cr. P. C., from R. L. Ross, Esq., Sessions Judge of Darbhanga, dated the 21st of May 1913, recommending revision by the High Court of the order of Mr. A. Slater, Subdivisional Magistrate of Madhubani, dated the 26th of April 1913, directing the surrender of the accused to the Nepal authorities to meet the charge pending against them.

The facts will appear from the Letter of Reference which is set out below.

"On a certain day in Bhadra 1966 (1909 A. D.) one Peary Goar was assaulted by six persons, among whom were the Petitioners Gulli Sahu and Gobind Sahu, by order of the Zemindar Jia Lal in village Malini in Nepal. Seven days after the assault Peary Goar died. The complaint, a copy of which has been sent from Nepal is dated 26th Jaith 1967, and was made by Musammat Bhagwatia, the widow of Peary Goar. On 29th January 1912, the Sub-Inspector of Phulpras Police-station in the District of Darbhanga, sent an enquiry slip to the Lieutenant of Hanumannagar in Nepal, through the Subdivisional Magistrate of Madhubani, enquiring whether one Gulli Sahu was wanted in the case of the murder of a Goala. On 22nd February 1912, the Lieutenant of Hanumannagar replied that Gulli Sahu was an accused in that case and asked for his arrest promising to send proof of criminality and nationality according to the Treaty. On 9th March 1912, a warrant of arrest was issued. On 12th November 1912, Gulli Sahu surrendered to the Subdivisional Magistrate of Madhubani and was released on bail. On 12th January 1913, the Lieutenant of Hanumannagar sent the evidence of criminality and nationality and also requested the arrest of Gobind Sahu. The Subdivisional Magistrate of Madhubani after examining the witnesses for the prosecution and for the defence has found that 'the accused have committed an offence and are fugitives from justice and should therefore be surrendered to meet the charge.'

"Even if it be assumed that the nationality of the Petitioners is Nepalese, as to which there is a conflict of evidence, and if it also be assumed that Peary Goar died in consequence of the assault, as to which there is, on the one hand, in the absence of medical evidence, no direct proof, while there is a good deal of evidence to the effect that he died from natural causes, the widow of the deceased being one of the witnesses who deposes to this effect, still there is no proof and no finding that an extradition offence has been committed. The evidence is that the deceased was assaulted with kicks and blows from the fist, that he became unconscious, that his wife and nephew came and gave him water to drink, that he revived and was taken home, and that he died 7 days later.

"The case is by virtue of the provisions of sec. 18 of the Indian Extradition Act of 1903 (XV of 1903), governed by the Treaties in force between the British Government and the Government of Nepal. The extradition offences under the Treaties are specified in Art. 4 of the Treaty of 10th February 1855 (Aitchison's

(1) 7 Bom. L. R. 463 at p. 467 (1905).

(2) 21 Punj. Rec. [1886] Cr. 45 at p. 52

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Treaties, Vol. II, p. 118, Ed. of 1909), and in the Treaties of 23rd July 1866, (*ib.* p. 121) and of 24th June 1881 (*ib.* p. 122). The only possible heads of crime to which the act of the Petitioners could be referred are those specified in Art. 4 of the first mentioned Treaty as (1) murder and (2) maiming. There is no evidence of any intention to cause death or of any knowledge that the assault must in all probability cause death. The case is not a case of murder under the law of British India. The Petitioners might, if the evidence was believed, possibly be convicted of causing grievous hurt, although it seems doubtful whether there is evidence of anything more than simple hurt. But even grievous hurt is not equivalent to maiming which is a special form of hurt. 'To maim is to injure any part of a man's body which may render him in fighting less able to defend himself or annoy his enemy.' (Archbold, 23rd Ed., p. 842, citing 1 Hawkin's Pleas of the Crown, c. 55, s. 1). It is true that under the Indian Extradition Act any form of hurt is an extradition offence: but the terms in the Treaty must be taken as they stand, and must be construed in their strict technical sense.

"The Magistrate has not considered it necessary to submit any explanation."

Messrs. Jackson and *K. N. Chaudhuri* (with *Babu Rajendra Prosad*) for the Accused.

Mr. S. Ahmed for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference by the Sessions Judge of Darbhanga under sec. 438, Cr. P. C., recommending for revision an order passed by the Subdivisional Magistrate of Madhubani, directing the surrender of two alleged fugitive offenders, *viz.*, Gulli Sahu and Gobind Sahu to the Nepal authorities.

In Bhador 1966 (1909) Gulli Sahu and Gobind Sahu with 4 other persons are said to have assaulted one Peary Goar under the orders of a zemindar, one Jia Lal, in village Malini within the territory of Nepal. Seven days after the assault Peary Goar is alleged to have died. His widow Musammat Bhagwatia laid a complaint before the Nepal authorities on 26th Jeth 1967. Two out of the 4 other persons were tried in Nepal and convicted. One of the two was sentenced to be hanged and the other sentenced to transportation for life. On the 29th January 1912, the Sub-Inspector of Phulpras Police-station, within the Subdivision of Madhubani, sent an enquiry slip through the Subdivisional officer to the Lieutenant of Hanumannagar in Nepal, enquiring if one Gulli Sahu was wanted by the authorities of Nepal in the case of the murder of a Goala. The Lieutenant whose official position corresponds to that of a Sub. divisional officer in British India replied on the 22nd February 1912 that Gulli Sahu was accused in that case and asked for his arrest promising to send proof of criminality and nationality. On the 9th March 1912, the Subdivisional Magistrate of Madhubani issued a warrant of arrest against Gulli Sahu who, on surrendering before the Magistrate on 18th November 1912, was released on bail by that Magistrate. On the 12th January 1913 the Lieutenant of Hanumannagar sent the evidence of criminality and nationality to the Subdivisional Magistrate and requested that Gobind Sahu should also be arrested. On 3rd March 1913 Gobind Sahu was arrested and released on bail. After examining witnesses for the prosecution and

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the defence, the Subdivisional Magistrate by his judgment, dated the 20th April 1913, directed the surrender of the accused Gulli Sahu and Gobind Sahu to the Nepal authorities. The Magistrate concludes his judgment thus :—"The accused, I hold, have committed an offence and are fugitives from justice and should therefore be surrendered to meet the charge."

The learned Judge in making this reference to us points out—(1) that there is a conflict of evidence as to the nationality of the accused, (2) that while there is no direct proof that Peary Goar died in consequence of the assault, there is a good deal of evidence that he died of natural causes, the evidence of the widow being to that effect, (3) that there is neither proof nor finding that an extradition offence has been committed, and (4) that the evidence if believed, at best makes out a case of grievous, if not of simple, hurt only. The learned Judge further points out that although under the Indian Extradition Act any form of hurt is an extradition offence, this case, by virtue of sec. 18 of the Act is governed by the Treaties between the British Government and the Government of Nepal, and does not disclose any offence for which an extradition order can be passed.

The learned Deputy Legal Remembrancer on behalf of the Crown urges that regard being had to the provisions of sec. 15 of the Indian Extradition Act, it is the Government of India or the Local Government alone and not the High Court that have the power to discharge the person for whose arrest warrant has been issued under the Act. In this connection it is necessary to examine the provision of the law under which the Magistrate has purported to act. It is frankly admitted on behalf of the Crown that sec. 7 of the Act is not the Magistrate's authority for his proceedings, but it is urged that his action is covered by the provisions of sec. 10 of the Act. The portions of that section material to this case are contained in sub-secs. (1) and (2) that run thus :—

"(1) If it appears to any Magistrate of the first class or any Magistrate empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State not being a Foreign State and that such person may lawfully be surrendered to such State or that a warrant may be issued for his arrest under sec. 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant, if the offence had been committed within the local limits of his jurisdiction."

"(2) The Magistrate shall forthwith report the issue of a warrant under this section, if the offence appears or is alleged to have been committed in the territories of a State for which there is a Political Agent, to such Political Agent and in other cases to the Local Government."

Bearing the above provisions of the law in mind the order of the Magistrate is open to attack on several grounds. *Firstly*, he issued the warrant, at least in the case of Gulli Sahu, on mere information without any evidence. *Secondly*, he has not reported the issue of the warrants to the Political Agent, there being one in Nepal. *Thirdly*, he has made an enquiry into the case without a warrant or warrants issued by the Political Agent in or for the Nepal State. *Fourthly*, he has ordered the surrender of the accused on

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High Court Notice.

The High Court, Appellate Side, will be closed on Monday the 22nd June 1914, being the day fixed by the Government of India for the celebration of the Birthday of the King Emperor.

HIGH COURT, APPELLATE SIDE. *The 1st June 1914.*	H. M VEITCH, *Offg. Registrar.*

Ranimoni Dasi *v.* Radha Prosad Mullick.

We are pleased to find that their Lordships of the Privy Council have affirmed the decision of the High Court on appeal in the case of *Ranimoni Dasi* v. *Radha Prosad Mullick* (15 C. W. N. 113). The decision of the Privy Council is reported at p. 873 of this issue. The trial Judge, Fletcher, J., felt bound by the interpretation placed on the Will by the Judicial Committee on a previous occasion [*Ranimoni Dasi* v *Radha Prosad Mullick* (L R. 35 I. A. 118: s c 12 C W. N. 729)] and in fact the terms of the Order in Council were so unequivocally against the contention of the party who has in the present instance succeeded before the Judicial Committee, that his Lordship expressed himself to the effect that his application ought never to have been brought in the Court, and he dismissed it with costs to all parties. The Appellate Court reversed that decision, but on the question of costs directed that the costs of all parties in the Court of first instance and of the Appeal should come out of the estate. The Privy Council too in affirming this judgment of the Appeal Court directed that the costs of all parties as between solicitor and client should come out of the estate.

Transferee of Occupancy-holding.

On Tuesday last, the 2nd June 1914, a Full Bench of the High Court, consisting of his Lordship the Chief Justice and Stephen, Woodroffe, Mookerjee and Holmwood, JJ., delivered judgment disposing of some very disputed points bearing on the position of a purchaser of the whole or a portion of an occupancy holding The tendency of later decisions has been, on the whole, more favourable to the purchaser than earlier ones, but this, in their Lordships' view, is due to economic causes. "The life of the law," the judgment goes on to add, in the words of a well-known jurist, "is not logic, but experience."

The judgment does not discuss in detail the arguments addressed to the Court, but sums up their Lordships' considered opinion as follows :—

First, that the transfer of the whole or a part of an occupancy-holding is operative against the raiyat

(*a*) where it is made voluntarily, or

(*b*) where it is made involuntarily and the raiyat having knowledge thereof fails or omits to have the sale set aside.

A sale, their Lordships explain, is made involuntarily when it is in execution of a money-decree, but not of a decree, founded on a mortgage or charge voluntarily made

Secondly, such a transfer would be operative against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of a whole holding, the landlord in the absence of his consent is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding or not by way of sale, the landlord, though he has

not consented, is not ordinarily entitled to recover possession of the holding, unless there has been

(*a*) an abandonment within the meaning of sec. 87 of the Bengal Tenancy Act, or

(*b*) a relinquishment of the holding, or

(*c*) a repudiation of tenancy.

Whether there has been a relinquishment or repudiation or not, depends on the substantial effect of what has been done in each case.

Finally, as against all other persons except the landlord and the raiyat, the transfer is operative where it would be operative against the raiyat. In this view, it was held that a transferee of a portion of an occupancy-holding sold in execution of a rent decree obtained against the raiyat is his representative within the meaning of sec. 47 of the Civil Procedure Code, and is a person whose immoveable property has been sold.

The above formulation of the law, from its form, appears to be intended for acceptance by the Legislature, should it be so inclined. But it does not cover the whole ground. At the close of the judgment, his Lordship the Chief Justice was understood to say that questions not covered by this judgment arising in other cases not yet heard and depending on the decision of the Full Bench may be brought before his Lordship by the Vakils concerned, by application. It is sincerely to be hoped that the course adopted will help the Court in arriving at a real settlement of the divergencies of judicial opinion which centre round the position of the transferee of an occupancy-holding.

CURRENT INDIAN CASES.

(CRIMINAL.)

Criminal Procedure Code, secs. 215, 403, 439—Commitment, setting aside of.—Autrefois acquit.

EMPEROR *v.* SAILANI I. L. R. 36 All. 4.

Two persons were placed on their trial under sec. 323, I. P. C. The case was compounded and both accused were acquitted. Subsequently the wounded man died and a post-mortem examination showed that death was due to the assault by the accused. Both accused were sent up by the police under sec. 304, I. P. C. and the Magistrate committed one of them to the Court of Sessions, but under the direction of the Sessions Judge the other accused was also committed. This accused moved the High Court for the quashing of the commitment.

Held—That a commitment can be set aside only on [illegible]int of law.

there was no legal bar to the trial of Sailani on [illegible]er sec. 304, whether he could be convited of [illegible]ection depended on the evidence in the case [illegible] proved by that evidence that he was as has [illegible] for the death of the man, that is to ted on [illegible] enabled the Court to apply either [illegible] P. C., to the case.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*Folkstone Corporation* v. *Brockman.* Before LORDS LOREBURN, KINNEAR, DUNEDIN AND ATKINSON. 6th February 1914.

Dedication of a road as a public highway—User.

This appeal raised the question as to whether a certain road had been effectually dedicated to to the public as a highway for foot-passengers.

The Justices held that the maker of the road did not intend to dedicate it as a public highway.

The Court of Appeal reversed that decision, and in support of it, it was urged that the user of the road by the public created a *presumptio juris* in favour of dedication. Their Lordships allowed the appeal, and in the course of his judgment, Lord Kinnear said as follows :—

The nature of user, and consequently the weight to be given to it varied indefinitely in different cases, and whether it would import a presumption of grant or dedication must depend upon the circumstances of the particular case.

After referring to *Mann* v. *Brodie* (10 App. Cas. 378) and *Poole* v. *Huskisson* (11 M. and W., 830), his Lordship said that the points to be noted in those decisions were, *first*, that the thing to be proved was intention to dedicate, and, *secondly*, that while public user might be evidence tending to instruct dedication, it would be good for that purpose only when it was exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee. Lord Justice Buckley had failed to advert to the critical fact with which the Justices introduced their conclusions—namely, that it was not the intention of Lord Radnor to dedicate the road as a public highway.

In conclusion, he said that on the question of dedication he was of opinion that the decision of the Justices was final and conclusive as a decision of fact; that the Court below had no authority to inquire whether in fact it was right or wrong; and that no ground had been brought forward for setting it aside as contrary to law.

Sir Robert Finaly, K. C., Mr. Ryde, K. C, and *Mr. R. W. Turner* for the Appellants.

Mr. Cave, K. C., and *Mr. Randolph A. Glen* for the Respondents.

B. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD AND SHARFUDDIN, JJ. No. 1987 OF 1913. KERAMUDDIN SARKAR, Petitioner *v.* THE KING-EMPEROR, Opposite Party. 23rd January 1914.

Criminal Procedure Code (Act V of 1898), secs. 110, 112, 117—Procedure to be followed as in warrant cases—Opportunity to produce defence evidence.

This was a Rule against an order of Mr. S. C. Ghatak, Subdivisional Magistrate of Thakurgaon, dated the 5th of November 1913, directing under sec. 110, Cr. P. C., the Petitioner to execute a bond in Rs. 500 with two sureties of Rs. 500 each, to be of good behaviour for one year, appeal from which order was dismissed by Mr. J. A. Ezechiel, District Magistrate of Dinajpur, on 8th of December 1913.

Their Lordships delivered the following judgment in this case :—

This was a Rule calling upon the District Magistrate of Dinajpur to show cause why the order under sec. 110, Cr. P. C., passed against the the Petitioner should not be set aside, *firstly*, on ground that the provisions of sec. 112 have not been complied with, inasmuch as the substance of the information received from the police has not been recorded and the accused person had no notice thereof; and *secondly*, that the case is triable as a warrant case and the accused had a right to have the witnesses properly cross-examined and to have processes issued on any witnesses he desired to call in defence. The Rule could have been stated more shortly by saying that it had not been heard *firstly* with reference to the provisions of sec. 112 and *secondly* with reference to the provisions of sec. 117.

As regards the alleged breach of the provisions of sec. 112, the learned Magistrate points out in his explanation that he has followed the letter of secs. 112 and 113. There was a proceeding drawn up. The person in respect of whom it was drawn was present in Court, and it was read over to him and the substance explained to him. But the conditions in which he was present in Court are rather different to what is the ordinary practice. He was only present in Court, because he had been brought there by a policeman after being locked up all night. He therefore certainly had no opportunity of producing his defence witnesses; and even if, we were inclined to discharge the Rule as regards sec. 112, the disregard of the provisions of sec. 117 is quite fatal to the case. That section provides that in proceedings under sec. 110 the procedure for warrant cases shall as far as possible be adopted, and that means, as it obviously must mean, that a person who has such a serious charge alleged against him must have time to bring his witnesses and have their evidence recorded. In the present case it appears that the accused had no opportunity of choosing and producing his own evidence or having them produced by summons. He had no chance of choosing his own legal adviser, the learned Magistrate having come out from the station accompanied by a single muktear, who, as it happened, was able to appear on behalf of the accused, although of course he knew nothing about his case. The only witnesses he could have examined were the bystanders who happened to have gathered round the cutchery out of curiosity, and it cannot be said that those were the witnesses whom he voluntarily chose in his defence.

The proceedings clearly show that the man had not anything like a fair trial, and the order under sec. 110 must therefore be set aside, and if it is necessary to take further proceedings, those proceedings must be taken with due regard to the spirit as well as to the letter of the law.

The Petitioner will be discharged from the security bond.

Mr. C. R. Das, Dr. Suhrawardy and *Babu Atulya Charan Bose* for the Petitioner.

No one for the Crown.

CIVIL APPELLATE JURISDICTION. Before COXE, and MULLICK, JJ. APPEAL FROM APPELLATE DECREE NO. 1636 OF 1912. HALDHAR JHA, Defendant, Appellant *v.* SYED SHAH MAHAMAD ASHRAF ALAM, Plaintiff, Respondent. Heard 22nd April. Judgment, 27th April 1914.

Enhancement—Lease for term—Enhancement conditioned on non-performance of certain act—Breach of covenant—Waiver during continuance of lease—Enhanced rent, if payable after expiry of lease.

This was a suit for rent based on a *kabuliyat.* The suit was decreed by the Courts below. The *kabuliyat* on which the suit was based expired and it was contended on behalf of the Plaintiff that the tenant held over under the *kabuliyat* and was bound by its terms. The *kabuliyat* was for the years 1304 to 1312. Mangoes were to be planted in the first year of the lease and were to be made ready for bearing at the end of 5 years, that is to say, at the end of 1308. If the tenant failed to carry out these conditions, he was liable for rent at the rate of Rs. 10 per bigha. It was found that the tenant did not plant any trees. The Plaintiff however had previously sued for rent at the rate of Rs. 3 a bigha for the years 1309 to 1312.

Held, that the case came under the Tenancy Act.

Under the Tenancy Act enhancement of the rent of raiyats, whether occupancy raiyats or non-occupancy raiyats, is greatly restricted. These restrictions constitute a valuable protection for the tenants, and the Courts should always be very careful to prevent landlords from evading these restrictions by inducing improvident tenants to take lands at lower rents with a stipulation for future enhancement.

Held also, that as the Plaintiff sued for rent at Rs. 3 for 1309 to 1312, he could not after the expiration of the *kabuliyat* obtain any higher rate which he had waived during the term itself. The tenant held over under the same terms as in the years 1309 to 1312.

Babus Upendra Nath Chatterjee and *Nares Chandra Sinha* for the Appellant.

Maulvi Muhammad Khurshed Hussein for the Respondent.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before MULLICK, J. APPEALS FROM APPELLATE DECREES NOS. 2889 AND 3347 OF 1911. SRI NARAIN SINGH AND OTHERS, Plaintiffs, Appellants *v.* CHULHAI KHAN AND OTHERS, Defendants, Respondents. Heard, 17th April. Judgment, 28th April 1914.

Suit, maintainability of—Road-cess return—Non-entry of land in possession of tenant, effect of—Cess Act, sec. 20.

The suits were for recovery of arrears of rent. The Defendants held *batai* lands under the Plaintiffs. The defence *inter alia* was that as the Plaintiffs did not enter the holdings in the Road-cess return, they could not claim any rent. Both Courts dismissed the suits, holding that it was the Plaintiff's duty, when filing in 1898 the cess-return concerning that portion of his estate, which related to the land in suit, to mention in the return that the lands in suit were in possession of the tenant Defendants.

Held, that sec. 20 of the Cess Act was no bar to the maintainability of the suit; sec. 20 does not enact that if a proprietor, whether by mistake or otherwise, enter a piece of land in the wrong part of his return, he thereby loses his right to claim rent.

The object of the Cess Act is that no land within the estate shall escape assessment. It is immaterial for the purpose of the Collector, whether the land is entered as in possession of the tenant or in the *khas* possession of the zemindar.

Babu Jogendra Chandra Ghose for the Appellants.

Babu Luchmi Narayan Singh for the Respondents.

A. T. M. *Appeal allowed: Cases remanded.*

CIVIL APPELLATE JURISDICTION. Before MULLICK, J. APPEAL FROM APPELLATE DECREE No. 939 OF 1912. BIDHUMUKHI CHOWDHURANI, Plaintiff, Appellant *v.* ASMATULLA and others, Defendants, Respondents. Heard, 15th April. Judgment, 28th April 1914.

Protected interest—Bengal Tenancy Act, sec. 160 (g)—Seputni.

One Lachmipat, the owner of a *putni* taluk, granted a *dar-putni* to Manulla. This *dar-putni* vested in equal shares in three persons named Bhairab, Nil Chand and Jaga Mohon. Nil Ch[illegible] died, and his estate passed into the possession of Bhairab as executor. Jaga Mohon gave a *seputni* settlement of his one-third share in the *dar-putni* to Bhairab, acting both on behalf of himself and as executor of the estate of Nil Chand. The Plaintiff had, by a purchase at a sale for arrears of rent, become sixteen annas proprietor of the *dar-putni*. He stated that he had by notice under sec. 167 of the Bengal Tenancy Act annulled the encumbrance created by the *seputni* and that therefore the Defendants who were tenants upon the land were liable to pay the whole rent [illegible] him. The lower Appellate Court dismissed t[illegible] suit.

On appeal to the High Court, it was contende[d] that the *seputni* was not a protected interest withi[n] the meaning of sec. 160 (*g*) of the Bengal Tena[ncy] Act. A general permission to grant a *seputn[i]* though in writing, was not sufficient and tha[t] what was required was a special permission i[n] each case.

The *patta* by which the *dar-putni* was creat[ed] expressly stated that the *dar-putnidar* might gra[nt] *seputni* settlements.

Held, all that sec. 160 (*g*) of the Bengal T[en]ancy Act requires is that the permission of t[he] proprietor should be express, and that it should [be] in writing. As these requirements were fulfill[ed] in this case, the *seputni* was therefore a protect[ed] interest within the meaning of the Act.

A general authority, such as was contained [in] the *dar-putni patta* under consideration, [is] sufficient to protect the *seputni*.

Semble, the scope of sec. 160 (*g*) is identi[cal] with that of sec. 11 of the Putni Regulation.

Dr. Rash Behary Ghose and *Babus* [illegible] *Nath Chuckerbutty* and *Bimal Chunder Das* [for] the Appellant.

Babus Sarat Chandra Roy Chowdhury and *B*[illegible] *Mohan Mujumdar* for the Respondents.

A. T. M. *Appeal dismissed*

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a procedure not known to the Extradition Act.

It is true that sec. 15 of the Act ousts the jurisdiction of this Court to enquire into the propriety of a warrant issued under Chap. III, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, not being sanctioned by it, we cannot but assume that the Magistrate has acted in his general jurisdiction and as such his order is revisable by this Court and liable to be set aside at the instance of the party whose liberty is affected by it.

In the view we have taken of the law in this case, we are supported by similar views expressed by learned Judges of the Bombay High Court and the Punjab Chief Court, respectively, in the cases *Emperor* v. *Hussainally Niazally* (1) and *In the matter of Akadyer* (2).

Before concluding this judgment we desire to quote the following passage from the judgment of the Privy Council delivered by the Lord Justice Mellish in *Attorney-General for the Colony of Hong-kong* v. *Kwok a-Sing* (3) which Magistrates dealing with such cases may profitably bear in mind :

" Suppose that a subject of China kills an Englishman within English territory or on board an English ship, under circumstances which according to English law might amount to manslaughter only, could it possibly be right for the English Government to surrender such a person to the Chinese Government to be tried according to Chinese law to which the distinction between murder and manslaughter may be wholly unknown ? "

We accept the reference of the learned Judge made to us for the reasons indicated in this order and we direct that the accused be discharged.

Accused discharged.

(1) 7 Bom L. R. 463 at p. 467 (1905).
(2) 21 Punj. Rec. [1886] Cr. 45 at p. 52.
(3) L R. 5 P. C. 179 at p. 199 (1873).

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
30, March.

RANIMONI DASI and anr., Appellants,
v.
RADHAPRASAD MULLICK and ors., Respondents.

Hindu Law—Will, construction of—Construction put on terms of Will with reference to events that had then happened, if binding on happening of a fresh event—Gift to daughters in equal shares and each share to each daughter's sons on her death—Gift to class, some of whom not in existence at testator's death—Hindu Wills Act (XXI of 1870), sec. 3.

A testator who died in 1875 directed his executors (in certain events which happened) to make over and divide the whole of his estate "unto and between" his two daughters "in equal shares to whom and their respective sons" "he gave, devised and bequeathed the same, but should either of his said daughters die without leaving any male issue surviving, but leaving the other daughter her surviving, then and in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter was to be paid to such her son or sons, share and share alike." R, *one of the*

RANIMONI DASI *v.* RADHAPRASAD MULLICK.

daughters, being childless adopted a son J in 1900. P, the other daughter, had several sons born in the testator's lifetime and several others born subsequently. In 1904, when both R and P were alive, the question whether under the Will they were each entitled absolutely to a moiety of the estate having been raised at the suit of R, the Privy Council on 14th May 1908 held that in the events that had happened, R and P were entitled to the estate "in equal shares for life with benefit of survivorship between themselves." P died in 1909 and in 1910 one of her sons who were born in the testator's lifetime applied for a further construction of the Will in the events that had happened, making his brothers and J parties. The High Court (on appeal) held that the fresh event that had happened (i.e., *P's dying leaving sons*) *took the case outside the purview of the Order in Council which in the events which had then happened was concerned only with the question,* viz, *what interest the daughters took under the Will; that the intention of the testator was that the sons of a daughter were to succeed to her moiety on her death; but that in view of the rule of Hindu Law that no person not in existence at the testator's death can take, under his Will and the proviso in sec. 3 of the Hindu Wills Act, only those sons of P who were then in existence would succeed to P's moiety under the Will (the gift to grandchildren, though a gift to a class of persons some of whom could not take under the above rule of Hindu Law, not being for that reason defeated as regards those born in the testator's lifetime). R and J having appealed to His Majesty in Council:*

Held—*That the judgment of the High Court was correct and based on correct reasoning.*

RADHA PRASAD MULLICK *v.* RANIMONI DASI (2) *affirmed.*

The appeal was dismissed subject to a direction that the decision was not to prejudice the position of J, if and when the question of his right to take under the Will should come before a Court for decision.

This was an Appeal from a Judgment and Decree of the High Court at Calcutta in its Appellate Jurisdiction, dated the 1st August, 1910, on an Appeal from a Judgment and Decree of the said High Court in its Ordinary Original Jurisdiction, dated the 4th March, 1910.

The only questions for determination on this Appeal arose on the construction of the Will of one Hari Das Dutt, deceased, and of the Judgment and Decree of the Judicial Committee in *Radha Prosad Mullick* v. *Ranimoni Dasi* (1).

The facts relating to the litigation are shortly as follows :—The said Hari Das Dutt, a Hindu governed by the Bengal School of Hindu Law, died on the 30th October, 1875, leaving a Will executed on the day of his death and leaving the following members of his family him surviving, *viz* :—Surnomoni Dasi, his widow, the Appellant Ranimoni Dasi and Premmoni Dasi, since deceased, his daughters, Radha Prosad Mullick, since deceased, the Respondent Kasi Prosad Mullick and Jyoti Prosad Mullick, since deceased, his grandsons by his daughter Premmoni Dasi. Ranimoni Dasi was married to Rama Kant Sen and was childless.

Hari Das Dutt appointed the said Surnomoni Dasi, his father Madhusudan

(1) L R 35 I. A. 118: s. c. 12 C. W. N. 729 (1908).

(2) 15 C. W. N. 113 (1910).

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Dutt, and his uncle Dwarkanath Dutt Executrix aud Executors of his Will and gave them directions and authority to adopt a son to him. On the 20th December, 1875, Surnomoni Dasi and Dwarkanath Dutt took out Probate of the said Will from the said High Court.

Under the powers contained in the Will, Surnomoni, on the 9th August, 1876, adopted the said Jyoti Prosad Mullick, son of Premmoni Dasi, as a son to Hari Das Dutt, but he died intestate and unmarried, on the 9th January, 1881. On the 9th February, 1881, Surnomoni then adopted one Amrito Lall Dutt as a son who on the 1st August, 1894, instituted a suit against Surnomoni and others for the construction of the Will of Hari Dass Dutt, and for administration of his estate. The said suit terminated in the decision of the Judicial Committee, dated the 2nd May 1900, by which it was held that the power of adoption contained in the said Will was invalid and incapable of execution under the Hindu Law, and the suit was accordingly dismissed. On the 2nd November, 1900, Ranimoni with her husband, Rama Kant Sen, adopted the second appellant Jugul Kissore Sen as their son.

Surnomoni died on the 14th August, 1904. On the 19th December 1904, Ranimoni Dasi instituted the present suit in the High Court at Calcutta against Premmoni Dasi, her sons Radha Prosad Mullick, the Respondent Kasi Prosad Mullick and the Respondents Peary Lall Mullick and Behary Lall Mullick, both of whom had been born after the death of the said Hari Das Dutt and the Respondent Jugul Kissore Sen, for the construction of the said Will, and the administration of the estate of the testator, and she claimed *inter alia*, that in the events which had happened, there being no adopted son, she and the said Premmoni were each entitled under the said Will absolutely to a moiety of the said estate. The said suit was defended and written statements were filed on behalf of the respective Defendants, (1) Peary Lall Mullick and Behari Lall Mullick; (2) Radha Prosad Mullick and Kasi Prosad Mullick; (3) Premmoni Dasi and (4) Jugul Kissore Sen.

The Clause in the Will upon which construction was sought was as follows :—

"But in case none of such adopted sons survive my said wife or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my Executors after the death of my said wife or the death of such son after her, but under the age of 18 years without leaving a son or sons, to make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares to whom and their respective sons, I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter her surviving, then and in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share alike."

On the 31st July, 1905, Judgment was delivered and it was held that the said Plaintiff and Premmoni Dasi were each entitled under the said Will to a moiety to the said estate absolutely. No opinion was expressed on the question as to whether the gift was defeasible in the

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event of a daughter dying without leaving male issue, it being held to be unnecessary to do so unless and until the event took place. A Decree was made containing the above declaration of title and directing enquiries, partition, and other relief and ordering that the costs of all parties should be paid out of the estate.

On the 12th September, 1905, the said Radha Prosad Mullick and the Respondent Kasi Prosad Mullick, and on the 14th September, 1905, the Respondents Peary Lall Mullick and Bahari Lall Mullick filed Appeals respectively to the said High Court in its Appellate Jurisdiction against the said Judgment and Decree. On the 23rd April, 1906, the said High Court delivered Judgment and made a Decree affirming the Judgment and Decree of the Lower Court on the question of construction, but varying it by omitting certain enquiries directed thereby, and the order for partition on the ground that such enquiries and partition could not take place inasmuch as the representatives of the estate of Surnomoni Dasi, against whom the said enquiries were directed, and of the said testator were not parties to the suit. It was held that it was premature to decide whether the gift to the daughters was defeasible in the event of either daughter dying without male issue and that that question should be left open until it had been ascertained what the events were. Liberty was granted to any of the parties to apply as they might be advised and, as to a partition of the properties, if and when the necessary parties were before the Court. The costs of all parties were directed to be paid out of the estate.

The said Radha Prosad Mullick and the Respondent Kasi Prosad Mullick appealed from the said Judgment and Decree to His Majesty in Council, and on the 14th May, 1908, this Board delivered Judgment in the said Appeal; *Radha Prosad Mullick* v. *Ranimoni Dasi* (1). It was held that on the true construction of the said Will the Plaintiff and Premmoni Dasi, the daughters, were entitled to the testator's estate for life in equal shares with benefit of survivorship between themselves. The said Decree of the High Court, dated the 23rd April, 1906, was varied by substituting for the words contained therein "are each absolutely entitled to a moiety or half part of the estate of the testator including the additions and accretions thereto" the words "are in the events that have happened entitled to the estate of the testator including the additions and accretions thereto in equal shares for life and with benefit of survivorship between themselves." In other respects the said Decree of the High Court was affirmed and costs of the Appellants and Respondents were ordered to be paid out of the estate.

On the 25th August, 1908, an Order was made in the said Suit on the application of the Plaintiff Ranimoni Dasi, adding as parties Defendants to the said Suit, N. S. Watkins, the Administrator *pendente lite* of the Estate of Hari Das Dutt deceased, with a copy of the Will annexed, and the Administrator-General of Bengal, the Executor of the Will of the said Surnomoni Dasi, it being further ordered that such addition of parties was made at the Plaintiff's risk, and without prejudice to the questions as to whether the Administrator-General was a necessary party, and whether there could be a partition in this Suit.

(1) L. R. 35 I. A. 118 : s. c. 12 C. W. N. 729 (1908).

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On the 8th May, 1909, the said Premmoni Dasi died, leaving the said Radha Prosad Mullick and the Respondents Kasi Prosad Mullick, Peary Lall Mullick and Behary Lall Mullick her sons, her surviving. On the 10th December, 1909, an Order was made directing an entry as to the death to be recorded in this suit.

On the 17th February, 1910, the said Radha Prosad Mullick, under the liberty to apply contained in the Decree of the High Court, dated 23rd April, 1906, instituted the present proceeding by presenting a Petition to the High Court, praying, *inter alia*, that this suit may be further proceeded with in order that the issues and questions therein remaining undetermined may be determined and disposed of by a further Decree or otherwise; that to this end the suit may be set down for further hearing; that all necessary and proper orders and directions may be made and given for the purposes aforesaid, and that the rights of parties to and in the moiety of the estate of the said Hari Das Dutt, the income of which was payable to the said Premmoni during her life, may be determined in this suit.

On the 4th March, 1910, the High Court (Fletcher, J.) delivered Judgment and made an Order dismissing the said application with costs. It was held that the question raised by the application was concluded by the judgment and decree of the Judicial Committee, dated the 14th May, 1908, on the ground that it had decided that the said daughters Ranimoni and Premmoni had a life estate with benefit of survivorship between themselves, and that even though the said Premmoni had died leaving sons, under the terms of the said judgment and decree, her interest in the moiety passed to the Plaintiff Ranimoni for life.

On the 14th April, 1910, the said Radha Prosad Mullick appealed to the said High Court in its Appellate Jurisdiction against the said Judgment and Decree. On the 1st August, 1910, the said High Court (Sir L. Jenkins, C. J., and Woodroffe, J. delivered judgment) reversed the said Judgment and Decree of the Lower Court and decreed the said Appeal

In the course of his Judgment the learned Chief Justice (Woodroffe, J., concurring) said as follows :—

"First then I turn to the order in Council and there I find it declared that the daughters 'are in the events that have happened entitled to the estate of the said testator * * * in equal shares for life and with benefit of survivorship between themselves.' It may be that these words, standing alone, and isolated from the surrounding circumstances, have the force that has been ascribed to them by the learned Judge, but to appreciate their real meaning regard must be had to the facts to which they relate and to the opinion on which they were founded. Now it is stated by Their Lordships almost at the outset of their opinion that the only question raised on the Appeal was as to the nature of the estate which in the events which had happened, the testator's daughters took under the terms of the Will. And at this point it is important to bear in mind what those events were, and also that the High Court had determined that the daughters each took a half share in the testator's estate absolutely, but expressed the view that it would be premature to decide whether that gift was defeasible in the event of either daughter dying without male issue, and they expressly left the question open until it was ascertained what the events

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were. Their Lordships of the Privy Council, while dissenting from the view that the daughters took absolute interests, went on to describe the utmost interest that they did and could take in the events which up to that time had happened as between themselves and apart from any subsequent disturbing event.

"As I read the opinion and Order in Council, there was no intention to decide the rights of sons in reference to a subsequent event which might or might not happen, and this would accord with what I understand to be the practice in ordinary cases. But now a fresh event has happened, for Premmoni has died leaving sons, and this as it seems to me takes the case outside the purview of the Order in Council so that the effect of the Will under the altered circumstances has to be considered.

"Now the Will contemplates two events and the provision applicable in the event that has happened is in these terms: 'In the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike,' and in connection with this provision the opening words of the gift have to be borne in mind. Though this part of the clause has not been specifically construed by their Lordships of the Privy Council they have indicated their view as to what the testator meant, and have stated that according to the true construction of the Will the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons. It seems probable that the word remainder was not used with the special significance that attaches to it in English real property law, but borrowed from the language of the Court [*see Radha Prosad Mullick* v. *Ranimoni Dasi* (3)] to emphasize the contrast between the view taken by the High Court and the Privy Council. Accepting then this as the intention of the testator, is there any legal obstacle in its way? Now it has to be borne in mind that after the testator's death two sons were born to Premmoni, the Defendants Peary Lall and Behari Lall and that of her sons living at the testator's death Jyoti Prosad predeceased her.

"The gift is to a class and the first point to be decided is one of construction: who come within the class? Having regard to the date of the Will it is regulated as to its interpretation by the Hindu Wills Act, 1870, and the incorporated provisions of the Indian Succession Act, 1865.

"The method of incorporation has been the subject of judicial comment and even animadversion, but the canon of construction to be applied has been thus defined by Lord Esher in the case in *Re: Wood's Estate* (4):—'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act, just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all.' This then is the rule by which the Court is to be guided.

"Sec. 85 of the Succession Act provides that "where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.'

"By sec. 98 it is provided that 'where

(3) I. L. R. 33 Cal. 947 at p. 965: s.c. 10 C. W. N. 695 (706).

(4) L. R. 31 Ch. D. 607 at p. 615 (1886).

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a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.'

"These two sections are in Chapter XI and they deal with the construction of Wills—Chapter XII however is concerned with a different topic 'void bequests" and by section 100 it is provided :—

'Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.'

"Sec. 101 formulates the rule against perpetuity with which we have nothing to do, while sec 102 provides that 'if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections or either of them, such bequest shall be wholly void.'

"Sec. 3 of the Hindu Wills Act, 1870, is by way of a proviso to the portions of the Succession Act incorporated by sec. 2 and it is thereby provided that nothing in the Act contained shall authorise any Hindu, Jaina, Sikh or Buddhist to create in property any interest which he could not have created before the first day of September, 1870. Whether this provision has regard only to the nature of the interest or extends also to the capacity of the person in whose favour the interest is expressed to be created has been a matter of considerable discussion. If the narrower view be adopted, nothing in the shape of repugnancy would arise on the construction of the Act, but this cannot be said of the wider view; indeed its adoption involves to an appreciable extent the nullifying of that which has been incorporated. But to discuss the respective merits of these rival constructions would profit nothing, for the point is covered by authority binding on us and going as far back as 1882 when it was decided by the Court of Appeal reversing the Judgment of Wilson, J., as he then was, that the proviso I have read controls both the quantity and quality of the interest created and in their natural and ordinary meaning include the capacity of a donee to take; *Alinga Monjori Dabee* v. *Sonamoni Dabee* (5) Pontifex, J, in *Cally Nath Naugh Chowdhury* v. *Chunder Nath Naugh Chowdhury* (6) expressed an opinion to the same effect.

"Accepting then, as I must, this as the true meaning of sec. 3, I will now consider what its effect is in the circumstances of this case".

"The gift is to the son or sons of Premmoni share and share alike, but their possession of it is deferred until a time later than the death of the testator by reason of the prior bequest to their mother, so that under sec. 98 the property at their mother's death would go to such of the sons as should be then alive and to the representatives of any of the sons who had died since the death of the testator. According to this the property would go in five equal shares to Radhaprosad, Kasi Prasad, Peary Lall, Behary Lall and the representatives of Jyoti Prosad. But this result must be controlled by the proviso in sec. 3 of the Hindu Wills Act and the rule of Hindu Law that a bequest to a person not in existence at the time of the testator's death is void so that the saving provision in sec. 100 cannot be applied.

"The result then is that Peary Lall and

(5) I. L. R. 8 Cal. 637 (1882).
(6) I. L. R. 8 Cal. 873 (1882).

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Behary Lall cannot take. What then is the effect of this?

"On behalf of Ranimoni it is contended that as some of the class cannot take, the whole gift is void and in support of this *Leake* v. *Robinson* (7) has been cited. But this contention proceeds on a misapplication of this case and a misconception of the true nature of a gift to a class.

"In *Leake* v. *Robinson* (7) the gift to the class failed, because the class could not be ascertained within the period allowed by the rule against perpetuities. The gift here in no way offends that rule: its only fault is that the class of legatees includes some who were not in existence at the date of the testator's death and were thus under a personal incapacity: and the difference is obvious. In a gift to a class the testator looks to the body as a whole rather than to the members constituting that body [*Kingsbury* v. *Walter* (8)] and the class is in a sense personified. But if that class cannot be ascertained until a time beyond that permitted by the rule against perpetuity there is no class to which the gift can legally be made. But if as here the fault is, not that the class cannot be ascertained within the period permitted by law, but that certain members of the class are incapable of taking, different considerations apply. Now according to sec. 98 sons living at the death of the testator would take and the provision in favour of the representatives of deceased sons shows that the sons would take vested interests. Apart from the rule against gifts to unborn persons the class thus taking would be liable to enlargement with a corresponding divestment of vested shares.

"But where that rule applies there can be no divestment, for a vested interest cannot be divested by a person incapable of taking.

"The incapacity therefore of some members of the class does not invalidate the gift under the Succession Act which in this respect seems to be in harmony with the current of English authority on this point, *e.g.*, *Dawset* v. *Sweet* (9), *Young* v. *Davies* (10), *Shaw* v. *McMahon* (11) and *Fell* v. *Biddlph* (12).

"This view of sec. 98 and its effect is borne out by the general scheme of the Succession Act; Chap. XII is headed 'Of void bequests,' and it indicates the grounds on which a gift to a class is void: they are limited to those set forth in secs. 100 and 101. But the gift here certainly does not offend the rule against perpetuity contained in sec. 101: the only question is whether it comes within sec. 100. I do not think it does: but for the rule of Hindu Law which forbids the gift to an unborn person this gift in reversion to sons would be good as it comprises the whole of the remaining interest of the testator in the thing bequeathed and the gift to the unborn sons would therefore have been valid.

"It is the rule of Hindu Law in combination with the interpretation that has been placed on sec. 3 of the Hindu Wills Act that avoids the gift, so that it cannot be said that the bequest to the class is inoperative with regard to some of that class by reason of the rule contained in sec. 100. And so the ground of avoidance on which the gift to Premmoni's sons as a class is open to attack is not one for which provision is made by the Act. The

(7) 2 Merivale 368 (1817).
(8) L. R. [1901] A. C. 187, at p. 191.
(9) 1 Amb. 175 (1753).
(10) 2 Dr. and Sm, 167 (1863)
(11) 4 Dr. and War., 431 (1843).
(12) L. R. 10 C. P. 701 (1875).

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result then is that the gift to the class is good, but reading sec. 3 of the Hindu Wills Act in the sense that has been ascribed to it, the afterborn sons Peary Lall and Behary Lall cannot take so that those now entitled to participate are Radha Prosad, Kasi Prosad and the representatives of Jyoti Prosad and between them the property bequeathed will be divided in three equal shares.

"Having regard to all the circumstances, I think this is a case where the costs of all parties in the Court of first instance should come out of the estate and also the costs of the Appeal. There will be liberty to apply to the Judge sitting on the Original Side, if necessary, as to realizing the money necessary for raising these costs. The case will now go back to the Court of first instance."

The present Appeal to His Majesty in Council was preferred by Ranimoni Dasi and Jugal Kissore.

Sir R. Finlay, K. C., and *Mr. K. Brown* for the Appellants submitted that the moiety of the estate enjoyed by Premmoni Dasi for her life passed by survivorship to the first Appellant. The High Court erred in holding that no grandson of the testator born or adopted since 1875 could take under his Will. Jugal Kissore was joined in the suit, because it might be said that he, not having been in existence at the death of the testator, was not entitled to succeed to Ranimoni.

[The Court intimated that Jugal Kissore's interest was not to be considered in the case.]

Reference was made to Mayne's Hindu Law, p. 762; *Radha Prosad Mullick* v. *Ranimoni Dasi* (1).

(1) L. R. 35 I. A. 118 : s. c. 12 C. W. N. 729 (1908).

Mr. L. DeGruyther, K. C., Mr. Ross, K. C., Mr. Dunne, and *Mr. O'Gorman*, for the several Respondents, were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—Their Lordships have had an opportunity of considering the Judgment of the Court below on the question as to whether on the death of the younger daughter leaving male issue the estate passed over for life to the elder daughter, and they are of opinion that it is correct, and is based on correct reasons. They will therefore humbly advise His Majesty to dismiss this Appeal.

With regard to the contention of the Appellants that the Court was wrong in holding that no grandchildren of the testator born or adopted, after the death of the testator on 30th October 1875, could take under his Will, their Lordships will not advise His Majesty to make any order except that the present advice is not to prejudice the position of the second Appellant, if and when such question comes before a Court for decision.

The costs of all parties as between solicitor and client will come out of the estate.

Solicitors: *Messrs. T. L. Wilson & Co*, for the Appellants

Solicitors: *Messrs. Watkins & Hunter, Gush, Phillips, Walters & Williams* for the Respondents.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 9 OF 1913.

JENKINS, C. J. D. CHATTERJEE, J. 1914, 31 March.	GURU DAS DAS, Defendant, Appellant, *v.* KALI DAS CHANGA, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 85 (2)—Under-raiyat, sub-lease by—Permanent lease by under-raiyat if invalid—Application by analogy of statutory provision to cases outside it—Permanent lease described as one for nine years to meet objection of Registering Officer.

Sec. 85 of the Bengal Tenancy Act has no application to a permanent lease created by an under-raiyat in favour of a sub-lessee: nor can the provisions of that section be applied to such a case by analogy.

RAM CHUNDER DUTT *v.* JUGHES CHUNDER DUTT (1) *referred to.*

The leases in this case were held to be permanent leases.

This was an Appeal under sec. 15 of the Letters Patent preferred on the 24th of February 1913 against a decree of Beachcroft, J., dated the 24th of January 1913, in Second Appeal No. 2954 of 1911, which had been preferred against a decree of G. N. Ray, Esq., District Judge of Zilla Noakhali, dated the 3rd of July 1911, reversing a decree of Maulvi Mahomed Ibrahim Hossein, Munsif, Lakhipur, dated the 30th of January 1911.

The Plaintiff who sued the Defendant in ejectment was an under-raiyat, the Defendant being the successor in interest of lessees under the Plaintiff. The Defendant pleaded that his lease conferred on him a permanent, heritable and transferable interest.

The Munsif decreed the suit; the District Judge on appeal reversed that decision holding that the tenancy of the Defendant was a permanent one. Two kabuliyats respectively of 1890 and 1900 were put in by the Plaintiff. In the former no period was mentioned, but there was a clause that the lessee might transfer by gift or sale and enjoy possession *putra-poutradikrame.* Another clause forbade cutting of trees and digging of tanks. Below the body of the deed was a sentence apparently added after the document was completed but before its registration to the effect that the lease was for 9 years. The District Judge was of opinion that this last clause was not operative having been entered obviously to meet the objection of the Registering Officer in view of sec. 85 (2) of the Bengal Tenancy Act. The later kabuliyat of 1900 opened with a clause to the effect that the sub-lease was for a period of 9 years only, and it appeared that a clause giving power to transfer by gift and sale and enjoy possession generation after generation had been struck out before registration. The District Judge held that this kabuliyat was executed, because the parties were under a wrong impression as to their rights.

BEACHCROFT, J., before whom the Second Appeal came on for hearing reversed the decision of the District Judge, holding that the sub-lease did not create a permanent tenancy, but one only for 9 years, and that even if it did in terms purport to create a permanent tenancy, it would be invalid under sec. 85 (2), and that in either event, this suit brought at the end of the term of 9 years should succeed and the Plaintiff should recover possession.

The Defendant preferred this Appeal under the Letters Patent.

Babu Jatindra Mohan Ghose for the Appellant :—The Plaintiff-Respondent

(1) 19 W. R. 358 (1873).

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is a dar-osat raiyat or a sub-tenant in the first degree and the Defendant-Appellant is nim-dar-osat raiyat or sub-tenant in the second degree. The Appellant holds the disputed land under two leases. The Lower Appellate Court held that the leases conferred on the Appellant a permanent right, that the clauses to the effect that they were for 9 years were put in to satisfy the Registrar who might otherwise have refused to register the leases and that the provisions of sec. 85 of the Bengal Tenancy Act could be pleaded by the landlord and not by the raiyat himself.

[THE CHIEF JUSTICE :—Sec. 85 refers to leases by raiyats and not by under-raiyats. Here both the parties are under-raiyats.]

Babu Jogendra Nath Mukerjee for the Respondent :—The principle underlying sec. 85 of the Bengal Tenancy Act should be applied to sub-leases granted by under-raiyats. The Legislature meant to lay down rules for all grades of sub-infeudations under this section, otherwise there would be this anomaly that while a raiyat would not be able to create leases for terms exceeding 9 years, under-raiyats would be competent to do so.

[THE CHIEF JUSTICE—Referred to the observations of the Judicial Committee in *Ram Chunder* v. *Jughes Chunder* (1).]

Moreover, there were express clauses to the effect that the leases were for 9 years. The express provision could not be defeated by the intention of the parties as gathered from the circumstances.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This Appeal arises out of a suit in ejectment.

(1) 19 W. R. 353 (1873).

The Munsif passed a decree in the Plaintiff's favour. That was overruled by the Lower Appellate Court. But the decision of the Lower Appellate Court has in turn been reversed by the judgment of this Court, and it is from that judgment that this Letters Patent Appeal is preferred.

The Judge of the Lower Appellate Court came to the conclusion that as between the parties to this litigation the Plaintiff had created a permanent tenancy in favour of the Defendant, Appellant before us. The documents are susceptible of that meaning and we see no reason for disturbing the learned Judge's conclusion.

An argument was addressed to us suggesting that sec. 85 of the Bengal Tenancy Act had some bearing on the case. It is manifest from the terms of that section that it does not directly apply as between the parties to this suit.

Then it has been suggested that by analogy the section applies. To that I will make answer in the words of the Privy Council in *Ram Chunder Dutt* v. *Jughes Chunder Dutt* (1) that arguments from analogy may arise where a principle of law is involved; but where the Courts are dealing with the positive enactments of a statute, reasons founded upon analogies are scarcely applicable.

The conclusion therefore to which I come is that the judgment of Mr. Justice Beachcroft must be set aside and that of the Lower Appellate Court restored; and the Appellant must receive from the Respondent his costs of both Appeals in the High Court.

D. CHATTERJEE, J.—I agree.

Appeal allowed.

(1) 19 W. R. 353 (1873).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 344 OF 1911.

FLETCHER, J.
RICHARDSON, J.
1914,
24, March,

MANINDRA CHANDRA NANDI, Claimant No. 1, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Opposite Party, Respondent.

Land Acquisition Act (I of 1894), sec. 23—Calcutta Municipal Act (III B. C. of 1899), sec. 557, cls. (c) *and* (d)*—Bustee land, acquisition of—Mode of valuation—Future use of land if can be considered in ascertaining value—Evidence as to under-tenants and rents paid by them, if relevant to determine market-value—Evidence as to sales of lands other than bustee lands in the neighbourhood, if admissible—Cl.* (c), *sec. 557, meaning and effect of—Cl.* (d), *presumption under, nature of.*

A piece of bustee land was acquired at the expense of the Corporation of Calcutta and the Special Land Acquisition Judge on a reference under sec. 18 of the Land Acquisition Act refused to admit evidence relating to the under-tenants and the rents paid by them and disallowed questions put to a valuer with regard to sales of other lands in the neighbourhood which were not bustee lands:

Held—*That cl.* (c) *of sec. 557 of the Calcutta Municipal Act which amends the Land Acquisition Act means that when a land is compulsorily acquired, any use to which the land may be put in future, should not be taken into consideration in determining its value, but the valuation shall be determined according to the market-value then existing of the land or building in the position that the matters then were. That this clause precludes evidence being given of the purposes to which bustee lands can be put in future and the Land Acquisition Judge rightly refused to admit evidence relating to the under-tenants and the rents paid by them, such matter being not relevant for the purpose of ascertaining the market-value as defined by sub-sec.* (c) *of sec. 557.*

That the Judge was right in disallowing the questions put to the witness with regard to sales of other lands in the neighbourhood which were not bustee lands, although in ordinary cases under sec. 23 of the Land Acquisition Act such evidence would have been admissible.

That the presumption under cl. (d) *of sec. 557 is a rebuttable presumption and it is only until the contrary is shown that the Court is entitled to presume that twenty-five times the annual value of the property as entered in the Assessment book is the value of the property within the meaning of sub-sec.* (c).

This was an Appeal preferred on the 31st of August 1911 against the decree of Arthur Goodeve, Esq., Special Land Acquisition Judge of 24-Parganas, dated the 8th of May 1911.

A piece of land measuring 6 bighas 7 cottahs, 11 chittaks and 20 square feet, forming part of a bustee known as the Halsi Bagan Bustee, was acquired by the Special Land Acquisition Collector under the orders of the Local Government on behalf of the Chairman of the Corporation of Calcutta for the purpose of making a road for the main sewer of the fringe drainage area. The Collector awarded compensation at the rate of Rs. 700 per cottah for an area of 3 bighas, 12 cottahs, 6 chittaks, 30 square feet, forming the front portion of the land in question to a depth of 60 feet and at a rate of Rs. 450 per cottah for an area of 2 bighas, 15 cottahs, 4 chittaks, 35 square feet, forming the back portion of the land. He also awarded Rs. 2,308-15-6 for certain huts

on the land. There was a reference to the Special Land Acquisition Judge of 24-Parganas under sec. 18 of Act I of 1894 by the Collector at the instance of two of the claimants, Nos. 1 and 2.

Before the Judge one Mohadeb Sadhukhan, a house-owner of Halsi Bagan was examined as a witness for the claimant No. 1 and questions relating to the under-tenants and the rents paid by them for land and structures thereupon were put to him, but disallowed by the Court as will appear from the material portion of the deposition of this witness set out below.

"I hold 15 cotthas of land under the Maharaja of Cossimbazar on the west side of the Ultadingi Junction Road. It is a little way distant from the road. I reach the Ultadingi Junction Road by going over other land of the Maharaja. Halsi Bagan Bustee belonged to Rani Sornamoyi of Cossimbazar. The present owner is Maharaja Manindra Chandra Nandi. I paid Rs. 29-10-6 to the Maharaja with rates and taxes. I have got under-tenants.

Q.—How many under-tenants?

(Question disallowed as being irrelevant.)

Q.—How much do they pay to you? (Question disallowed as being irrelevant.)

I have got my account-books here.

Can you say from your account-books how much rent they pay you?

(Question disallowed as being irrelevant.)

(*Note.*—The Court disallows all questions relating to the under-tenants and the rents paid by them for land and structures thereupon.)

Another witness examined before the Judge on behalf of the claimant No. 1 was Krishna Chandra Banerji, a Civil Engineer and Surveyor, who had been a Superintending Engineer in the Public Works Department before he retired from Government service; certain questions put to this witness were disallowed by the Court. The nature of the questions will appear from the portion of the deposition of this witness set out below.

Q.—Do you think that the land in suit would be valued on a rent basis? (Question disallowed as being vague.)

I consider myself competent to give an opinion as to the value of land in this Court.

I would go upon sales and other things, not upon rentals in this case.

Q.—Why would you not go upon rental?

A.—From my experience of bustee lands in Calcutta, I find that rents are as a rule very low. If calculated on that basis, it would be much lower than the award given by the Collector. By it I mean the assessment.

Q.—What do you mean by rentals?

A.—By rental I mean rents paid by tenants to the landlord. I take the Maharaja claimant to be the landlord in this case.

Q.—Did you make any enquiries into the rentals realised by the under-tenants?

A.—Yes. I did.

Q.—What did you find? (Question disallowed as the result of the enquiries is not evidence.)

Q.—With reference to sales in the neighbourhood, what sort of plots would in your opinion be most useful in assisting the Court to determine the market-value of the lands in suit? (Question disallowed, as this is a matter for argument from the evidence.)

The depth of the acquired land from the Ultadingi Junction Road along the

Halsi Bagan Road is 60 feet on the south and is 145 feet on the north along the Nandan Bagan Lane.

The frontage along the Ultadingi Junction Road is 900 feet.

Q.—Would you as a surveyor draw any inference from these figures? (Question disallowed as being too vague.)

Would you indicate any practical working such as regards road frontage per cottah on which surveyors may act safely? (Question disallowed as being vague.)"

Large frontages increase the value of land. Of the two plots of land of the same size, the one with a larger frontage is of greater value.

Q.—How would you compare the sales marked in your map with the acquired land? (Question disallowed as being too general and vague.)

The Special Land Acquisition Judge upheld the Collector's award and the claimant No. 1 preferred an Appeal to the High Court.

Mr. Caspersz, *Babus Jogesh Chundra Dey*, *Jyoti Proshad Sarbadhikary*, *Hemendra Nath Sen* and *Sarat Kumar Mitter* for the Appellant.

Babu Ram Chandra Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an Appeal from a Judgment of the learned Special Land Acquisition Judge of 24-Parganas, dated the 8th May 1911. The land which has been acquired for a public purpose is a certain piece of bustee land situated in Halsi Bagan within the Original Jurisdiction of this Court, that is, within the limits of the Presidency town and the statutory powers under which the land been acquired are the Land Acquisition Act of 1894, as varied by sec. 557 of the Calcutta Municipal Act, III (B. C.) of 1899. The point that has been argued before us in this Appeal turns solely upon the question whether the learned Judge of the Court below placed a right construction on the provisions of that section of the Calcutta Municipal Act and was right in excluding evidence as to sales of other properties in the neighbourhood which were not sales of bustee lands. The learned Counsel for the Appellant conceded that, unless he could satisfy us that the learned Special Land Acquisition Judge had erred in excluding that evidence, there was no evidence before us on which we ought or could award to the Appellant more than Rs. 590 a cottah which has been allowed by the Lower Court.

Now, sec. 557 of the Calcutta Municipal Act provides as follows :—"Any land or building which any Municipal authority authorised by this Act to acquire," that means one of the three Municipal authorities, namely, the Corporation, the General Committee and the Chairman who are the three Municipal authorities to carry into effect the Act, "may be acquired under the provisions of the Land Acquisition Act, 1894; and for that purpose the said Act shall be subject to the following amendments." We may here mention only one of the amendments which is necessary for our purpose, and that is (*c*) which provides: "the market value of the land or building shall be deemed for the purposes of clause *first* of sub-sec. (1) of sec. 23 of the Land Acquisition Act to be the market value according to the disposition of the land or building at the date of the publication of the declaration relating thereto under sec. 6 of the said Land Acquisition Act."

The clause is not very happily worded, but it is quite clear what it means, namely, that when a land is compulsorily acquired, any use to which the land may be put in future should not be taken into consideration in determining its value, but the valuation shall be determined according to the market value then existing of the land or building in the position that the matters then were. That seems to me quite clear on the terms of that sub-section and that was the view which was adopted by this Court in the case of *Harish Chandra Neogy* v. *Secretary of State for India* (1). The learned Judges in giving the judgment make the following remarks:—"Sec. 557 of the Calcutta Municipal Act precludes any valuation based on the most advantageous disposition of land, *e.g.*, a valuation of bustee land on the supposition of its adaptability for use as building land to carry extensive structures which is the most advantageous use to which the land can be put in Calcutta." With these remarks, I entirely argee. It seems to me that sub-sec. (*c*) of sec. 557 of the Calcutta Municipal Act precludes evidence being given of the purposes to which bustee lands can be put in future. Then comes sub-sec. (*d*) of sec. 557. Sub-sec. (*d*) provides "the market value of the land or building shall, until the contrary is shown, be presumed, for the purposes of the said clause *first* of sub-sec. (1) of sec. 23" which means sec. 23 of the Land Acquisition Act of 1894 "to be twenty-five times the annual value of the property, as entered in the Assessment-book prescribed by this Act." That of course is a rebuttable presumption, because the sub-section states that that presumption is to be made only until the contrary is shown and it is only until the contrary is shown that the Court is entitled to presume that twenty-five times the annual value of the property as entered in the Assessment-book is the value of the property within the meaning of sub-sec. (*c*). The only point in this case is, therefore, whether the learned Judge of the Court below rightly excluded the evidence, as appears, first of all, from page 141 of the printed paper-book relating to the under-tenants and the rents paid by them for land and structures thereupon. In my opinion, the learned Judge rightly refused to admit evidence relating to the under-tenants and the rents paid by them; and that matter is not relevant for the purpose of ascertaining the market value as defined by sub-sec. (*c*) of sec. 557. The other evidence which the learned Judge rejected was the questions put to a valuer with regard to sales of other lands in the neighbourhood which were not bustee lands. In ordinary cases, under sec. 23 of the Land Acquisition Act, that evidence would have been admissible, but the case of *Harish Chundra Neogy* v. *Secretary of State* (1), to which I have already referred, shows quite clearly that, in the opinion of the learned Judges in that case such evidence is not admissible; and with that opinion I agree. It seems to me that the learned Judge was perfectly justified in refusing to allow these questions to be put to the witness Krishna Chandra Banerjee as appears from pages 143 and 144 of the paper-book before us. That being so, the learned Judge, in my opinion, proceeded on a correct basis to arrive at the value of this land as provided by sec. 557 of the Calcutta Municipal Act.

(1) 11 C. W. N. 875 (1907).

(1) 11 C. W. N. 875 (1907).

That being so, the present Appeal fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 473 OF 1911.

JENKINS, C. J. WOODROFFE, J. 1913, 13, March.

SURYA KANTA RAY CHOWDHURY, Defendant No 2, Appellant,

v.

FANI BHUSAN BANERJEE, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), sec. 11—Res judicata—"*Persons litigating under the same title*"—*Reversioner allowed to recover his moiety on proof of absence of legal necessity for sale by Hindu widow—Fresh suit on the other moiety falling in—Decision on the issue of legal necessity if* res judicata.

Where the Plaintiff having sued the Defendant to recover possession as reversioners of a property alienated by a Hindu widow, obtained a decree in respect of a moiety of the property upon a finding that the sale was not for legal necessity, but the suit was dismissed as regards the other moiety on the ground that it had not passed to the Plaintiff, and afterwards this moiety too having passed to the Plaintiff, he again sued the Defendant for recovery of this moiety:

Held—*That the decision in the previous suit that the sale was not for legal necessity was* res judicata *in the present suit, as the parties were litigating under the same title in both suits,* viz., *the Plaintiff as the owner of the reversion and the Defendant as purchaser from the widow.*

This was an Appeal preferred on the 2nd of March 1911 against the decree of T. W. Richardson, Esq., District Judge Zilla 24-Parganas, dated the 14th of November 1910, affirming a decree of Babu Ashtosh Ghosh, Munsif at Basirhat, dated the 14th of April 1910.

The material facts as set out in the judgment of the District Judge were as follows:—

Mathura Nath died leaving a widow, Putimoni, who died in 1908, and as reversionary heirs the Plaintiff Respondent and his step-brother, Mani Mohan. The Appellant, a Defendant in the suit, purchased from Putimoni a property in which she had a widow's estate. In a previous suit instituted in 1902, during the course of which Plaintiff was a minor, represented by his mother and guardian, a claim was made on his behalf to the whole of the property on the basis that Mani Mohan had died before Putimoni. It appears that Mani Mohan had eloped with a woman and had not been heard of for a period of more than seven years before the date of the widow's death. It was contended that sec. 108 of the Evidence Act created the presumption that Moni Mohan was dead at that date. The suit was finally disposed of by the High Court on second appeal on the 31st January 1907. The litigation decided that the sale to the Appellant was not justified by legal necessity and the Plaintiff recovered a half share of the property. His claim to the remaining half share was disallowed on the ground that sec. 108 of the Evidence Act did not support the presumption sought to be rested upon it. In other words, the Plaintiff having failed to prove Mani Mohan's death was held not to be entitled to recover the half share which appertained to Mani Mohan, if Mani Mohan was alive. The present suit was instituted on the 15th July 1909. The Plaintiff's case now

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is that Mani Mohan having died in the year 1315, he is entitled as heir to recover Mani Mohan's share.

It was contended on behalf of the Plaintiff that the question of legal necessity for the sale having been determined adversely to the Defendant in the previous suit was *res judicata* in the present and that contention was upheld in both the lower Courts.

The Defendant thereupon preferred this Second Appeal.

Babus Nilmadhub Bose and *Sarat Chandra Ghosh* for the Appellant.

Babus Sarat Chandra Ray Chowdhury and *Anilendra Nath Ray Chowdhury* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This Appeal arises out of a suit by one claiming to be entitled to a reversion, for recovery of possession of a moiety of a property, after setting aside an alienation purporting to have been made by the original owner's widow. Prior to the present suit, another had been instituted by the same Plaintiff against the same Defendant, for the purpose of recovering the property of which that now in suit forms a part. The issue was raised in that case as to whether there was legal necessity for the widow's alienation ; and it was held adversely to the present Defendant that there was no legal necessity for the purported alienation to him. But it was further held that the Plaintiff's suit must fail as to a moiety, because it was not shown that more than a moiety of the reversion had passed to him. The present suit was commenced in 1909 at a time when this moiety had passed to the Plaintiff so that he was in the position of a reversioner in regard to it, and in this suit he claims the moiety which he failed to recover in the former suit. He brings this suit against the same Defendant seeking to recover the moiety that was included in the former suit and impugns the same transaction as was successfully impugned in the former suit. In these circumstances, it has been contended on behalf of the Plaintiff that the determination by the Court of the former suit as to the existence of the legal necessity concluded the matter. That view has been accepted by both the Courts.

It has been argued before us that the provisions of sec. 11 of the Code of Civil Procedure do not cover the present case, for it is urged that it cannot be said that the parties are litigating under the same title. The learned vakils have not been able to bring to our notice any decision which defines with precision what the meaning is of the phrase "litigating under the same title." But in my opinion, these words cannot exclude the application of the rule of *res judicata* to the issue of legal necessity which has been raised. That issue was tried and determined between the present litigants in the former suit and in that suit as in this the Plaintiff has litigated as the owner of the reversion and the Defendant as the purchaser from the widow. This therefore is eminently a case where the doctrine of *res judicata* should apply.

We must, therefore, uphold the decree of the Lower Appellate Court and dismiss the Appeal with costs.

WOODROFFE, J.—I agree.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 858 OF 1911.

CARNDUFF, J.	BUDHAI SARDAR and
RICHARDSON, J.	others, Defendants,
1914,	Appellants,
Heard,	*v.*
2, February.	SONAULLAH MIRDHA
Judgment,	and ors., Plaintiffs,
9, March.	Respondents.

Mahomedan Law—Pre-emption—Sale by kobala *—Right if arises before or after registration—Mahomedan Law of sale or statute law superseding it applicable—Pre-emptor if loses right by rejecting previous offer—Waiver.*

Where a kobala *was executed by a Mahomedan in favour of a stranger, but possession was not delivered:*

Held—*That a co-sharer of the vendor who did not perform the necessary* talabs *until he became aware of its registration was entitled to maintain a suit for pre-emption, although he had previously come to know of the execution of the* kobala.

Per CARNDUFF, J.—*As under Mahomedan Law the right of pre-emption does not arise until after the cessation of the vendor's title, the point of time at which the right is to be taken to arise at the present day should be determined by the statutory law of sale which has superseded the Mahomedan law.*

Per RICHARDSON, J.—*When possession is not given and the price is not paid till registration, the right of pre-emption arises upon registration and not before.*

The mere fact that previous to the sale, the pre-emptor had refused to buy the property cannot in the absence of proof of the terms and circumstances of the offer made to him bar his right to pre-empt when the property is later on sold to a stranger.

CARNDUFF, J.—*This would be so because the right of pre-emption under the Mahomedan Law does not arise out of an obligation on the part of an intending vendor to sell preferentially to the obligor if he offers as good conditions as any intending vendee, but because the obligation is attached to a particular status which binds the purchaser from the person obliged to hand over the subject-matter to the other party to the obligation on receiving the price paid by him for it.*

KOOLDEEP SINGH *v.* RAMDEEN SINGH (2), MUSSTT. LADAN *v.* BHYRO RAM (4) *not followed.*

GOOR DOYAL *v.* TEENARAIN (3), MUSSTT. LADAN *v.* BHYRO RAM (4), SOONDER KOOER *v.* RAGHUBOR DYAL (5) and JEHANGEER BUKSH *v.* BHIKARI LALL (6) *referred to.*

Per RICHARDSON, J.—*In the absence of any thing shewing that the pre-emptor had an opportunity to purchase the property at the price offered by the stranger or that he had sanctioned the sale to the vendee at that price, the mere fact that subsequently he himself was negotiating to purchase at a higher price did not constitute waiver.*

JALU LAL *v.* JANKI KOER (10) *referred to.*

This was an Appeal preferred on the 11th of April 1911 against a decree of Babu Satya Charan Ganguli, Subordinate Judge of Zilla Faridpur, dated the 31st of January 1911, modifying a decree of Babu Annoda Kumar Sen, Munsif of that place, dated the 25th of September 1909.

The facts of the case will appear from the judgment.

Babu Baidya Nath Dutt (with *Babu*

(2) 24 W. R. 198 (1875).
(3) 2 W. R. 215 (1865).
(4) 8 W. R. 255 (1867).
(5) 10 W. R. 246 (1868).
(6) 6 B. L. R. 42n : s. c. 11 W. R. 71 (1869)
(10) I. L. R 35 Cal. 575 (1908).

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Purna Chandra Ray) for the Appellants :—Plaintiffs' suit is barred by waiver and acquiescence. The Defendant No. 6 having first offered the property to the Plaintiffs and afterwards having actually executed a *kobala* in their favour and the Plaintiffs having failed to pay the consideration money, the suit is barred by waiver. I rely upon the rulings, *Kooldeep Singh* v. *Ramdeen Singh* (2) and *Torul Komhar* v. *Musammat Achhee* (1). The sale to Defendants 1 to 5 was complete when the *kobala* was executed. The rules in the Transfer of Property Act do not apply to sales under the Mahomedan Law. *Musstt. Soonder Kooer* v. *Raghubor Dyal* (5), *Jahangeer Buksh* v. *Bhikari Lall* (6) relied upon.

Babu Mohendra Nath Ray (with *Babu Lalit Mohan Banerji*) for the Respondents :—The right of pre-emption did not arise before the completion of the sale to the Defendants, *e.g.*, before the registration of the *kobala*. So it does not matter if the registration of the Plaintiffs' *kobala* fell through before that owing to the Plaintiffs' fault. The Plaintiffs cannot be held to have waived their right of pre-emption before it actually arose. I rely upon a later case reported in *Jadu Lal* v. *Janki Koer* (10). I am also prepared to argue that the rulings relied upon by the other side are wrong.

Babu Baidya Nath Dutt in reply—I submit, the right of pre-emption arose with the execution of the Defendants' *kobala* and the Plaintiffs got their *kobala* executed in exercise of that right; for, they could not have got a *kobala* in any other way, in the face of the Defendants' *kobala*.

(1) 18 W. R. 401 : s. c. 9 B. L. R. 258 (1872).

(2) 24 W. R. 198 (1875).

(5) 10 W. R. 246 (1868).

(6) 6 B. L. R. 42n : s. c. 11 W. R. 71 (1869).

(10) I. L. R. 35 Cal. 575 (1908).

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—This Second Appeal has been preferred against an Appellate decree declaring a right of pre-emption under the Mahomedan Law of *saffa*. The facts found may, for present purposes, be thus succinctly stated.

The right is claimed by one Sonaullah in respect of the share of a *jote* which his co-sharer Ansaruddi has sold to an outsider, Budhai. Some time previously Ansaruddi had offered to sell the share to Sonaullah, and Sonaullah had refused to buy. But when precisely this offer was made, and what were its terms, do not appear. After Sonaullah's refusal, Ansaruddi on the 14th December 1907 executed a *kobala* conveying the share to Budhai for Rs. 300; but no consideration passed then, and there was no delivery of possession. Having become aware of the execution of Budhai's *kobala*, Sonaullah approached Ansaruddi on the 23rd December and obtained another *kobala* purporting to transfer the share to him for Rs. 400. The latter transaction fell through owing to Sonaullah's failure to produce the purchase money at the time of registration; but the transfer to Budhai was completed by the payment of the consideration by Budhai and the registration of his *kobala* on the 3rd of the following January. Of this completion Sonaullah heard on the 6th January, and he thereupon duly performed the ceremonies prescribed by Mahomedan Law, and eventually brought the present suit to enforce his right.

The Court of first instance held that

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Sonaullah had forfeited the right, *first*, by his initial refusal to purchase the share, and, *secondly*, by his failure to pay the purchase money stipulated for in the *kobala* executed in his favour on the 23rd December. The lower Appellate Court has reversed this decision and decreed the suit, holding that Sonaullah's right of pre-emption did not accrue until the transfer to Budhai had been completed by the registration of Budhai's *kobala* on the 3rd January, and that, therefore, Sonaullah could not have lost it by any thing done, or omitted, by him prior to that date.

In so far as the earlier offer and refusal are concerned, there seems to me to be no difficulty in accepting the Subordinate Judge's view. The Appellants rely on *Torul Komhar* v. *Musammat Achhee* (1) and *Kooldeep Singh* v. *Ramdeen Singh* (2). In the former case, it was held that, where a pre-emptor, on being asked as such to purchase, deliberately refuses to exercise his right of pre-emption, he cannot be allowed, on the incidental rule of Mahomedan Law that the pre-emptor's title to purchase is not extinguished until the property has actually passed, to take the property away from a third party who has purchased after having satisfied himself by careful enquiry that there is no other impediment. In the latter case it was laid down that a party must be deemed to waive his right of pre-emption when he declines the seller's offer and the property is afterwards sold to another with his knowledge. But the facts connected with these cases are not fully reported: the facts relating to the present case are, as I have already stated, but imperfectly known; and it is impossible to say whether the rulings referred to are or are not applicable. Moreover, these rulings are not consistent with the decision of the Full Bench of this Court in *Goor Doyal* v. *Teknarain* (3), or with the views expressed in *Musstt. Ladan* v. *Bhyro Ram* (4), *Soonder Kooer* v. *Raghubor Dyal* (5) and *Jehangeer Buksh* v. *Bhikari Lall* (6). On principle too, it would seem that the right cannot arise until there has been a sale to a third party; for the right of *saffa* recognised by the Mahomedan Law is not the right of pre-emption known to the Roman Law, that is to say, the right arising out of an obligation on the part of an intending vendor to sell preferentially to the obligor if he offers as good conditions as any intended vendee, but rather the obligation attached to a particular status, which binds the purchaser from the person obliged to hand over the subject matter to the other party to the obligation on receiving the price paid by him for it. And all the authorities appear to be clear on the point that the right accrues only when the property has passed from the original owner to a purchaser.

There remains the question whether Sonaullah lost his right of pre-emption by the course he took on the 23rd December when he had become aware of the execution of the *kobala* of the 14th in favour of Budhai and, instead of proceeding to perform the preliminary ceremonies of *talab-in-mowa-sibat* and *talab-i-ishti shad*, entered into rival negotiations for the conveyance of the share to himself as an ordinary purchaser. The answer to this depends on whether Sona-

(1) 18 W. R. 401 : s. c. 9 B. L. R. 253 (1872).
(2) 24 W. R. 198 (1875).

(3) 2 W. R. 215 (1865).
(4) 8 W. R. 255 (1867).
(5) 10 W. R. 246 (1868).
(6) 6 B. L. R. 42n : s. c. 11 W. R. 71 (1869).

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ullah's right arose when he heard of the execution of Budhai's *kobala* which was, under the Mahomedan Law, sufficient to pass the share to Budhai or not until it came to his knowledge that the registration required by the general law to complete the transfer had been effected. For, so far as I can see, there is nothing in the facts found in this connection to raise any issue as to either estoppel or waiver.

The point whether or not the Mahomedan Law, pure and undiluted, is to be applied is one of considerable difficulty. It would seem from the judgment in *Najmunnessa* v. *Ajaib Ali* (7) to be accepted in the United Provinces, where cases of pre-emption are much more frequent than in the Lower Provinces of Bengal, as settled by the rulings of the Full Bench of the Allahabad High Court in *Janki* v. *Girjadat* (8) and *Begam* v. *Muhammad Yakub* (9) that, in considering whether a right of pre-emption has arisen, the Courts should apply the Mahomedan Law alone and hold that, if and as soon as there is a complete sale under that law, although not under the general law, the right has accrued. But in one of the Full Bench cases referred to, Mr. Justice Mahmood raised a dissentient voice; in the other Mr. Justice Banerjee also differed from his brother Judges; and in each the agreement for sale had been followed by delivery of possession as well as payment of consideration. In *Jadu Lal* v. *Janki Koer* (10) this Court has recently referred to the difficulties that are likely to arise in applying the principle that, for the purposes of pre-emption, it is necessary to follow the Mahomedan Law relating to sale, and refused to extend the Allahabad rulings to a case, such as this, in which there had been neither payment nor delivery of possession. And I confess that the weight of principle and logic seems to me to be on the side of the contention that the general law, which is paramount and has superseded the Mahomedan Law, should govern the incident of sale in applying the law of pre-emption.

(7) I. L. R. 22 All. 343 (1900).
(8) I. L. R. 7 All 482 (1885).
(9) I. L. R. 16 All. 344 (1894).
(10) I. L. R. 35 Cal. 575, 599 (1908)

On one point there seems to be absolute unanimity, and it will be well to take it as the starting point. At the foundation of the Mahomedan Law on the subject lies the entire cessation of all rights on the part of the original owner; for, as I have already indicated, and as Mr. Justice Mahmood aptly put it in *Janki* v. *Girjadat* (8), the right of *safa* is a right of substitution, and it pre-supposes not only a sale, but the transfer of all the rights of the vendor to a vendee whose place the pre-emptor is entitled to take. That being so, it would seem to be contrary to the spirit of the Mahomedan Law itself to enforce the right in respect of a transaction which would be a complete transfer of the vendor's rights, had that law continued to prevail, but is not so in fact by reason of the general law now in force. In other words, those used by Sir Roland Wilson at p. 412 of his Digest of Anglo-Mahomedan Law, Ed. 4, "inasmuch as the general law embodied in sec. 54 of the Transfer of Property Act, 1882, confessedly supersedes the Mahomedan Law of sale on the question of what is necessary in order to transfer the ownership of immoveable property to the purchaser, while the Mahomedan Law itself requires that, for the purpose of pre-

(8) I. L. R. 7 All. 482 (1885).

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emption, there should be an entire cessation of ownership on the part of the seller, it would seem that we are defeating, rather than giving effect to, that law in the sphere in which we profess to preserve it, if we insist on ignoring a legislative change outside that sphere which has altered the legal procedure for transferring ownership."

No doubt, difficulties may arise in practice whether the Mahomedan Law or the general law be applied strictly. If the latter, the pre-emptor must, where registration is required, wait for registration, which may be deferred or dispensed with, and in the meantime he may be subjected to the evil which the Mahomedan Law of *saffa* is directed against. If the former, his right might apparently —see *Musstt. Ladan* v. *Bhyro Ram* (4)—be defeated by a rescission of the contract for sale at any time before delivery of possession. It is, however, hardly necessary to pursue the matter further or to say more than that this case is on all fours with *Jadu Lal* v *Janki* (10) and that we follow our learned brothers in distinguishing the Allahabad cases and holding that, in circumstances such as those before us now, the right did not arise until the pre-emptor became aware of the registration of the *kobala* conveying the property to Budhai. In this view I would dismiss the Appeal with costs.

RICHARDSON, J.—I agree that the Appeal should be dismissed. The main contention urged on behalf of the Defendants, Appellants, was that under the Mahomedan Law the Plaintiffs lost their right of pre-emption by waiting till the conveyance to the Defendants was registered. In support of this contention the case of *Begum* v. *Muhammad Yakub* (9) was relied on. In that case the vendor sold the property, received the price and delivered possession to the vendee. When the pre-emptor came on to assert his right, he was met by the objection that the claim was premature, because the sale had not been completed by registration. It was held in effect that under the Mahomedan Law the sale had advanced to a stage when pre emption might be claimed. It was urged at the time and might be urged now that to hold the contrary might lead in some cases to evasion and denial of the right of pre-emption. How long is the pre-emptor to wait for registration? If he waits too long, might it not be said that he had waived his right? While he waits, he suffers the inconvenience which the right of pre-emption was designed to obviate. The decision of the Allahabad High Court, however, was distinguished in this Court in the case of *Jadu Lal* v. *Janki Koer* (10), where possession was not given and where the price was not paid till registration. Reference was then made to an earlier case [*Musstt. Ladan* v. *Bhyro Ram* (4).] In that case it was held in effect in part reliance on the authority of a passage in the Hedaya (Ed. 177, Vol. III, Ch. XXXVIII, p. 5, 98) that when possession was not delivered, the parties to the sale might rescind it so as to defeat a pre-emptor who asserted his right after the sale, but before the rescission. A similar conclusion was reached in the case of *Musammat Ojheoonissa* v. *Sheikh Rustum Ali* (11). The facts in these two last mentioned cases are sufficiently stated in the judgments.

(4) 8 W. R. 256 (1867).
(10) I. L. R. 35 Cal. 575 (1908).

(4) 8 W R. 256 (1867).
(9) I. L. R. 16 All. 344 (1894).
(10) I. L. R. 35 Cal. 575 (1908).
(11) [1864] W. R. 219.

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Apparently the price had not been paid in either case, but it is by no means clear that payment of the price would have affected the result. On the other hand, if possession had been delivered, the pre-emptor would probably have succeeded. No doubt some of the observations made in *Ladan's* case (4) suggest that the Judge might have been disposed to consider registration essential to a complete transfer of ownership. But for the purposes of the decisions it was unnecessary to go so far, and, however that may be, these two cases show at any rate the importance of delivery of possession under the Mahomedan Law, and the uncertainty attending a claim of pre emption made before possession is delivered [cf. *Buksha Ali* v. *Tofer Ali* (12)]. So too sales which are in their inception invalid under the Mahomedan Law are made valid and effectual by possession being given [*Najmunnessa* (7)], and the right of pre-emption arises then and not before.

There is no difficulty in applying the Mahomedan Law where possession is delivered, but if it is to be applied where possession is not delivered, inconvenience may be caused by the rule or supposed rule of that law that a sale is constituted by offer and acceptance unconditionally expressed. The Mahomedan Law of sale is not now administered in India except incidentally in connection with the subject of pre-emption, and it is doubtful to what extent and with what qualifications a principle so broad can ever have been accepted in practice. The question of the quantum of evidence reasonably necessary to prove a transaction as important as a sale of land cannot be altogether neglected.

(4) 8 W. R. 255 (1867).
(7) I. L. R. 22 All. 343 (1900).
(12) 20 W. R. 216 (1873).

Inquiry might disclose the existence of general and particular rules of evidence, which would be important in this connection. In *Ojheoonissa's* case (11) it was said at p. 220—"a sale is a complete sale in the eye of the Mahomedan Law when the seller says orally 'I have sold' and the purchaser says 'I have bought.' In the present case when a bill of sale has actually been written out and signed by the seller, he no doubt has done his part towards the completion of the sale; he has in fact proclaimed in a more solemn and formal manner than by word of mouth that he has sold, but if the bill of sale is still in the seller's hands, and has never left them, and nothing has been done by the purchaser, such as the payment of the purchase money or entry into possession, which would be tantamount to his acquiescence in the sale, one essential element for the constitution of a complete sale is wanting, for the purchaser has not said either directly or indirectly, 'I have bought.'"

The concluding sentence of this quotation really means that the purchaser's assent to the sale had not been proved. Any attempt to apply the Mahomedan Law strictly in all cases might involve great, if not insuperable, difficulties. What is really required is some simple rule or rules, easily understood and easily applied. In *Jadu Lal's* case (10), Brett J. suggested that a solution of the problem was to be found "in determining in each case what was the intention of the parties." A working rule might perhaps be founded on that with the addition that the intention of the parties to the sale must be manifested in some unequivocal way to the outside world. One effectual and acceptable mode of manifesting that intention

(10) I. L. R. 35 Cal. 575 (1908).
(11) [1864] W. R. 219.

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may be delivery of possession: another may be registration.

In the present case, however, we need go no further than the learned Judges actually went in *Jadu Lal's* case (10), distinguishing the case of *Begum* v. *Muhammad Yakub* (9) on the facts and holding that when possession is not given and the price is not paid till registration, the right of pre emption arises upon registration and not before. The result is that the contention that there was undue delay on the Plaintiffs' part in asserting their claim to pre emption must be rejected.

There remains the question of waiver. It is said in the first place that the vendor offered the property to the Plaintiff before he entered into negotiations with the vendee Budhai and that the Plaintiff deprived himself of his right of pre-emption by refusing the offer. The circumstances, however, in which the offer was made and the details of the offer are not disclosed and in my opinion there is no substance in this contention. It further appears that after the execution of the instrument of the 14th December 1907, the Plaintiffs themselves entered into negotiations with the vendor to purchase the property for Rs. 400. An instrument of sale was duly prepared, but was not registered, because the Plaintiffs did not pay the price. I cannot suppose that the failure of the Plaintiffs to purchase the property for Rs. 400 amounted to waiver of their right of pre-emption in respect of the sale to the vendee for Rs. 300. The cases of *Torul* v. *Achhee* (1) and *Kooldeep* v. *Ramdeep* (2) were referred to in this connection, but the facts being insufficiently reported, it is impossible to say precisely what was decided in those cases. The facts of the case before us do not bring it within such rulings as those in *Sheo Tuhul Singh* v. *Ram Kooer* (13), and *Brojo Kishore* v. *Kirtee Chandra* (14). On the facts found the present case rather resembles that of *Jehangeer* v. *Bhikari* (6), and in review *Jahangeer* v. *Bhikaree* (15). It does not appear that at the time of the original offer, the Plaintiffs had any knowledge of any agreement or even of any proposal to sell the property to a third person and it does not appear that they ever had any opportunity to purchase the property for Rs. 300 or that they ever sanctioned its sale to the vendee for that price [cf. *Kanhai* v. *Kalka* (16)]. In the result I agree that the Appeal should be dismissed with costs.

Appeal dismissed.

(1) 18 W. R. 401: s. c. 9 B. L. R. 253 (1872).
(2) 24 W. R. 198 (1875).
(9) I. L. R. 16 All. 344 (1894).
(10) I. L. R. 35 Cal. 575 (1908).
(6) 6 B. L. R. 42n: s. c. 11 W. R 71 (1869).
(13) W. R. [1864] 311.
(14) 15 W. R. 247 (1871).
(15) 11 W. R. 480 (1869).
(16) I. L. R. 27 All. 670 (1905).

CIVIL APPELLATE JURISDICTION.

APPEALS FROM APPELLATE DECREES Nos. 2903 OF 1911 AND 31 OF 1912.

NEWBOULD, J.
RAY, J.
1913,
21, August.

MUSAMMAT GULAB KOER and others, Plaintiffs, Appellants,
v.
RAMRATAN PANDE, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 103A—Draft record-of-rights, entries in, if admissible in evidence in rent suits.

Entries in a draft record-of-rights published under sec. 103A of the Bengal Tenancy Act are not admissible in evidence

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Contents.

NOTES.

Adjournments in Privy Council.

Lord Moulton, in refusing an application for the postponement of the hearing of an appeal from India in a case in which the summons was issued in 1907 and the decree appealed from was made in 1910, observed that in such cases their Lordships were most unwilling to show any indulgence to Appellants or allow any postponement of appeals.

Autrefois acquit.

The judgment of the Lord Chief Justice in the case of *Rex* v. *Barron*, a short report of which appears at p. clxxv of this issue, is an important pronouncement on the law of *autrefois acquit.* The prisoner was previously tried for an unnatural offence and convicted; but that conviction was quashed on the ground of wrongful admission of evidence. At the second trial he was convicted for gross indecency, his plea of *autrefois acquit* being overruled by the Court. In the Court of Criminal Appeal, the Lord Chief Justice held :— "The test was not whether the facts relied upon were the same in the two trials. The question was whether the Appellant had been acquitted of an offence which was the same offence as "gross indecency," *i.e.*, whether the acquittal on the first charge necessarily involved an acquittal on the charge of gross indecency. It was quite clear that the jury could not have convicted the Appellant of gross indecency at the first trial. And it was clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offence. Acquittal of the whole of an offence did not involve an acquittal of every part of it. Therefore the Appellant had never been in peril of being convicted of "gross indecency."

His Lordship stated the law on the subject as follows:—"The principle upon which the plea depended has often been stated. It was that the law did not permit a man to be twice in peril of being convicted of the same offence. If therefore he had been acquitted, *i.e.*, found to be not guilty of the offence by a Court competent to try him, such acquittal was a bar to a second indictment for the same offence. That rule applied not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder was a bar to a subsequent indictment for manslaughter as the jury could have convicted of manslaughter."

The net result of the judgment of the Lord Chief Justice seems to be that the questions that arise on a plea of *autrefois acquit* are these :

Could the prisoner have been convicted at the first trial of the offence charged at the subsequent trial?

Was the previous trial by a competent Court?

The rule of law that a man should not be placed twice in jeopardy on the same facts has never been doubted or qualified, but as his Lordship observed, it has not always been found easy to apply the rule to the facts of particular cases. If we apply the tests laid down above to the facts of

the recent case of *Emperor* v. *Nirmal Kanto Roy*, 18 C. W. N. 723, we at once realise the difficulty pointed out by the Lord Chief Justice. We must remember, however, that in this country the legislature has enacted the law on the subject in sec. 403 of the Code of Criminal Procedure, and it is on the interpretation of this and other relevant sections of that Code that the decision of Stephen, J., mainly rests. The principle of the English law and the provisions of the Indian Code do not seem, however, to differ materially.

Proposed Bar Association.

There is a movement amongst the members of the Bar in England to organise a Bar Association on more comprehensive lines than the Bar Council. The general body of the Bar seem to be dissatisfied with the limited scope and programme of work of the Bar Council. The latter usually confine themselves to matters relating to the etiquette of the Bar and legislation affecting the legal profession. But the prevailing feeling in the profession is that the Bar if better organised can make its influence much more felt in the framing of the law and in the proper administration of it to the immense benefit of the public at large. Then, the law and its administration will form the strongest tie between the different members of the Empire. None are more competent to advise Government in matters of legislation and adminis ration of justice than the members of the Bar.

But so long as the Bar of the Empire remains a scattered and disorganised body, such opinion is neither ascertainable nor can it be conveyed to the authorities after due deliberation. The new movement that has been set on foot in England proposes to include within it the members of the English Bar who practise in other parts of the Empire. This is a very ambitious scheme and we entertain serious doubts whether the Bar beyond the sea can be included within this organisation. But what seems to us practicable is that the Bar outside the British Isles should form organisations of their own with similar objects and these branch organisations may work independently in local matters, but as occasion may require they may be in communication with the central organisation in London in matters of moment affecting the legal profession and administration of justice. In this manner, the Bar as a body will be able to exert a healthy influence on the Bench, the legal profession and the Government in matters falling legitimately within their scope; and this would be also of great advantage to the general public. It is also suggested that a Conference of the Bar of the Empire should be held in London for the exchange of ideas and obtaining suggestions for the scope of the organisation and its programme of work. If such Conference is held in October, the members of the Calcutta Bar are sure to be well-represented. But we expect that this movement may have the indirect effect of making the Bar Council shake off its lethargy and expand its operations and programme of work for meeting the requirements of the Bar of the Empire.

CURRENT INDIAN CASES.

(CRIMINAL.)

Criminial Procedure Code, sec. 54—Credible information.

EMPEROR *v.* GOPAL SINGH, I. L. R. 36 All. 6.

One R was wanted on a charge of cheating by the Bombay police and a warrant for his arrest was issued to the Sub-Inspector, Baragaon, in whose circle the village of R was situate. The Sub-Inspector ordered his subordinate constables to be on the look-out for R and to arrest him wherever found. S, a constable, with a chowkidar came across R and proceeded to arrest him informing him at the same time that a warrant had been issued by the Bombay police under which R was wanted. On R calling for help the petitioners came up and assaulted the constable and the chowkidar and prevented the arrest of R. The Petitioners were convicted under sec. 353, I. P. C.

Held—That under sec. 54, cl. (1), Cr. P. C, every police officer is empowered to arrest without a warrant a person who has committed a cognizable offence on suspicion or credible information of the commission of the offence. The constable had information of the offence committed by R through the warrant issued by the Bombay police and such information may well be described as credible information. . . . . The constable and the chowkidar were within their rights and were discharging their duty in their attempt to arrest R and if in the discharge of their duties they were obstructed by the Petitioners the offence of the latter falls under sec. 353, I. P. C.

Criminal Procedure Code (Act V of 1898), secs. 244, 540. Supplementary list of defence witnesses—Affidavit, safeguards to be observed in connection with.

EMPEROR *v.* MUNGAL, I. L. R. 36 All. 13.

In a case under secs. 3 and 4 of Act III of 1867 the Magistrate before whom the accused was placed on his trial examined all the prosecution witnesses and after taking the defence adjourned the hearing. During the absence of this Magistrate the accused put in an application before another Magistrate praying that eighteen witnesses might be summoned for the defence. The application was granted.

Held—That the second Magistrate not being in seisin of the case had no power to issue summonses for witnesses.

Regarding affidavits to be filed in Courts, Knox, J., observed—

It may be the case that the care and precision with which affidavits are intended to be verified and sworn to by the persons who make them are not always observed by those who administer affidavits and those who prepare them. The intention of the law is and it cannot be too often repeated that an affidavit must contain nothing but bare facts known to the person who makes

the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed.

. . . . . .

I hope that those who make affidavits, those who prepare affidavits and those who are entrusted with the solemn duty of having affidavits sworn before them will take proper care to see that the provisions of the law are duly carried out. Carelessness on the part of any one of these may place the deponent in a very serious position.

Indian Penal Code, sec. 306—Sati.

EMPEROR *v.* RAM DOYAL, I. L R. 36 All. 26.

In a case of *sati* it appeared that after the death of her husband the widow announced her intention of committing *sati*. The male members of the family argued with her, but she persisted in her intention. Neighbours were called in to assist, but with no effect. Finally one of the village chaukidars was sent off to the local police-station to give word to the officer in charge. Arriving at the burning ghat the widow directed the funeral pyre to be built at a certain spot. The accused placed the corpse on the pyre. The widow after walking round it seven times mounted the pyre, sat down and placed the head of the corpse on her lap. She then demanded *ghee* which was supplied by one accused and she poured it over the pyre and her own person. She demanded more and one of the accused gave it to her. This also she poured over herself and the pyre. Then one of the accused poured some *ghee* over her and the pyre. The pyre was then fired, but the witnesses refused to state by whose hand this was done. All this was done before the arrival of the police.

Their Lordships in the judgment observed :

"Fully believing that the woman was determined to be burnt with her husband's body they did all that was necessary to enable her to commit suicide except the furnishing of fire. They and the witnesses deliberately conceal the truth as to the last act and concoct miracles for the purpose. They do not state that they took any steps to prevent her taking fire or matches. They took no active steps to prevent the suicide and they hastened a funeral which in the circumstances they ought to have delayed and would have delayed if they had been sincere in their remonstrances. *Sati* may or may not be forbidden by the Hindu religion, but it was once a common practice and the sympathies of the people, at least of the unenlightened people, are all with *sati* and it is looked upon as a meritorious deed.

I have no hesitation in holding that though the accused may in the beginning have sincerely remonstrated with the widow they finally gave way to her determination and intentionally aided the doing of the deed."

The High Court upheld the conviction of abetment of suicide.

Jurisdiction of Magistrate to revive case after discharge of accused.

EMPEROR *v.* W. C. KYMER, I. L. R. 36 All. 53.

One W lodged a complaint against K charging him with cheating and criminal misappropriation in connection with the purchase of a phæton and a motor car. The Magistrate discharged the accused on all the charges. Subsequently W complained to the police with reference to a sum of money paid by her to K in connection with the purchase of a motor car and which she charged him with criminally misappropriating. The case was reinstated in the Court of the same Magistrate, who after taking some evidence framed a charge.

Held—That it was open to the Magistrate having once discharged the accused to again enquire into the same charge on a second complaint.

Queen-Empress v. *Umedam*, All. W. N. 1895 86 followed.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL—*Rex* v. *Barron*. Before THE LORD CHIEF JUSTICE, LAWRENCE AND LUSH, JJ. 23rd March 1914.

The plea of autrefois acquit—*Test of its application.*

This was an appeal from a conviction for gross indecency. The prisoner was previously tried for an unnatural offence and convicted, but that conviction was quashed on the ground of wrongful admission of evidence. At the second trial he pleaded *autrefois acquit*, but the trial Judge ruled that the charge of which he stood indicted at the second trial was not a charge of which he stood in peril at the first trial, and found the accused guilty.

On appeal it was contended that the true test to apply the plea of *autrefois acquit* was whether the facts in both cases were the same. It was immaterial that the prisoner could not have been convicted of gross indecency on the indictment for the unnatural offence at the first trial. The Court decided against the appellant and dismissed the appeal. The Lord Chief Justice said as follows :—

The principle upon which the plea depended had often been stated. It was that the law did not permit a man to be twice in peril of being convicted of the same offence. [2 Hawk. P. C. (1824 ed.), c 35]. If, therefore, he had been acquitted, *i.e.*, found to be not guilty of the offence, by a Court competent to try him, such acquittal was a bar to a second indictment for the same offence. That rule applied not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder was a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter [2 Hale's P. C. (1800 ed.), 246]. The Appellant, having by order of that Court on his appeal from his first conviction had a judgment and verdict of acquittal entered, was in the same position for all purposes as if he had actually been acquitted. The question therefore they had to consider was

whether the acquittal on the charge of the first offence involved an acquittal on the charge of gross indecency.

Mr. Blake Odgers contended that the true test by which this question had to be decided was this:—Were the facts which were in evidence at the first trial the same facts as those on which the prosecution relied in support of the second indictment? If they were, he said that the Appellant was "in peril" on the former trial, notwithstanding that the Appellant could not at the trial on the first indictment for the more serious offence have been convicted of the minor offence. He cited in support of this contention *Reg.* v. *King*, [1897], 1 Q. B. 214. The headnote stated that a Defendant, who had been convicted on an indictment charging him with obtaining credit for goods by false pretences, could not be afterwards convicted upon a further indictment charging him with larceny of the same goods, and Mr. Justice Hawkins was reported as having said:—"It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts; the offences are practically the same, though not their legal effect." It was quite plain that the learned Judge did not intend to lay down and did not lay down as a general principle of law that a man could not be placed twice in jeopardy upon the same facts if the offences were different. The statement obviously referred to a case where the offences were the same: "practically the same" the words were, and as the two offences in the present case were not either exactly or practically the same, it did not help the Appellant. The substantial identity of the offence was recognized in *Reg.* v. *King*, [1897], 1 Q. B. 214, as a condition to the validity of the plea of *autrefois acquit*, and that case made no change in the general and well settled principle of law applicable to these pleas.

The test was not, in their opinion, whether the facts relied upon were the same in the two trials. The question was whether the Appellant had been acquitted of an offence which was the same offence as "gross indecency," *i. e.*, whether the acquittal on the first charge necessarily involved an acquittal on the charge of gross indecency. It was quite clear that the jury could not have convicted the Appellant of gross indecency at the first trial. And it was equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offence. Acquittal of the whole of an offence did not involve an acquittal of every part of it. Therefore the Appellant had never been in peril of being convicted of gross indecency. The rule of law now affirmed had never been doubted or qualified, though it had not always been found easy to apply the rule to the facts of particular cases. The offence to which the Appellant eventually pleaded guilty at the second trial was not the same or substantially the same as that charged at the first trial.

Mr. Blake Odgers for the Appellant.
Mr. Du Parcq for the Crown.

B. D.

COURT OF APPEAL.—*Wells* v. *Wells*. Before LORD JUSTICES SWINFEN EADY AND PICKFORD. 15th May 1914.

Fees due to Barristers from Solicitors are not debts and cannot be attached as such.

This was an Appeal from a decision of the President of the Probate, Divorce and Admiralty Division, which is shortly reported at p. clxxix (*infra*). The Court dismissed the Appeal. Lord Justice Swinfen Eady said:—

In my opinion fees owing to counsel are not debts, and cannot be attached or garnisheed as such, nor can the garnishees be ordered to pay the amounts as debts, nor can execution issue against them in default of payment. I am quite aware that the solicitors are ready to pay, and, indeed, are desirous of paying, to the proper person, whatever may be due from them for counsel's fees earned by the judgment-debtor, but they cannot be ordered in garnishee proceedings to pay the amount to the judgment creditor. It is settled beyond all question that counsel's fee is not a debt, but an honorarium. The fees are payable as a matter of honour and not of legal obligation. See *Kennedy* v. *Broun* (32 L. J., C. P., 137) and *In re Le Brassem and Oakley* [(1896) 2 Ch., at p. 494]. It was, however, urged that where the Solicitor acknowledged that he had received from his lay client the money to pay counsel's fees, and that he actually had in hand the money, the position was different, that there was a legal obligation on him to pay, and that an action would lie against him for money had and received. This proposition is quite unfounded. These facts do not make the least difference as regards the right of counsel to sue. Counsel can no more sue for their fees when the Solicitor has received the money than when he has not received it. See *Hobart* v. *Butler* (9 I. C. L. R., 157). The case of *Ex-parte Colquhoun, In re Clift* (38 W. R., 688) was then pressed upon us, and it was insisted that unless a barrister had a legal right to recover his fees this case could not be supported. In that case an application was made to the Court of Bankruptcy by a member of the Bar, that a trustee in Bankruptcy of a Solicitor might be ordered to pay to him the amount he had received in respect of the counsel's fees comprised in bills of costs which the trustee had collected and got in. In my opinion, the case, so far as decided by Mr. Justice Cave, was quite rightly decided, but it affords no justification for contending that a barrister has

any legal claim to his fees when the amount has been received by the solicitor.

The principle upon which the Court proceeded was that clearly stated by Lord Justice James in *Ex-parte James*, *In re Condon* (L. R. 9 Ch. App, 609), and frequently enforced subsequently in reported cases. The Court exercising administrative jurisdiction, and having control over its officers, will in proper cases order, and, if necessary, compel them to make payments which are honest and just, although such payments may not be recoverable either at law or in equity as between litigant parties. In that case money which had been paid to a trustee in bankruptcy under a mistake of law was ordered to be refunded. This was followed, and, indeed, extended, in *Ex-parte Simmonds*, *In re Carnac* (L. R., 16 Q. B. D., 308). There money had been paid to a trustee in bankruptcy under a mistake of law and had been applied by him in paying dividends to creditors: it had been paid away, but the Court ordered him to repay the amount out of other moneys coming to his hands, and applicable to the payment of dividends to the creditors. . . .

There is another case upon which I ought to say a word—that is the case of *In re H. and C. Hall* (2 Jur., N. S., 1,076), which was with reference to the right of counsel to prove in bankruptcy for fees. In that case the solicitor for the assignees of a bankrupt undertook to hand over in full as the counsel any fees which might come to the hands of the assignees. So far that was merely what the assignees would have been ordered to do by the Court, and is the same as *Re Clift, Ex-parte Colquhoun.* But in the same case Mr. Commissioner Fane held that as regards counsel's fees received by the bankrupt Solicitors before their bankruptcy, and admitted by them to have so been received, counsel could prove for this sum as money had and received to his use. This case is very shortly reported, but in our opinion the decision cannot be supported upon the ground on which it appears to have been rested. No action for money had and received would have lain against the solicitors at the suit of counsel, and no proof upon that ground could be sustained. The decision can only be supported, if at all, on the principle of *Ex-parte James* that the estate of the bankrupt's having been increased by the fees of counsel paid to and improperly retained by the Solicitors, and this amount having been mixed with and become indistinguishable from the rest of the bankrupt's property, all that the Court can do by way of acting honestly is to order the trustee to pay to counsel a sum equal to the dividend on the amount so received, rateably with the other creditors and as if he had a legal right of proof. As, however, it is not necessary to decide this question, I propose to say no more about it, but to leave it where it was left by Lord Justice Lindley in *In re Le Brasseur and Oakley* [(1896) 2 Ch., at p. 494].

Mr. Disturnal, *K. C.*, and *Mr. Le Bas* for the Appellant.

Mr. L. Scott, *K. C.*, and *Mr. Willis* for the Judgment-debtor.

Mr. D. Hogg for the garnishees.

B. D.

COURT OF APPEAL.—*Re Benson G. H. Bower* v. *Sir G. Chetwynd.* Before THE MASTER OF THE ROLLS, LORD JUSTICE BUCKLEY AND CHANNELL J. 28th March 1914.

When once time has begun to run, is running suspended by bankruptcy proceedings?

A person before becoming bankrupt in 1890 incurred a debt from the Appellant which was proved in bankruptcy. The Appellant received some dividends, but was not paid in full. The bankrupt died in 1911 without obtaining his discharge. By his will he left a fund which became assets for the payment of his debts and which did not vest in the trustee in bankruptcy. The Appellant now claimed to realise the debt. It was held that the claim was barred by limitation. Mr. Justice Channell said as follows :—

The contentions of Mr. Hansell on this point on behalf of the Appellant were, *first*, that the exercise of the power of appointment which made the fund available as assets gave him a new right of action or proceeding which was not barred, and, *secondly*, that even if that was not so, the effect of the bankruptcy was to prevent the statute from running. To the first of these points the answer is that the words of the statute are six years "next after the cause of such actions or suits," and although the appointment and the death gave creditors a new fund from which to get payment, and a new mode of proceeding in order to get it, yet this was merely a new remedy and not a new cause of action, the cause being really the old debt. As to the second point, cases were quoted, beginning, I think, with *Ex parte Ross*, 2 Gl. and J. 330, which show that in the bankruptcy a debt does not become barred by lapse of time, if it was not so barred at the beginning of the bankruptcy, and of this there can be no doubt, but this is only *in the bankruptcy.* From the nature of the case, as there are usually no means of recovering a debt provable in a bankruptcy other than under the machinery of the bankruptcy, there is likely to be little authority on the point whether bankruptcy keeps alive the right to take such other remedies, if there are any, notwithstanding the lapse of time, and we find no direct authority on this point.

The real difficulty in the way of the Appellant is the well established rule that, if the statute once begins to run, it continues to run whatever happens. The only case we can find in the books

where the running of the statute has been said to have been suspended is a decision of Lord-Chancellor Chelmsford in *Seagram* v. *Knight*, L. R. 2 Ch., 638, but that was a peculiar case on very special facts, and whatever view may be taken of it, it clearly is not an authority in the present case. The general rule is clear. *Copley* v. *Dorkmincque* (2 Lev., 16), where, after the time had begun to run, the Courts were closed owing to the rebellion and no action could be brought, is a very strong case. *Rhodes* v. *Smethurst* (4 M. and W., 42) is another strong case, where the whole matter was carefully considered. The principle of the rule, if on such a technical matter there can be said to be any principle, appears to be that if any man has a cause of action which is ripe so that he has an opportunity of bringing his action and does not do so, he thereby takes the risk of the happening of some unexpected event which takes away from him the possibility of bringing his action within the remainder of the period which he has under the statute. The rule may work hardship in particular cases, but it is so well established that no Court would now decline to follow it.

Mr. E. W. Hansell for the Appellant.

Mr. George Cave, K. C., and *Mr. Mellor* for the Respondent.

B. D.

KING'S BENCH DIVISION.—*Lucy* v. *Bawden*. Before MR. JUSTICE ATKIN AND A COMMON JURY. 14th February 1914.

Landlord's duty to repair defective staircase—His liability when the tenant knows that the premises are defective.

The Plaintiff was the wife of a tenant of a house belonging to the Defendant. She alleged that by reason of defective steps leading from the pavement to the door of the house, she fell down and received injuries for which she claimed damages. The jury found that she was injured through the defect in the flight of steps, but also found that before the accident, she knew of the existence of the defect. On these findings it was urged that the landlord was under an obligation to take reasonable care to keep the premises safe. For the landlord it was contended that the findings of the jury shewed that there was no trap, and that the Plaintiff had no cause of action. The learned Judge dismissed the claim, and in the course of his judgment said as follows:—

Mr. Greer contended that there was an obligation upon the Defendant to provide a reasonably safe staircase for the use of the tenants and such persons as might lawfully use the stairs, relying upon *Miller* v. *Hancock* [(1893) 2 Q. B. 177]. He thought that the case of *Miller* v. *Hancock*, was an authority binding him to hold that if the landlord remained in possession and control of a common staircase, in the circumstances of that case he was under some obligation to persons lawfully using it. He could not distinguish this case from *Miller* v. *Hancock*. He was pressed by Mr. Haldinstein with the words of Lord Atkinson in the House of Lords in *Cavalier* v. *Pope* [(1906) A. C. at p 433]:—"In *Miller* v. *Hancock* and *Hargroves, Aronson & Co.*, v. *Hartopp* [(1905 1) K. B. 472], the landlord was held liable, because control was retained by him." He was not satisfied in fact that the landlord had the power or the right to admit to or to exclude all people. He would suppose that such right did not exist at any rate in respect of the families of the tenants, including, therefore, the Plaintiff. But nevertheless, he considered that the circumstances did raise an implied duty on the part of the landlord towards persons using the steps.

The important question was what was the extent of such duty? He did not see how the duty could be larger than the duty of an occupier of premises, and those whom he invited to enter his premises for purposes of lawful business; *Indermaur* v *Dames* (L. R.. 2 C. P.). In *Smith* v. *London* and *St. Katherine's Docks Company* (L R, 3 C. P., at p. 333) Mr. Justice Byles said that there was a duty on the part of the Defendants to the Plaintiff not to permit the gangway to be insecure without warning the Plaintiff. It was urged, however, that in *Miller Hancock* the Court of Appeal had laid down the duty of the landlord as being an absolute duty to provide approaches reasonably safe and keep them so, and passages were read from the judgment of Lord Esher and Lord Justice Bowen which read apart from the context he (Mr. Justice Atkin) thought were capable of that construction.

The evidence in that case, however, was clearly consistent with the defects being in the nature of a trap, and the reference in Lord Bowen's judgment in *Smith* v. *London* and *St. Katherine's Docks Company* made it very improbable that he intended to state any proposition of law different from what was stated in that case as mentioned above. That this was a true view of the effect of *Miller* v. *Hancock* seemed to be established by the judgments of the Court of Appeal in *Huggett* v. *Miers* [(1908) 2 K. B., 278]. It was difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It was plain that he was in the absence of express or implied agreement not liable at all for the consequence of letting a house in a state of even dangerous disrepair. His Lordship could see no difference between the use of an unlighted staircase (*Huggett* v. *Miers*) and the use of an unfenced staircase.

The finding of the jury that the defect was due to the negligence of the Defendant must be taken

to assume that the duty of the landlord was to provide a reasonably safe access; and not merely to avoid having an access in the nature of a trap. If the duty were the larger one, his Lordship thought that there was evidence to support the jury's finding. In his opinion, however, the duty being what he had stated there was no evidence of negligence on the landlord's part. He could adopt the words of *Lord Atkinson in Cavalier* v. *Pope* at page 432 :—"It is, I think, clear that the case does not come within the principle of *Indermaur* v. *Dames* and the cases which followed it down to *Earl* v. *Lubbock* [(1905) 1 K. B., 253], because one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge and notice of the existence of the danger through which he has suffered." In the present case the fourth finding of the jury negatived the existence of the essential fact. The danger, if any, was patent to every one and the Plaintiff gave evidence that she herself had complained to the Defendant's agent about it. Mr. Greer contended that the Plaintiff could recover unless the Defendant could show that with full appreciation of the danger she voluntarily took upon herself to bear the risk. That contention was ill founded when once the duty of the owner was found to be limited. In such a case the true maxim seemed to be *Scienti non fit injuria.*

Mr. Greer, *K. C*, and *Mr. May* for the Plaintiff.

Mr. Haldenstein, *K. C*, and *Mr. Bromley Eames* for the Defendant.

B. D.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.—*Wells* (Judgment creditor) v. *Wells* (Judgment debtor). Slaughter and May (Garnishees). (Before THE RIGHT HON'BLE SIR SAMUEL EVANS, PRESIDENT.) 30th March 1914.

Fees due to a Barrister from a Solicitor are not debts, and cannot be assigned or attached by a creditor.

This case raised the question whether fees due to a barrister from a solicitor could be regarded as debts and be attached as such.

As the result of divorce proceedings by the wife against the husband, who was a barrister, alimony was ordered to be paid to her. The husband, thereupon executed a deed of assignment in favour of one Harry Nye of the fees due to him from the solicitor. The wife attached the fees in the hands of the solicitors by garnishee proceedings.

The Court held that the fees were neither assignable, nor could they be attached as debts by the judgment-creditor. The learned president in the course of his judgment said as follows :—

I have said that the assignment deals with a barrister's fees as "book debts." Now it is clear on the authorities that these fees are not properly to be described as debts at all. I have grave doubts whether they could be made the subject-matter of an equitable assignment, but it is clear from the provisions of the Judicature Act of 1873 (36 and 37 Vict., c. 66) that they are not *choses in action.* Even if they were assignable in some such way, the deed is void from lack of consideration. Mr. Justice Parker in his judgment in the Court of Appeal in *Glegg* v. *Bromley*, 1912, 3 K. B., 474, lays it down that for every equitable assignment there must be consideration.

The first part of the present case raises the important question whether fees received by a solicitor relating to the services of a barrister can be regarded as debts at all. In my view it is quite clear that they cannot be so regarded, and that view is fortified by the elaborate judgment of Lord Chief Justice Erle in the Court of Common Pleas which is reported in 32 *L. J.* (New Series), 137. The learned Chief Justice there cites Lord Cottenham as saying that a counsel's fee is not a debt but an honorarium; his services are not sold or hired and what he receives for them is a mere gratuity. That view was endorsed by the Court of Appeal in the case of *In re* Le Brasseur and Oakley, 1896, 2 Ch., 487. Lord Justice Lindley, when dealing with this point, then said :—

"I think that it would be much to be regretted if the Court, either by itself or its officers, did anything to enable Counsel to recover his fees from his client, whether the lay client or the solicitor client Fees are payable as a matter of honour. The solicitor can, if so required by Counsel, be compelled either not to retain him or to pay his fee with the brief. That is the remedy of Counsel, and he has it in his own hands. But if he does not choose to insist on payment of his fees with the brief, the payment becomes a matter of honour, not of legal obligation. In *In re Hall* [2 Jur. (N. S.), 1,076], where Counsel was admitted to prove for fees in the bankruptcy of some solicitors, the decision proceeded entirely on the admission made by the solicitors that they had actually received a specific sum in respect of the fees in question from their clients previously to the bankruptcy—an admission which it would be very difficult to get over."

No authority has ever laid down that a barrister's fees are a debt provable in bankruptcy in competition with other creditors. If that is correct, the question here arises whether a garnishee order can attach fees if they are not debts. A garnishee order only applies to the attachment of debts. In the case of *Webb* v. *Stenton* (11 Q. B. D., 518), Lord Esher said in the Court of Appeal :—"It seems to me on the plain reading of r. 2 of Or. XLV that no order can be made unless some person at the time the order is made is indebted to the judgment-debtor.

If there be a person so indebted, then the order will be that all debts owing or accruing from such person to the judgment-debtor shall be attached. If there is a debt due, payable *in presenti*, of course an order may be made to attach that debt. If there is no debt payable *in presenti*, but there is a debt in existence, *debitum in presenti*, but payable *in futuro*, it seems to me that such an order could be made with regard to that debt, although it be the only debt, and there is no debt payable *in presenti*, because such third person is indebted to the judgment-debtor, and that would satisfy the words of the rule."

If it is not a debt, it is not provable as a debt and there would be no order unless the person was indebted. On referring to the forms used in garnishee proceedings as to the practice and the rules, it will be found that there are two forms of order in this division—an order *nisi* and an order *absolute*. Examples of them will be found in "Ravden on Practice and Law in the Divorce Division," at pp. 369-70. The authorities show that a barrister's fees must be regarded as gratuities; that is, therefore, sufficient to dispose of the matter if it is right that a garnishee order cannot be made save as to a debt or something which is subject to a legal obligation and is not a mere gratuity. The decision in the case of *Innes* v. *The East India Company* [25 *L. J.* (New Series), C. P., 154] is against any opposite contention. I am of opinion that this deed is void from fraud and want of consideration, and that garnishee proceedings cannot be used to attach these sums in the hands of solicitors.

Mr. Lee Bas for the Judgment creditor.

Mr. W. O. Willis for the Judgment-debtor (the husband).

Mr. Douglas Hogg for the Garnishees.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION—Before FLETCHER AND RICHARDSON, JJ APPEAL FROM APPELLATE DECREES Nos. 637 AND 673 OF 1911. KUMUD NATH CHATTERJEE AND ANOTHER, Defendants Nos. 3 and 4, Appellants, *v.* SM. SABITRI DEBI, Plaintiff and two other Defendants, Respondents. 20th May 1914.

Suit for rent against tenant and in the alternative for money against co-sharers, if rent realised by the latter, whether maintainable in a Court other than a Small Cause Court.

These two appeals arose out of two suits for recovery of arrears of rent brought by the Plaintiff who is a co-sharer landlord to the extent of 4 as. share against the tenant Defendants and in the alternative against the other co-sharer landlord Defendants, whose interest extends to 12 as. in case the co-sharers had realised the whole rent from the tenant. The first Court found that the collection of rent was joint and that the tenant had paid the whole rent for the years in suit to the co-sharer Defendants. It therefore held that as the Plaintiff failed to prove separate collection and inasmuch as the collection of the entire rent by the co-sharer Defendants was not unlawful, the Plaintiff was not entitled to get any relief against them. The learned Munsif further held that even if the Plaintiff had any remedy against her co sharers for unlawful detention of her share of the rent realised, the claim was cognizable only by a Court of Small Causes. On appeal, the learned Subordinate Judge held that such a suit in an alternative form is maintainable on the authorities of *Ahamuddeen* v. *Girish Chandra Shamunt*, I. L R. 4 Cal. 350, *Madan Mohan Lal* v. *Holloway* I. L. R. 12 Cal. 555, *Sham Sing* v. *Kishun Sahai*, 6 C. L. J. 190. He further held that "the forum in which a suit lies is primarily determined by its nature. These suits as framed are suits for rent to begin with. The Plaintiff asked for relief in the first place against the tenants and in the second in the event her claims were held not sustainable against the tenants, against her co sharers. It was open to her to frame the suits in that fashion and to ask for relief in the alternative, *vide* Or. I, r. 3 of the Civil Procedure Code." The lower Appellate Court therefore passed a decree against the co-sharer Defendants. Thereupon the co-sharer Defendants preferred these Second Appeals and it was contended on their behalf that the suits as found by the lower Appellate Court are really suits for recovery of money realised by the co-sharer Defendants due to the Plaintiff, and as such the suits were not maintainable in an ordinary Court, but were cognizable by Courts of Small Causes and that the claims prayed for in the alternative are not maintainable.

Held, that the suits as framed were maintainable in law and they were rightly instituted in ordinary Courts. The Small Causes Courts have no jurisdiction to try the suits as they were primarily rent suits.

Babu Sharashi Charan Mitter, for Appellants.

Babus Bepin Chandra Ghosh and *Atul Krishna Roy* for Respondents.

A. T. M. *Appeal dismissed.*

GULAB KOER v. RAMRATAN PANDE.

in a suit for rent. It is not until the record-of-rights is finally published that the presumption of correctness arises.

These were Appeals preferred on the 20th of November 1911 against the decrees of G. J. Monahan, Esq, District Judge of Zilla Shahabad, dated the 8th of August 1911, modifying the decree of Maulvi Syed Nasimul Huq, Munsif, 1st Court at Arrah, dated the 10th of November 1910.

The Appeals arose out of two suits for rent in which the Munsif gave the Plaintiffs decrees upon the basis of receipts produced by the Defendant, overruling the Defendant's allegation that the rentals were in fact less than were shown in the receipts. The Defendants relied principally upon certain entries in the draft record-of-rights published under sec. 103A of the Bengal Tenancy Act, but the Munsif excluded them from consideration, as in his opinion they were inadmissible in evidence.

The lower Appellate Court modified the decrees of the Munsif on the strength of these entries which it admitted in evidence. In the course of his judgment, the learned Judge observed :

"It seems to me that in the absence of any good reason to the contrary, the decision of the Assistant Settlement Officer under sec. 103A which is that of a competent revenue authority should be followed. The receipts are written by the *malik* and he can mention or not mention *abwabs* just as he pleases. Thus I think, it will be far safer in this present suit to follow the decision under sec. 103A and to disallow the *abwabs*."

The Plaintiff preferred this second Appeal.

Babu Rajendra Pershad (for *Babu Chander Sekhar Pershad Singh*) for the Appellants.

Babu Raghunath Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These two Appeals are second Appeals from the decision of two rent-suits. The Munsif granted decrees for the whole amount claimed in both the suits. These decrees have been modified by the lower Appellate Court and the Plaintiffs have preferred these second Appeals The learned District Judge has based his decision as to the amount of rent and cesses payable by the Defendants on certain entries in a draft record-of-rights which was published under sec. 103A of the Bengal Tenancy Act. In our opinion these entries were not admissible in evidence. It is not until the record-of-rights is finally published that the presumption of its correctness arises.

We accordingly decree this Appeal and modify the decree of the lower Appellate Court. The amount of rent and cesses payable in each suit will be the amount found payable by the first Court. To this amount will be added damages at the rate of 12½ per cent., the rate allowed by the District Judge.

The Appellants will get their costs in all Courts.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
6, April.

JOHN KING & CO., LD., Appellants,
v.
THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF HOWRAH and ors., Respondents.

Land, title to—Title-deeds, what are—Original grant not forthcoming—Subsequent conveyances through which title derived, if title-deeds—Court refusing to consider them as title-deeds and basing decision on conduct of parties—Error vitiating judgment—Real question not considered—Drainage-channel, dispute between Municipality and private owner as to title to—Boundaries in title-deeds if may be ignored and title declared up to centre line of channel—Court if may vary boundaries in title-deeds.

Plaintiffs, who sued for recovery of possession of a strip of land lying between their premises and a public road, including a khal *or* nulla *which lay between the said premises and the road, proved a clear title for over 50 years by a succession of duly registered conveyances, mortgages, reconveyances and other title-deeds and also proved that during that period they had leased portions of the land by leases that themselves were registered. The Judge at the trial accordingly found in the Plaintiffs' favour, dispossession having taken place within 12 years of the suit. On appeal,* the High Court reversed that decision observing that the original grant of the land made by Government about the year 1830 to one Smith to whom Plaintiffs traced their title was not forthcoming, and that though in the later conveyances referred to above the* khal *appeared to have been treated as a part of the subject of the grant, it was unlikely that Government would include it in their grant without securing the continued maintenance in the public interest of a water channel which existed from time out of memory and played a conspicuous part in the drainage system of the local Municipality; and that in the absence of the original grant none of the other documents referred to in the case could be regarded as "being in any sense title-deeds", they being "obviously insufficient to create title" and being "at most mere assertions of title made from time to time by the predecessors-in-interest of the Plaintiffs." In this view it treated the case as though it was one in which the Court had nothing relevant before it but the conduct of the parties to decide whether the Plaintiffs or the Defendant Municipality were entitled to the land:*

Held, *affirming the trial Judge, that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the Plaintiffs, and the High Court was wrong in saying that the Plaintiffs had no title deeds—in consequence of which error it never considered the real question in the case.*

That having regard to the boundary consistently found in the deeds, which was stated to be the public road, it was impossible to hold that the title of the Plaintiffs went up only to the centre line of the khal *and thus make the deeds convey lands marked out by different metes and bounds from that which there appeared.*

The appeal arose out of a suit by the Plaintiff Company for a declaration of their title to and confirmation of possession of a piece of land lying between their premises and a public road called Telkalghat Road—which strip of land included a *khal* and a strip of land lying between the said road and the Plaintiffs' said premises. The Plaintiffs claimed title both as lessees and as purchasers of the superior interest and alleged that they and their predecessors had been in possession ad-

versely to all other persons for more than sixty years.

The Defendants were the Chairman of the Municipal Commissioners of Howrah and the Howrah Amta Light Railway Company, Ld. It appears that the two Defendants entered into an agreement under which the former were to transfer to the latter, for the purposes of the supply of power and the construction of sidings for the latter's railway, so much of the *khal* as lay opposite to Company's premises. In pursuance of this covenant the Railway Company proceeded to fill up the *khal* and on the portion filled up to erect offices and lay down lines. The plaint averred that the Plaintiffs' possession was being by these and other acts disturbed and interfered with by the Defendants and they prayed also for a permanent injunction restraining the Defendants from interfering with the Plaintiffs' possession.

The Defendant Corporation denied the Plaintiffs' title to the land in dispute and alleged that the entire land lying between the boundary of the *khal* towards the Plaintiffs' premises and the Road was and had always been the property of the Corporation and their predecessors and in their possession in their own right and adversely to the Plaintiffs and their predecessors. They denied that the Telkalghat Road formed the southern boundary of the Plaintiff Company's premises as alleged by them. The Railway Company supported the Municipality.

The substantial issues which were raised for trial were :—

1st. Is the Plaintiff Company's claim barred by limitation ?

2nd. Does the *khal* as well as the land lying to the south of it and extending up to the Telkalghat Road, as described in the plaint, belong to the Plaintiffs ?

Upon this second issue, the judgment of the High Court recites it as common ground that "the land in dispute was originally part of a *char*, measuring some 55 bighas which was settled by the Government of the day with one Smith on or about the year 1830 and conveyed by Smith to one Calder in 1844." The original lease to Smith could not be found and Calder's conveyance was thus the earliest document bearing upon the disputed land. Subsequent dealings with the land so far as they appeared from the documents produced by the Plaintiffs are thus summarised by the High Court.

"The Plaintiff Company have claimed the land, first as lessees and finally as proprietors. As to their leasehold, it appears, that, sometime before 1849, Calder granted a permanent lease of 2 out of his 55 bighas to one Craig who built upon it what was known as the Vulcan Foundry ; and this is the site of the northern part of the Plaintiff Company's present premises. Craig's interest in these two bighas was subsequently conveyed to one Stewart and in 1854 a 40 years' lease was granted by Calder's successor, Golapi Dasi, to a certain Hugh McLardy in respect of 4 more bighas of the 55 immediately adjoining Craig's land on the south. McLardy's interest likewise eventually passed to Stewart, who thus became the lessees of the whole 6 bighas and who on 26th March 1881, conveyed his entire interest to Messrs. John King and Company, the predecessor of the present limited liability Company. The lease granted by Golapi Dasi expired on 1894, and, in anticipation of this Messrs. John King & Co. obtained in 1891 a further lease for 15 years. In all the

documents relating to these leases except one (a permanent lease with option of purchase, Ex. 9) obtained on the 4th April 1855 by one Mackey, the southern boundary is given as a *nulla*.

"Turning next to the acquisition of the proprietary right claimed, we find that it passed from Smith to Calder, then to Craig, then to Golapi Dasi, then to Mackey and eventually to a certain Chundra Kanta Mukerjee who mortgaged a parcel of 8 bighas including the land in suit. In execution of the decree obtained on the basis of that mortgage, this land was put up for sale and purchased by Messrs. John King & Co., on the 4th August 1893. In Calder's conveyance, the land is described as bounded on the south by the north of the public road to the north of Mr. Humphrey's house; and in the other documents connected with the chain of transfer indicated above, as well as the mortgages and other transaction arising therefrom it is referred to as the public road or 'a public road' or 'the Gholadanga-Ghat Road.'"

It appears further that in 1862, when the entire Gholadanga property was owned and possessed by Mackey, that property (excluding the portion subsequently acquired by the Plaintiff Company) was acquired by Government on behalf of the East India Railway Company, and that at that time the *khal* was treated as a part and parcel of the land until 1869, when the Municipality addressed the Railway Board of Agency with a view to having the *khal* made over to the Municipality "as its possession by the Municipality was a matter of the highest importance and affected the drainage and cleanliness of a large portion of the town." The Board of Agency in their reply stated that the "drain clearly belonged to the Railway Company", but they did not object to the transfer which was subsequently amicably arranged.

The Subordinate Judge of Howrah, Babu Pareshnath Chatterjee, delivered judgment decreeing the Plaintiffs' suit on 10th August 1908. He held that "Plaintiffs' proprietary right or free-hold interest in the unacquired portion of Mackey's property including the disputed *khal* or *nulla* had been proved to the hilt" With regard to the lease-hold title claimed by the Plaintiffs, the Subordinate Judge thought it probable that in order to keep the *khal* available to other tenants of the land Golapi Dasi did not include the *khal* in the lease of 4 bighas to McLardy, but as Mackey obtained lease of the entire Gholadanga property, she found no objection to include the *khal* in that lease.

In the result he held that "even if the Plaintiffs' allegation in the plaint be not quite accurate so far as their lease-hold interest is concerned, that cannot surely affect the Plaintiffs' proprietary right and all the documents relating to the Plaintiffs' proprietary right clearly go to show that the disputed *khal* is included within the Plaintiffs' property and that the Plaintiffs have proprietary right thereto." "The Revenue Survey Map," the Subordinate Judge found, "no doubt describes the whole space occupied by the road and the *khal* as Telkalghat Road, but in the said space there is a dividing line by which the two things have been kept separate and I do not therefore see how it can be inferred from the said map that the *khal* is a part of the road."

The Subordinate Judge further found that "there was no document on the side of the defence to show that the disputed

khal or the soil of the said *khal* ever belonged to the Howrah Municipality."

With reference to the first issue, the Subordinate Judge found that the Municipality did no doubt do certain acts in connection with the disputed *khal*, referable to the powers conferred on the Municipality by statute, but no act of possession or user exercised over the *khal* by the Municipality under those powers could affect the Plaintiffs' title. Moreover, the property in question being a *khal*, was not capable of enjoyment by the owner in the ordinary way, and the possession of the owners should be presumed to continue until there was actual invasion or infringement of their right so as to give rise to a cause of action, that a slight act of possession by the owner would be sufficient to keep alive his right, and that the party who set up title by adverse possession must prove that their acts of possession had all along been adverse to the Plaintiffs and adequate in continuity, publicity and extent. Upon the evidence the Subordinate Judge found that there never was any real act of adverse possession on the part of the Municipality over the disputed *khal* and there was no invasion of the Plaintiffs' right until the Howrah-Amta Light Railway Company encroached upon the property in suit by causing a portion of the *khal* to be filled up on the south side and laying down railway lines and erecting station sheds on the filled-up portion, with the help or sanction of the Howrah Municipality within 2 years prior to the suit.

In the result the Subordinate Judge decreed the suit with costs and damages or mesne profits to be determined in execution proceedings.

The Municipality, alone preferred an appeal to the High Court.

The High Court (Mookerjee and Carnduff, JJ.) reversed the decree of the Subordinate Judge and dismissed the suit with costs throughout. In arriving at this conclusion, the learned Judges were influenced by the following amongst other considerations:

(1) That the *khal* has existed from time out of memory and played, as it still plays, conspicuous part in the drainage system of the Howrah Municipality.

(2) That the original grant to Smith was not forthcoming, and "none of the other documents referred to in the case could be regarded as being in any sense title-deeds. They were obviously insufficient to create title and were at most mere assertions of title made from time to time by predecessors in interest of the Plaintiff Company. In themselves, therefore, even if their intendment were perfectly clear, they would be of little value and could be useful only if supported by evidence of conduct pointing in the same direction."

(3) That it seems most unlikely that a natural channel of such manifest importance and general utility should have been actually included in the grant from the Government to Smith unless its continued existence and utility for public purpose had been at the same time secured.

(4) That even the transactions relating to the acquisition of a portion of the Gholadanga property by the E. I. Ry. Co., from Mackey was no direct evidence of the title of the Plaintiff, though in those proceedings the *khal* had undoubtedly been treated by Government as a part of that property. They simply showed that Government having made this public drain over to the Railway Company had to arrange for its restoration to the Muni-

cipality and the public and that their action in the matter did not really affect the issue.

Turning to the evidence of conduct the learned Judges held that "even if the Defendants had offered no furher evidence, we should be bound to hold that the former had altogether failed to substantiate their claim. At the outset the task before them was difficult and the onus they had to discharge heavy. For, in order to succeed it behoved them to prove affirmatively that their property includes land which was public land to begin with and which has always been occupied by a natural channel maintained as a public drain for the public benefit by Defendant Municipality ever since its creation. There exists, as we have said, apparently no documentary evidence of the original settlement by the Government with the first grantee and the unconditional inclusion therein of a *nulla* or *khal* of the kind described is, as has been observed already, contrary to probability and certainly not to be presumed. In these circumstances, the burden on the Plaintiff Company was no light one, and as we have seen they have in our opinion not succeeded in discharging it The Defendant Municipality on the contrary, seem to us to have made out, although it was, of course, unnecessary for them to do so, a much stronger affirmative case. It is true they also have no title-deeds, and their position is, perhaps, worse than that of an ordinary Defendant, because it rests upon and is rigidly defined by statute. By none of the Municipal Acts that have been in force is the subsoil of a public drain vested in the Municipal Commissioners, and the only foundation for a claim on the part of the Defendant Municipality to the ownership of the land covered by this *khal* is the transfer arranged for them by the Government with the E. I. Ry. Co. in 1869. But it is not their case that the subsoil is theirs; what they say is that the public drain as such is theirs, that the subsoil is not the Plaintiff Company's but the State's, and that they believe they are and have been merely discharging a trust in respect of it. And we think that they have conducted themselves throughout in accordance with this view and that it is the correct view to take. The survey maps of 1870 and 1872 distinctly show the *nulla* as appertaining to the road and it will presently appear that it was in fact so used by the Municipality. The Plaintiff Company's map which they filed in connection with their application to the Municipal Commissioners in 1888 depicts their parapet to the culvert as projecting well into the Telkalghat Road, and the conduct of the Municipality and its agents. . . . . is entirely consistent with their case."

On the question of title by adverse possession which each party had set up the High Court observed:

"On behalf of the Municipal Commissioners it has been contended that even if the title were in the predecessors in interest of Messrs. John King & Co, Ld., it was lost over and over again by the adverse possession of the Municipality. We doubt, however, whether if the Appellants had to base their defence upon this, they could be allowed to succeed against the Respondents. For regard being had to what has been said as to the rights of Municipal Corporations in respect of public drains and to the powers conferred and duties imposed upon them in this connection, there seems to us to be great force in the contention that all

the acts of the Howrah Commissioners which have been described above were, with perhaps the solitary exception of the curtailment of the parapet protecting the culvert, wholly compatible with the recognition of the Company's ownership of the subsoil. . . . . On behalf of the Respondent Company it has been suggested, though faintly, that a title had been acquired by long possession adverse to the true owner. But the suggestion may be summarily rejected, for so long as the Company and their predecessors were in possession as mere lessees, that is until 1893, no such acquisition was possible and enough has been said to demonstrate that no claim of this kind can reasonably be based upon any thing that was done by them after that year."

In the result the learned Judges held that in their view, the suit ought unquestionably to have been decided, on the merits, in favour of the Appellant Municipality; for not only did the Respondent Company not succeed in proving affirmatively that they were entitled to recover possession, but the Appellant Municipality succeeded in showing that the *khal*, on the title to which the Company's claim was rested, was originally public property and had been dealt with as such by the Municipality always and by the Plaintiffs themselves on several critical occasions. The Plaintiff Company thereupon preferred the present appeal to His Majesty in Council.

Mr. Ogden Lawrence and *Mr. M. N. Drucquer* for the Appellants.

Mr. DeGruyther, *K. C.*, and *Mr. Dunne* for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—This is an Appeal in an action brought by John King & Co, Limited, to obtain a declaration of their title to certain lands mainly consisting of a *khal*, or *nulla*, along the Telkalghat Road, Howrah, and for ejectment of the Defendants therefrom, and for damages or mesne profits.

The course of the case has been rather a singular one. The Plaintiffs at the trial proved a clear title to the lands for over fifty years by a succession of duly registered conveyances, mortgages, reconveyances, and other title-deeds, and also proved that during that period they leased portions of the land by leases that themselves were registered. Their Lordships indeed think that they might go so far as to say that, after the rather complex devolution which took place within that long period had been carefully explained by counsel for the Appellants, it became evident that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the Plaintiffs. They also proved that they had not been dispossessed by the Defendants until a period well within the period of limitation, and that therefore the Statute of Limitations did not apply.

The Judge at the trial, who went into the evidence with very great care, found in favour of the Plaintiffs on all points. An Appeal was brought to the High Court. It would seem from the judgment of that Court, that the Judges pronouncing it took a most extraordinary view of the Plaintiffs' case, ignored entirely the clear title to the land which the Plaintiffs had proved, and expressly held that they came into Court without title-deeds. They therefore treated the case as though it was one in which the Court had nothing relevant before them but the

conduct of the parties to decide which of them was entitled to the land.

Their Lordships are entirely unable to understand the grounds on which the High Court rejected the title of the Plaintiffs on their title-deeds, nor can they understand what the learned Judges meant by saying that the Plaintiffs have no title deeds. The consequence of this error on the part of the Judges of the High Court is that they never considered the real questions in the case, and their judgment gives to their Lordships no assistance.

The title-deeds of the Plaintiffs (none of which are impugned), which are all duly registered, show that the Plaintiffs or their predecessors in title have been, ever since 1855, the owners of a parcel of land bounded on the south by the Telkalghat Road. Now it may very well be that the Telkalghat Road was not at that date the broad metalled road that it is now, but it is certain that it lay to the south of a *khal*, or *nulla*, the bed of which, with its banks, is the principal subject in dispute in the present action.

Their Lordships have been asked to interpret this boundary of the property as meaning that the property of the Plaintiffs' predecessors in title only went up to the centre line of the *nulla*, which lies to the north of the Telkalghat Road itself. To do that would be to reject the description of the parcels which is to be found consistently in the deeds and to make these deeds convey land marked out by different metes and bounds from that which there appears. Their Lordships decline so to do. They think that it is possible that by allowing certain portions from time to time to be added to the Telkalghat Road for the purpose of improving that road, the Plaintiffs and their predecessors in title may have parted with the property, or at all events with the right of possession of those strips of land; but none of those form part of that which is claimed in this action. So far as that which is claimed in this action is concerned, they have title and they have had possession. They have been dispossessed from this, but they brought this action in due time, and their action of ejectment must succeed, and this Appeal must be allowed. Their Lordships are quite satisfied both with the reasons and the conclusions of the Judge at the trial, and they will humbly advise His Majesty that the decree of the High Court which is appealed against should be set aside, and that the decree of the Subordinate Judge should be restored and affirmed. The Respondents must pay the costs of the Appeal to the High Court and to this Board.

Solicitors: *Messrs. Neil, Clerk* and *Murray* for the Appellants.

Solicitors: *Messrs. Morgan, Price* and *Newburn* for the Respondents.

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. NO. 11 OF 1913.

JENKINS, C. J.	SACHINDRA KISHORE DEY, Defendant, Appellant,
N. R. CHATTERJEA, J.	*v.*
1914,	RAJANI KANT CHUCKERBUTTY, Plaintiff, Respondent.
Heard, 1 & 2, April.	
Judgment, 2, April.	

Hindu Law—Daughters inheriting father's estate jointly—Death of one—The other if succeeds to deceased's interest as reversionary heir—Adverse possession for more than twelve years during both daughters' lifetime—Surviving daughter's right to recover moiety share belonging to deceased, if arises from her death—Limitation Act (IX of 1908), Sch. I, Art. 141.

SACHINDRA KISHORE DEY *v.* RAJANI KANT CHUCKERBUTTY.

Where one of two daughters of a Hindu who inherited his properties died, the survivor did not acquire in the interest enjoyed by the deceased a title of the nature described in Art. 141 of Sch. I of the Limitation Act.

Where after both daughters had been kept out of possession for more than 12 years one of them died, and the other by some means or other got back possession :

Held—*That she could not maintain her possession against the person who by 12 years' adverse possession had acquired title in the entire property, including the interest of the deceased daughter, to which she succeeded by survivorship and not by inheritance.*

This was an appeal from a judgment of D. Chatterjee, J., in S. A. No. 3014 of 1911 dated the 30th of January 1913, dismissing an appeal preferred on the 20th of November 1911, against the decree of Babu Behari Lal Chatterjee, Subordinate Judge, 3rd Court of Zilla Mymensingh, dated the 25th of August 1911, modifying the decree of Babu Aswini Kumar Das, Munsif, 3rd Court at Kishoreganj, dated the 14th of February 1911.

The facts of the case material to this report will appear from the judgment of D. CHATTERJEE, J., which was as follows :—

D. CHATTERJEE, J.—One Kirtinarain who died about the year 1871 left him surviving two daughters Harasundari and Kashiswari and one daughter-in law Umatara, being the widow of his predeceased son. Certain jote land belonging to the estate of Kirtinarain which formed the subject-matter of contention in this case continued to be held by Umatara to the exclusion of Harasundari and Kashiswari who were married daughters living in their husbands' houses. After Umatara had been in possession for more than 12 years, that is, in the year 1291, she sold the jote to the father of the Plaintiff, and the father of the Plaintiff having got himself recognised as an in-coming tenant by the landlord remained in possession and also the Plaintiff after him, until on the death of Umatara in 1315, when the Plaintiff was dispossessed by Kashiswari and her two sons, Defendants Nos. 1 and 2. In the suit of the Plaintiff for recovery of possession, Defendant No. 1 pleaded that he had been in possession along with Umatara and Umatara's daughter had made a gift to him of her eight annas share so that he had become entitled to the whole 16-anna jote. This part of the Defendant's case has been held as not proved and the result of the finding is that Umatara remained in possession adverse to both Harasundari and Kashiswari before the sale and that after the sale, the Plaintiff's father and the Plaintiff after him were in such adverse possession until dispossessed by the Defendants. The Court of first instance held that as regards the 8 annas share of Kashiswari, her claim had been barred by 12 years' adverse possession after Umatara.

As regards the 8-anna share of Harasundari, Kashiswari had succeeded to it in 1899, that is within 12 years of the suit and with regard to that share Plaintiff's suit was dismissed. The lower appellate court has, however, decreed the whole suit of the Plaintiff holding that as the Zamindars had accepted rent from Umatara, it must be taken that a fresh settlement was made with her and that the Zamindars having recognised the father of the Plaintiff as an in-coming tenant must be taken to have made a fresh settlement with him so that neither the daughters nor their heirs

could have any further claim. It is contended before me in second appeal that the judgment of the learned Subordinate Judge decreeing the whole suit of the Plaintiff is wrong and that in any case the suit as regards the share of Harasundari ought to have been dismissed. In support of this contention reliance has been placed upon Art. 141 of the Limitation Act of 1877 which provides "Twelve years from the death of a female" as the period within which the suit for recovery of possession is to be brought by a Hindu or a Mahomedan who is "entitled to possession of the property on the death of the Hindu or a Mahomedan female." The question, therefore, for decision in this case is whether Art. 141 has any application to a case of this kind in which succession rests jointly in two female heirs. It is settled law that when there are more daughters than one, they succeed jointly as one with a right of survivorship. In this case there was no partition of the property amongst the two daughters so that no question that might arise in a case in which such a partition has taken place arises in this case. Apart from the question of adverse possession by Umatara and her alienees, the two heirs must be taken to have been in joint possession and that if they were in joint possession the suit by the survivor could not be one for recovery of possession. Therefore, the suit by Kashiswari could not be said to be one for recovery of possession on the death of Harasundari. In this view of the case I think that so long as Kashiswari is alive, Art. 141 has no operation. It would be premature now to say whether there would be any right in the Defendants Nos. 1 and 2 to recover possession after the death of Kashiswari. That would be a matter for consideration when that case does arise. In the present case, however, the Plaintiff is, I think entitled to recover possession of the whole land.

The decree of the lower appellate court is therefore sustained and the appeal is dismissed with costs.

Babu Gobinda Chandra Dey Roy for the Appellant.

Babu Sasankajibon Ray for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is a suit brought to recover possession of land, and to understand the legal question at issue it is necessary to state briefly what the facts of the case are. There was a Hindu father governed by the Dayabhaga school of law who at his death left two daughters Kashiswari and Harasundari and a daughter-in-law Umatara, the wife of a predeceased son. Kashiswari had two sons. On the death of the father Kirtinarain the daughters who were his heirs did not obtain possession, but Umatara, his daughter-in-law, did. She purported to alienate the estate to the predecessor of the Plaintiff, and the possession of Umatara and those who claim under her by purchase was for more than twelve years. Not only was this possession for more than twelve years, but this possession was adverse to Kashiswari and Harasundari. The result was that sec. 28 of the Indian Limitation Act operated with the consequence that the right of the daughters became extinguished. By some means, which are not disclosed, Kashiswari, Defendant No. 3, and her sons Defendants Nos. 1 and 2 afterwards got into possession of the property, and the present suit is to recover possession from them. Defendants Nos. 1 and 2 have no present title;

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That would have been with Kashiswari, Defendant No. 3, had it not been extinguished. So far as the original title to a moiety is concerned, it is not suggested before us that the claim of the Plaintiff could be resisted, but it is said that inasmuch as Harasundari died in 1306, the plea of adverse possession and the consequent extinguishment cannot prevail as to the 8 annas that originally survived to Kashiswari on Harasundari's death. So the problem that arises in this case is what was the effect of adverse possession against the two daughters who succeeded on the death of their father under the Dayabhaga system of law.

The nature of the right acquired by these two daughters is made apparent by the decision of the Privy Council in *Amrita Lal Bose* v. *Rojanee Kanto Mitter* (1): and, it is abundantly clear from that case that the survivor of the two daughters came in on the death of her sister not by way of inheritance as reversioner, but by right of survivorship. It necessarily follows from this that Art. 141 does not apply and that the surviving daughter cannot now claim that she acquired a title, on the death of Harasundari, of the nature described in Art. 141.

The result appears to me to be that so far as Kashiswari is concerned, her right was extinguished not only in the original 8 annas that devolved on her, but in respect of the whole 16 annas which passed to her and her sister as a single inheritance on the death of their father.

It is unnecessary for us now to express any opinion as to what will be the position of Defendants Nos. 1 and 2 on the death of Kashiswari. That depends on considerations which are outside the problem with which we have to deal. It is sufficient for our purpose to say that there was twelve years' adverse possession as against Kashiswari and Harasundari, and as against them and the survivor of them there was, by virtue of sec. 28, an extinguishment of their right in favour of the Plaintiff or those under whom the Plaintiff claims.

This in effect is the view taken by Mr. Justice D. Chatterjee, and we must therefore dismiss this appeal with costs.

Appeal dismissed.

(1) L. R. 2 I. A. 113 (1875).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No 2327 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1914.
29, January.

MOHENDRA NATH BISWAS and others, Defendants, Appellants,
v.
SHYAM LAL BANERJEE and another, Plaintiffs, Respondents.

Land held under Government on temporary lease—Permanent sub-lease by holders under Government and by sub-lessees themselves—Omission in settlement record of entry of such tenures if affects relationship of landlord and tenant between the subordinate holders.

Certain lands were held under the Government under a temporary settlement during the currency of which the holders granted a permanent sub lease to the Plaintiffs who before the expiration of the lease granted by Government granted a permanent lease to one of the grantors. Ever since then the sub-lessee and his successor in-interest were in occupation of the land, the settlement being from time to time renewed by Government in favour of the original settlement-holders or their representatives, but in the course of the last settlement the under-tenures were not mentioned in the settlement records.

Held (in a suit for rent by the Plaintiffs)—*That the mere omission of the settle-*

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ment authorities to make an entry in the settlement records in respect of the tenures and under-tenures cannot affect the rights of the parties; and the effect of the re-settlement by the Government with the original settlement-holders was to keep alive the contractual obligation of the subordinate holders among themselves.

The rights and obligations of the parties were mutual, the Plaintiffs being bound to make good the title of the Defendants as soon as by virtue of the resettlement they were placed in a position to continue the lease in favour of the Defendants and the Defendants being under an obligation to continue as tenants under the Plaintiffs on the basis of the lease and to pay rent accordingly.

This was an appeal from a decree of Babu Chandra Bhusan Banerjee, Subordinate Judge of Zilla Khulna, dated the 26th of May 1911, confirming a decree of Babu Hem Chandra Basu, Munsif, Bagerhat, dated the 28th of May 1910.

This appeal arose out of a suit for recovery of arrears of rent. The facts of the case were that Sri Nath Bhadra and Sri Nath Biswas were settlement-holders of a temporarily settled estate under Government. They carved out a *howla* by a *potta*, dated 16th Bhadra 1280, in favour of Umesh Mitter and Radhika Charan Bhattacharji, who again created the *nim-howla* in favour of the Defendants' father Chandra Nath Biswas, who executed the *kabuliat* (Exbt. I). Plaintiffs were executors of the estate of Aghore Mitter, son of Umesh Mitter, and under the terms of the *kabuliat* Plaintiffs were entitled to get Rs. 30 rent annually from the Defendants. The main contentions of the Defendants were that during the late settlement proceedings which took place between the years 1311 to 1313, the Settlement Officer did not recognise and record the existence of the Plaintiffs' *howla* or the Defendants' *nim-howla*, hence the relationship of landlord and tenant has ceased to exist.

Previously there was a rent suit between these parties and up to the High Court the Plaintiffs obtained a rent-decree and the objections now urged by the Defendants were all then urged. The High Court finally decided that the Defendants are liable to pay rents to the Plaintiffs under the terms of the *kabuliat.*

In the *kabuliat* executed by the settlement-holders to Government and amongst these Defendants' father Chandra Nath Biswas was one, there was a stipulation that the settlement-holders are bound to respect the recorded rights of the tenure-holders.

Babu Brojo Lal Chuckerbutty for *Babu Jadu Nath Kanjilal* for the Appellant.

Babu Surendra Chandra Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a suit for rent, and the question in controversy is whether the relationship of landlord and tenant subsists between the parties. The facts necessary for the determination of this question may be briefly stated.

Sri Nath Bhadra and Sri Nath Biswas held lands under the Government under a temporary settlement which was not to expire till the end of the year 1890. During the currency of this settlement they granted a permanent sub-lease to the Plaintiffs-Respondents on the 30th December 1873. The grantors and the grantees were aware of the precarious nature of their interest, but the parties assumed that upon the expiry of the then current

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term of settlement the Government would renew the lease in favour of the grantors, possibly upon payment of enhanced revenue. The grantees accordingly agreed that if at any future time the Government imposed an additional revenue, the grantees themselves would bear the additional burden in proportion to the area of land held by them. On the 4th February 1874, the lessees under the lease of the 30th December 1873 granted a permanent lease to one of the grantors. Here again a provision was inserted to the effect that if the revenue was increased upon a future settlement, the tenant would bear the burden in proportion to the land in his possession. Ever since then, the sub-lessee and his successor-in-interest have been in occupation of the land. The settlement has been from time to time renewed by the Government in favour of the original settlement-holders or their representatives. In the course of the last settlement, the under-tenures for some unexplained reason were not mentoined in the settlement records. In answer to the present suit for rent, the Defendants, the sub-lessees, under the permanent sub-lease of the 4th September 1874, contend that the Plaintiffs are no longer entitled to recover rent from them inasmuch as their tenures have not been recognised by the settlement authorities. This contention is obviously without foundation. The mere omission of the Settlement authorities to make an entry in the settlement records in respect of the tenures and under-tenures cannot affect the rights of the parties. On the other hand, it cannot be disputed for a moment that the effect of the resettlement by the Government with the original settlement holders was to keep alive the contractual obligation of the subordinate holders as amongst themselves. This position is supported by the decision of the Judicial Committee in the case of *Pria Nath Das* v. *Ram Taran Chatterjee* (1), and in fact accords with the view taken by this Court in an earlier litigation between these very parties which arose upon the termination of a previous settlement. It has been contended, however, that a different view of the rights and obligations of the parties should be taken on this occasion; because the tenure and under-tenure have not been recorded in the course of the settlement now current. As we have already explained, this circumstance does not in our opinion affect the position of the parties. Their rights and obligations are mutual; the Plaintiffs are bound to make good the title of the Defendants as soon as by virtue of the resettlement they are placed in a position to continue the lease in favour of the Defendants, and similarly the Defendants are under an obligation to continue as tenants under the Plaintiffs on the basis of the lease of the 4th February 1874 and to pay rent accordingly. In this view the Plaintiffs have been rightly allowed a decree for rent as against the Defendants.

The result is that the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 7 C. W. N. 601: s. c. I. L. R. 30 Cal. 811 (1903).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 407 OF 1909.

COXE, J.
RAY, J.
1913,
Heard, 30, May and 5, June.
Judgment, 1, July.

KALI PRASANNO GHOSH, Decree-holder, Appellant.

v.

SHAIKH GOLAM RAHMAN and others, Objectors, Respondents.

Civil Procedure Code (Act V of 1908), sec. 47—Decree, irreconcilable directions in—Decree impossible of execution—Claim on behalf of Deity—Appeal.

The Appellant obtained a decree on a mortgage executed by one G and had certain properties attached. Thereafter one Y brought a suit for declaration that the property was wakf *and could not therefore be attached and sold, and obtained a decree. On appeal to the High Court against this decree, G and one N were substituted as the heirs of Y who had died in the meantime, and the appeal was ultimately dismissed as against G and decreed on a compromise as between the Appellant and N, "allowing the Appellaut to recover the money due to him by sale of 4 annas share of the properties." On an application for execution of this decree of the High Court without making G a party to the execution, G appeared and objected that he was the sole mutwali of the property which was* wakf *and could not be sold in execution of the decree. The lower appellate court refused execution, holding that a suit for declaration could not legally terminate in a mortgage-decree, and that the decree which could be executed was the original mortgage-decree, but not the compromise-decree.*

Held—*That as G was a party to the suit in his personal capacity as also as mutwali, his objection came within sec. 47 of the Civil Procedure Code and an appeal lay from the order refusing to execute the decree.*

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That the ground upon which the application for execution was refused was erroneous; the decree of the High Court in the present case was, however, incapable of execution inasmuch as the decree in so far as it dismissed the appeal as against G as a part representative of the former mutwali was a final decision that the property was wakf *and inalienable, and a direction in the same decree that a portion of the property could be sold was irreconcilable with the rest of the decision and made it impossible to carry the whole decree into effect.*

This was an appeal preferred on the 25th of August 1909 against an order of F. Roe, Esq., District Judge of Zilla 24-Parganas, dated the 11th of June 1909, reversing an order of Babu Ram Lal Day, Munsif at Alipore, dated the 13th of March 1909.

The facts of the case will appear from the judgment.

Babus Jogesh Chandra Ray, Surendra Nath Ray and *Satyendra Nath Ray* for the Appellant.

Babus Akshoy Kumar Banerjee and *Biraj Mohan Majumder* (for the Deputy Registrar) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—The facts of this case as they have been laid before us are as follows :—One Golam Rahman mortgaged certain property to the Appellant. The Appellant obtained a decree on that mortgage and certain property was attached in execution. Thereafter Yakub Husain brought a suit

(1) 16 C. W. N. 26 : s. c. I. L. R. 39 Cal. 298 (1911).

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for declaration that this property was *wakf* and could not therefore be attached and sold in execution of Golam Rahman's debt. That suit was decreed by the courts below. On appeal to this Court Golam Rahman and Najoo Bibee were substituted on the record as heirs of Yakub Husain who had died, and the appeal was dismissed with costs as against Golam Rahman and was decreed on compromise as between the Appellant and Najoo Bibee. As regards Najoo Bibee, it was ordered that the decree of the lower court be set aside and the said Appellant do recover the money due to him by sale of 4 annas share of the properties mentioned in the schedule to the plaint. The Appellant applied for execution of this decree against Najoo Bibee not making Golam Rahman a party to the execution. Golam Rahman came in and alleged that he was the sole mutwali of the property and that the property was *wakf* and could not be sold in execution. The first court disallowed this objection and ordered execution to proceed. On appeal the learned District Judge set aside this order and rejected the Appellant's application for sale. The learned Judge held that the direction in the decree that the Appellant should recover the money due to him by sale of a quarter of the property did not authorise the sale of the property in execution of that decree, but only enabled the Appellant to execute the former decree upon the mortgage. The suit of Yakub was a suit for a declaration and could not terminate in the learned Judge's opinion in a mortgage-decree in favour of the Defendant.

I am not prepared to say that if the parties settled their differences in such a way that the Defendant was declared entitled to recover money from the Plaintiff, a compromise decree of that nature could not be enforced in ordinary execution. But in my opinion, the High Court decree is incapable of execution. Yakub was succeeded by Golam Rahman and Najoo. He had obtained a decree that the property was dedicated to the diety and inalienable. The appeal against that decree was dismissed, as against one of his joint representatives, *in toto*, and not only so far as it affected three quarters of the property. That is a final decision between the Appellant and Golam Rahman as a part representative of the former mutwali that the property is dedicated to the diety and inalienable. It appears to me that a direction in the same decree that a portion of the property can be sold is irreconcilable with the rest of the decision and makes it impossible to carry the whole decree into effect, or in other words, makes the decree incapable of execution. The case is somewhat obscured by the fact that the representative of Yakub against whom the whole appeal was dismissed is Golam Rahman. He was the original mortgagor, and it is impossible for him in his personal capacity to resist the mortgage. But his personal conduct does not bind him as a mutwali, and there cannot in my opinion be any question of estoppel. The estate which has been dedicated to the deity cannot be prejudiced by the acts of a perhaps unworthy representative. In this matter Golam Rahman objects, as the mutwali of the endowment, that the property is not saleable. The decree which is being executed shows that his contention is well founded. It may be that he is only a joint mutwali, but he is interested in and entitled to defend every inch of the property, as one at least of the trustees of the endowment. In these circumstances, it seems to me

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that he is entitled to succeed as such trustee, whether the former proceedings are or are not conclusive against him in his individual capacity.

Reliance, however, has been placed on the decision in *Shaikh Golam Rahman* v. *Surendra Nath Ray**. The facts in that case were exactly the same except that the creditor was different. That case also had arisen out of a mortgage by Golam Rahman, and a suit by Yakub, which was decided together with the suit out of which this case arises by the same judgment. And the learned Judges held that the creditor was entitled to succeed.

The learned Judges, however, seem to have been unaware that Golam Rahman had with Najoo Bibee been substituted in the former case for Yakub. They say :—"The suit which was instituted by Yakub Husain was instituted against the present decree-holders and the judgment-debtor Golam Rahman, the latter being made a *pro forma* Defendant. The Plaintiff Yakub Husain in that suit no doubt obtained a decree against the two Defendants, but there was no decree in favour of the *pro forma* Defendant Golam Rahman against the present decree-holders, who were also Defendants. The decree which Yakub Husain obtained did not inure to the benefit of Golam Rahman. Then the case came before this Court in second appeal. The widow of Yakub Husain compromised the case, allowing the decree-holders to proceed against the 4-anna share of the property of Yakub. There was no compromise effected between the decree-holders and Golam Rahman and the appeal of Yakub Husain against Golam Rahman was dismissed." As a *suit in* of fact Yakub's appeal was not dis- *mutwali*, It was not he that appealed. The creditor's appeal against him was dismissed and certainly this dismissal of the appeal inured to the benefit of his representatives.

I am not prepared, therefore, to accept this decision as binding upon us. It proceeds upon facts and does not lay down any principle of law.

On looking into the judgment of 1904, I see that the property was held to be *wakf* and that the creditor could not proceed against it except in so far, of course, as Golam Rahman had a personal interest in it. The learned Chief Justice said—"The finding of the Court below is that all the properties were *wakf* properties and upon the terms of the *wakfnama*, as printed in the paper-book, the view taken by the Court below seems to be right.

"The Court below has been careful to leave open any question of liability as against Golam Rahman in respect of any beneficial interest that he may have in the *wakf* property. I think, therefore, that these appeals must be dismissed with costs, as against the Respondent Golam."

It has been argued that no appeal lay to the District Judge and that therefore the Munsif's order should be restored. But it is clear that an appeal lay. It was held in *Kartik Chandra Ghosh* v. *Ashutosh Dhara* (1), which may be regarded as overruling *Jogendra Nath Sarkar* v. *Gobinda Chandra Dutt* (2), that when a judgment-debtor claims property not in his personal capacity, but as *shebait* for an idol, who was not a party to the suit, the case does not come under sec. 47, C. P. C., and no appeal lies. But in this case Golam Rahman is a party to the suit

17 of the * No. 20 of 1907. Unreported.

(1) 16 C. W. N. 26 : s. c. I. L. R. 39 Cal. 298 (1911).

(2) I. L. R. 35 Cal. 864 (1908).

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both in his personal capacity and also in his representative capacity.

Then it is argued that the case may be regarded as a continuation of the original execution proceedings and not as an execution of the High Court decree. But when the original execution was interrupted by a suit for a declaration that the property could not be sold and that declaration was decreed, the decision is just as fatal to the former as to the subsequent execution.

The Deputy Registrar who appears for the minor successors of Najoo Bibee supports the Respondent.

In my opinion, the execution cannot proceed in the face of the decision of 1904. The appeal is accordingly dismissed with costs. We assess the hearing fee at three gold mohurs.

RAY, J.—I agree in holding that the compromise decree is incapable of execution. It is not correct to say that the decree-holders were to execute their original mortgage-decree. That decree has become merged in the compromise decree so far as the mortgaged property which formed the subject of suit by Yakub is concerned. The compromise decree is incapable of execution, because Golam Rahman objects that the property is *wakf* and not saleable. He was a party to the suit which resulted in the compromise decree and when that decree is sought to be executed, he can properly come in under sec. 47, C. P. C. His brother had it established as against these decree-holders that the property was *wakf* and he as a representative of his brother sets up that decree as barring execution against it. The Full Bench case of *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (2) has no application to the present case. There is no estoppel and sec. 43 of the Transfer of Property Act does not stand in the way. Here Golam Rahman has not acquired any interest in the property in the sense in which the word 'interest' has been used in the section. The property has been found to be the property of the deity and Golam Rahman is one of the mutwalis. He can well say—I deemed the property not to be *wakf* and so mortgaged it to you, but now that it has been established to be *wakf* at the instance of my brother and the trust has devolved on me as one of the representatives of my brother, I am bound to tell you that you cannot sell. It appears to me, there is no answer to this.

(2) 16 C. W. N. 26: s. c. I. L. R. 39 Cal. 298 (1911).

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL NO. 5 OF 1911.

JENKINS, C. J. MOOKERJEE, J. 1913, 29, May.	KESHWAR BHAGAT, Defendant, Appellant, *v.* SHEO PROSAD LAL and others, Plaintiffs, Respondents.

Rent free holding, grant of, if valid—"Lakhiraj," meaning of—"Belagan," meaning of—Record-of-rights, entries of holdings in, as "belagan" and "kabillagan," effect of—Presumption from long and uninterrupted non-payment of rent, that holding "lakhiraj."

The word "belagan" means simply "not paying agricultural rent" and does not imply any thing as to liability to pay rent, whilst the word "kabillagan" indicates a tenancy for which rent is not actually paid, but which is liable to pay rent.

Where in respect of a holding entered in the record-of-rights as "belagan" the Dis-

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trict Judge presumed, from evidence of long and uninterrupted possession without payment of rent, a grant of land under conditions which make it rent-free :

Held—*That the District Judge was entitled to make that presumption and his determination in no way conflicted with the entry in the record-of-rights.*

There can be a rent free grant of permanently settled land and such a grant cannot be treated as a nullity by the grantor or his heirs or by any person claiming through him.

MOHAMED AKIL *v.* ASADUNNISSA BIBI (1) *referred to.*

This was an Appeal preferred on the 3rd of January 1911, against the decree of Mr. Justice Caspersz, dated the 6th of December 1910, in appeal from Appellate Decree No. 1327 of 1909.

The Plaintiff Appellant brought this suit to recover possession of some land as being his *zerait* land and in the alternative he prayed for assessment of rent thereon. In the record-of-rights there were two entries (1) in the column "landlords to whom rent is payable"—the name of the Plaintiff and (2) in the column where rent payable is to be entered, the words "belagan."

Both the Court of first instance and the Court of Appeal agreed in holding that the Plaintiff had failed to prove the land in suit to be his *zerait.* It was argued on behalf of the Plaintiff, however, that the entry in the record-of-rights amounted to an entry that the land was *mal.* The lower Appellate Court considered the two entries to be mutually conflicting and declined to place any reliance on them. On the other hand it found that the Plaintiff had for a long period not realised any rent from the land. It accordingly held that the Plaintiff had failed to prove that the land was subject to payment of rent and dismissed the suit.

In Second Appeal, before Caspersz, J., it was argued on behalf of the Plaintiff that the land being admittedly within the zemindary of the Plaintiff, and the Defendant being his tenant, the word "belagan" merely implied that the land though not assessed, was assessable with rent His Lordship gave effect to this contention, and in the course of his judgment remanding the case for assessment of rent observed as follows :—

In my opinion, the decision of the District Judge cannot be supported. A variety of reported cases have been cited and discussed at the Bar. I may mention the following cases in this connexion : *Harihar Mukhopadhya* v. *Madhab Chandra Baboo* (2), *Batai Ahir* v. *Bhuggobutty Kocr* (3), and *Sheikh Milan* v. *Mahomed Ali* (4).

No doubt the onus of proof was upon the Plaintiff but that fact does not relieve the Defendant from adducing evidence to rebut the presumption that arises from the entries in the record-of-rights. The relation of landlord and tenant admittedly exists between the parties upon that presumption and although the Defendant may have never paid any rent, it does not follow that he will never be liable to discharge that obligation to the landlord. No suit was brought to contest the entries in the record-of-rights. The Defendant failed to produce any *sanad* or to rebut the presumption of correctness attaching to the record.

The learned Vakil for the Defendant has relied in support of the District Judge's judgment upon Art. 130, Sch. II, of the Limitation Act. That article provides a period of limitation of 12 years for the resumption or assessment of rent-free land, the period running from the date when the right to resume or assess the land first accrues But the obligation to pay rent is a recurring obligation

(1) 9 W. R. 1 (1867).

(2) 14 Moo. I. A. 152 (1871).
(3) 11 C. L. R. 476 (1882).
(4) 10 C. W. N. 494 (1908).

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accruing daily in favour of the landlord. In my opinion, Art. 130 has no concern with the circumstances of the present litigation.*

The Defendants preferred this further appeal under sec. 15 of the Letters Patent.

Babus Surendra Madhub Mullick and *Provas Chandra Mitra* for the Appellant.

Babu Lukshmi Narayan Singh for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is an appeal from a judgment of Mr. Justice Caspersz, and it raises the question whether the Defendant's holding is liable to assessment for rent. The Plaintiff is the zemindar, and in the record-of-rights there is an entry of this particular holding in the name of the Defendant, but as "belagan." From a very useful publication, being a Guide and Glossary to the Survey and Settlement Operations in Behar, we learn the sense in which the settlement officers use the term "belagan." It indicates a rent-free tenure; and it is explained that "belagan" means simply "not paying agricultural rent" and does not imply any thing as to liability to pay rent. This is in contrast with the expression "kabil-lagan" also to be found in the same Glossary, which describes a tenancy for which rent is not actually paid, but which is liable to pay rent. In this case the Defendant pleaded a "lakhiraj" title. The word "lakhiraj" is often used loosely. In strictness it indicates a freedom from liability to revenue, but it is constantly used as indicating exemption from liability to pay rent, and it may fairly be taken in this case that the Defendant did plead a freedom from liability to pay rent. The decision of the lower Court of Appeal was that the Plaintiff had failed to prove that the land was subjected to rent; and the learned Judge consequently allowed the appeal and set aside the decree of the lower Court. Mr. Justice Caspersz on appeal has reversed that decree and sent back the case to the lower Appellate Court for a determination of the fair rental to be imposed on the land in suit. It is from this determination that the present appeal has been preferred.

In my opinion this appeal must succeed; for I think the finding of the lower Appellate Court is conclusive in this case. It has been argued before us that the entry "belagan" is decisive in favour of the zemindar. I fail to see that. The significance of the entry is indicated in the Glossary to which I have already drawn attention, and it is apparent from this, that while it may be indicative of a tenure, it also shows that no rent in fact was paid and makes no pronouncement either way as to liability to pay rent. It cannot, therefore, be said that the determination of the District Judge in any way conflicts with the entry in the record-of-rights. His judgment rests on a familiar rule of law, which has not been disputed before us, and in accordance with which the Court may, from evidence of long and uninterrupted possession without payment of rent, presume a grant of land under conditions which make it rent-free, though it may not be revenue-free. The difficulty in this case has largely arisen from a failure to distinguish between rent-free and revenue-free. It is no doubt true that freedom from revenue cannot now be effectively created, but the decision of the Full Bench in *Mohamed Akil* v. *Asadunnissa Bibi* (1), and more particularly that portion of Sir Barnes

(1) 9 W. R. 1 (1867).

Peacock's judgment, which is reported at pp. 41 and 61, makes it clear that there can be a rent-free grant of permanently settled land and such a grant cannot be treated as a nullity by the grantor or his heirs or by any person claiming through him. The zemindar in this case cannot claim the position of advantage which would have accrued to him, had he been the purchaser at a revenue sale, and we have to decide this case apart from that; and so regarding it, I think, we must hold that the learned Judge of the Lower Appellate Court was entitled to make the presumption he did, and that as a result we ought to decide that the Appellant before us holds the land free from liability to rent.

We must, therefore, set aside the judgment of Mr. Justice Caspersz and restore the decree of the District Judge with costs of this hearing and of the hearing before Mr. Justice Caspersz.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1478 OF 1913.

MOOKERJEE, J. BEACHCROFT, J. 1914, Heard, 24 and 25, March. Judgment, 26, March.	BATA KRISHNA RANA, Plaintiff, Petitioner, *v.* JANAKI NATH PANDAY, Defendant, Opposite Party.

Bengal Tenancy Act (VIII of 1885), secs. 61, 195 (e)—Putnidar, *if may deposit rent in Court in case of doubt as to who is entitled to receive it—Putni Regulation (VIII of 1819).*

A putnidar *who entertains a* bonâ fide *doubt as to who is entitled to receive rent from him, is entitled to deposit the rent in Court under sec. 61 of the Bengal Tenancy Act, no provision of the Putni Regulation (VIII of 1819), being in any way affected by that section.*

This was a Rule granted on the 3rd of December 1913 against an order of Babu Chandra Bhusan Banerjee, Small Cause Court Judge, Berhampur, dated the 27th of September 1913.

The facts of the case material to this report will appear from the judgment.

Babu Brojendra Nath Chatterjee for the Petitioner.

Babu Korunamoy Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This Rule raises an important question of first impression, namely, whether it is competent to a *putnidar* to avail himself of the provisions of sec. 61 of the Bengal Tenancy Act, notwithstanding cl. (*e*) of sec. 195. The circumstances under which the question arises for consideration are not disputed and may be briefly stated.

The Plaintiff alleges that he holds a *putni* talook. That on several occasions he had paid rent to the Mustaphis, that thereafter on the assertion that the estate had been sold for arrears of revenue and that the certified purchaser had conveyed title to him, one Janaki Nath Panday (the present Defendant) had realised rent from him on threat of proceedings under Reg. VIII of 1819 and that recently on the 11th December 1912 in a suit between the representatives of the original proprietors and the Defendant, it was decided that the property was not comprised within the estate sold for arrears of revenue. The Plaintiff asserts that, under these circumstances, he entertained a *bonâ fide* doubt as to who was entitled to receive the rent and that consequently he was entitled to make a deposit

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under cl. (*e*) of sec. 61 of the Bengal Tenancy Act. He accordingly made a deposit on the 15th May 1913. Notice was thereupon issued to the rival claimants. One of these, the transferee from the purchaser at the revenue-sale, entered appearance and prayed that the money deposited might be retained in Court, as he intended to institute a suit within a fortnight for the establishment of his alleged right to the rent. A receipt was then granted to the Plaintiff by the Court where the deposit had been made. The claimant, however, did not institute the suit. On the other hand, he took recourse to the summary procedure laid down in Reg. VIII of 1819 for recovery of arrears of rent. The consequence was that the Plaintiff was constrained to deposit the money claimed to prevent the sale of his tenure. The Platntiff now sues to recover damages from the Defendant on the allegation that at the time he was compelled to make the deposit to prevent the sale, there was no arrears due from him. The Defendant resisted the claim on the ground that an arrear of rent was due from the Plaintiff who was not competent to make a deposit under sec. 61.

It cannot be disputed that sec. 61, literally construed by itself, is applicable to the case of the Plaintiff. It provides that when the tenant entertains a *boná fide* doubt as to who is entitled to receive the rent, he may present to the Court having jurisdiction to entertain a suit for rent of the tenure an application in writing for permission to deposit in Court the full amount then due. It is not questioned that the Plaintiff is a tenant. It is also not seriously contested, and upon the facts stated it cannot be contested, that in the events which have happened, the tenant may entertain a *boná fide* doubt as to who is entitled to receive rent from him. Sec. 61 is, consequently, *primâ facie* applicable. But reliance is placed, on behalf of the Defendant, upon cl. (*e*) of sec. 195, which provides that nothing in the Bengal Tenancy Act shall affect any enactment relating to *putni* tenures in so far as it relates to those tenures. The question, consequently, arises whether sec. 61 does in any way affect an enactment relating to *putni* tenures. We invited the learned Vakil for the Defendant to specify the particular provision of Reg. VIII of 1819 which is affected by sec. 61 of the Bengal Tenancy Act, but he was constrained to admit that he could not point out any such section. On the other hand, an examination of the provisions of Reg. VIII of 1819 indicates that there is no section which corresponds to sec. 54 of the Bengal Tenancy Act. If the Putni Regulation had contained a provision as to the time and place for payment of *putni* rent, it might have been plausibly argued that sec. 61 of the Bengal Tenancy Act, if applied to *putni* tenures, would affect the provisions of the Putni Regulation. On these grounds, we hold that sec. 61 is applicable to a *putnidar* and it was open to the Plaintiff to deposit in Court the *putni* rent in the manner he did. The consequences which follow from such a deposit are stated in sub-sec. (2) of sec. 62, which provides that a receipt given under the section shall operate as an acquittance for the amount of the rent payable by the tenant and deposited in the same manner and to the same extent as if that amount of rent had been received by the person entitled to rent. Consequently, at the time when the proceedings under Reg. VIII of 1819 were instituted at the in-

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stance of the Defendant, there was no arrear of rent due from the Plaintiff. The inference follows that the Plaintiff is entitled to be indemnified on account of money paid under wrongful compulsion of legal process. *Fatima Khatoon* v. *Mohamed Jan* (1), *Dulichand* v. *Ram Kishen* (2), *Kanhaya Lal* v. *National Bank* (3).

The result is that this Rule is made absolute and the decree of dismissal made by the Court below set aside. The suit will stand decreed for the sum of Rs. 110-11-6 with interest thereon at the rate of 12 per cent. per annum from the 15th May 1913 up to this date. The sum decreed will bear interest at the rate of 6 per cent. per annum from this date till realisation. The Plaintiff will also recover his costs both here and in the Court below with interest as usual. We assess the hearing fee in this Court at three gold mohurs.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 5 OF 1914.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
Heard,
30, January
and
3, February.
Judgment,
3, February.

PROKASH CHANDRA KUNDU and ors., Accused, Petitioners,
v.
KING-EMPEROR, Opposite Party.

Excise Act [V (B. C.), of 1909], secs. 67, 70—Rules framed under sec. 85—R. 8, Chap. X, r. 75—Distinction between the old and the new Acts—Sec. 67, scope of—"Open place" in r. 75, meaning of—Sec. 70, duty of a searching officer under—Rioting—Separate sentence under sec. 353, I. P. C., when common object of riot is to commit that offence.

Where the Deputy Inspector of Excise on receipt of information that he would find certain persons in the act of illicitly distilling liquor if he went to a certain village went there with two Sub-Inspectors and a large number of peons, who actually saw the Petitioners removing the distilling apparatus, but before they had time to enter the house and arrest these persons or to make any search whatever the Petitioners proceeded to beat the peons, and were convicted under secs. 147 and 353, I. P. C.:

Held—*That as there was no search, the conviction could not be attacked on the ground of non-observance of the formalities relating to search.*

Sec. 67 of Act V of 1909 gives wider powers to excise officers than were given to them by the Act of 1878. The words "any officer of the excise" in that section would include a peon.

The expression "open place" in r. 75 of the rules framed under sec. 85 which lays down that officers below the rank of Inspector of Excise may exercise in open places only the power conferred by sec. 67 means "open" in the ordinary sense as opposed to "closed," but does not include a dwelling house; but two Sub-Inspectors and a Deputy Inspector being present there was no restriction on their entering the house for the purposes mentioned in sec. 67.

The letter of the law appears to make it necessary for an officer acting under sec. 70 of the Act to record the grounds of his belief before he enters to search any place, but the provisions of sec. 67 are not with regard to the searching of any place, but with regard to the arrest of any person

(1) 12 M. I. A. 65 (1868).
(2) L. R. 8 I. A. 93 : s. c. I. L. R. 7 Cal. 648 (1881).
(3) 17 C. W. N. 541 ; s. c. L. R. 40 I. A. 56 (1913).

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openly committing an offence whether in a house or in the open, and the officer who is empowered to arrest under sec. 67 in a house, that is any officer of the rank of Sub-Inspector or above it need not observe the formalities in conducting a search as laid down by r. 8, Ch. X, of the Excise Rules.

That persons who are shown to have committed a separate offence under sec. 353 should receive a separate punishment even although the common object of the riot is to commit that offence.

This was a Rule against the order of the Sub-Deputy Magistrate of Arambagh, dated the 19th of November 1913, convicting the Petitioners under sec. 147, I. P. C., and sentencing them each to undergo rigorous imprisonment for two months and further convicting the Petitioners Nos. 1 and 3 under sec. 353, I. P. C., and sentencing them each to undergo 2 months' rigorous imprisonment in addition, an appeal from which order was dismissed by the Deputy Magistrate of Hooghly, on the 12th of December 1913.

The facts material for this report will appear from the judgment.

Mr. Caspersz and *Babu Monmotho Nath Mukherjee* for the Petitioners.

Mr. Orr and *Babu Srish Chandra Chaudhury* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling on the District Magistrate of Hooghly to show cause why the conviction and sentence passed on the petitioners should not be set aside or otherwise modified as to this Court may seem good on the grounds, *firstly*, that there having been no search in accordance with the provisions of the law and the Excise officers not having observed any of the formalities required by law, the resistance offered to them was not unlawful and the conviction under sec. 147 is bad in law ; and *secondly*, that the Excise officers were not acting in the exercise of their duty and the conviction under sec. 353, I. P. C., is therefore bad in law.

We have had the provisions of both the Excise Acts of 1878 and the present Act V of 1909 (B. C.) laid before us and we find that the provisions of the new Act are substantially the same as that of the old, but are stated with much greater clearness and in much greater detail. We may remark that in one particular, with which we are specially concerned in this case, sec. 67 gives wider powers to Excise officers than any powers that were given to them by the Act of 1878. Sec. 67 says "any officer of the Excise," which would include a peon, "may subject to any restrictions prescribed by the Local Government by Rules made under sec. 85 arrest without warrant any person found committing an offence punishable under sec. 46 ;" and for the present we need not concern ourselves with secs. 68, 69 and 70 which prescribe a formal procedure upon information to the Collector, to any Collector or Magistrate or to a Collector or Excise Officer not below such rank as the Local Government by notification may prescribe.

What is stated in this case is that the Deputy Inspector of Excise had information that he would find certain persons in the act of illicitly distilling liquor if he went to this village. He accordingly went with two Sub-Inspectors and a large number of peons who, from the finding, actually saw the Appellants and their men removing the distilling apparatus, which the Magistrate found they probably afterwards destroyed, as no traces of it have been found. But before they had

time to enter the house and arrest these persons or to make any search whatever, the accused sallied out and proceeded to beat the peons. The unlawful assembly was joined by two men of higher rank, Prokash Chandra Kundu and Basanta Bhattacharjee, and the finding is clear that these two men were actually found taking part in the rioting. But as regards the accused Bassanta, the first Court held that inasmuch as he did not take any active part in the assault he might be absolved from the charge under sec. 353, which was a separate substantive charge and not raised by implication under sec. 149.

Taking then the simple facts it would appear that these officers were acting under sec. 67 of Act V of 1909, and that before they had time to do anything lawful or unlawful, they were wantonly assaulted by the Dubys encouraged and assisted by the other two petitioners Prokash and Basanta. That being so, the legal questions on which the Rule was issued do not seem to arise. There was no search and therefore it cannot be said that there was a search not in accordance with the provisions of the law, and there were no formalities to be observed at the time the assault was committed.

We wish to make it clear what it is that the law requires in the way of formalities. There are two portions of the Rules made under sec. 85 which deal with duties of officers in this respect. The one is rule 75 at page 69 of the rules dealing with restrictions of the exercise of powers conferred by secs. 66 and 67, and that says, "Officers below the rank of Inspector of Excise may exercise in open places only the power conferred by sec. 67;" the expression open place in this rule means open in the ordinary sense as opposed to closed, but does not include a dwelling house. Obviously two Sub-Inspectors and a Deputy Inspector being present, there was no restriction on their entering the house for the purposes mentioned in sec. 67. But as a matter of fact as we have seen they did not enter the house.

Then there are the provisions of Chap. X of the Rules dealing with detection, investigation and trial of offences. Rule 8 of that Chapter lays down that the provisions of the Criminal Procedure Code, especially secs. 101, 102 and 103 which apply to searches must be carefully observed by the officer who makes a search with or without warrant. Every officer who conducts a search will fill up Form 126. When a search is made without warrant, the officer conducting the search will record either separately or at the foot of the counterfoil of Form 126 the grounds of his belief that an offence punishable under secs. 46, 48, 52 or 53 has been committed and the reasons for considering that it is not advisable to obtain a search warrant. Here again this Rule has no application to this case, because no search was made. But supposing that the officer had entered the house under sec. 67 and tried to arrest without warrant any person found illicitly distilling, or to seize and detain any article which he had reason to believe to be liable to confiscation under the Act or detain and search any person upon whom, and any vessel, raft, vehicle, animal, package, receptacle or covering in or upon which he may have reasonable cause to suspect any such article to be,—it would not have been necessary for him to record his reasons before acting under sec. 67. If he was acting under sec. 70, the letter of the law appears to make it

necessary that the ground of his belief should be recorded before he enters to search any place. But the provisions of sec. 67 are not with regard to the searching of any place. They are with regard to the arrest of any person openly committing an offence whether in a house or in the open ; and the officer who is empowered to arrest under sec. 67 in a house, that is, any officer of the rank of Sub-Inspector or above it, need not fill in the Form 126 unless he finds it necessary further to make a search in the house. Then he will fill up the Form for the information of the authorities, and he will record at the foot of the counterfoil of the Form the ground of his belief, etc. But here, as we have said, there was no occasion for a formal search. Certain persons were seen committing an offence, and before they could be arrested, the Excise officers were beaten in the open, and the articles which constituted the evidence of the offence were removed.

That being the finding we think it is clear that the assault upon these officers was wholly unjustifiable, and that the riot was one of a very lawless and serious nature, and that the petitioners have been very leniently dealt with.

As regards the separate sentence under sec. 353, it is clear that persons who are shown to have committed a separate offence under sec. 353 should receive a separate punishment even although the common object of the riot is to commit that offence; and the argument of the learned Counsel that the accused Basanta Bhattacharjee was acquitted, he therefore cannot be convicted under sec. 147 with the common object of committing an offence under sec. 353, shows to what an *impasse* any doctrine to the contrary would lead us. The Rulings of the Court have for a long series of years been to the effect that separate sentence should not be passed upon people convicted of rioting for the offence which is specifically stated to have been the common object of the assembly, unless, as has been held in several cases, a specific charge is laid against the individual members of committing such an offence. In this case it would appear that all the offenders were rightly convicted of rioting and that two of the petitioners were also found to have taken part in the assault ; whereas the second petitioner Basanta Bhattacharjee was found to have taken no part in the actual assault. But it is clear that the encouragement of riot of this kind is quite sufficient to bring him within the purview of the law of rioting ; and it is also clear that those persons who committed separable acts of assault should be more severely punished than those who did not. The question is rather an academical one, inasmuch as the whole of the sentence which is passed could very well have been given under the rioting section without having recourse to the other section.

For all these reasons we are of opinion that the Rule must be discharged. The Petitioners will surrender to their bail and serve out the remainder of their sentence.

Rule discharged.

[CRIMINAL REFERENCE.]

No. 45 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914.
Heard,
26, March.
Judgment,
31, March.

DEDAR BUX and another,
Accused,
v.
SYAMAPADA MALAKAR,
Complainant.

Criminal Procedure Code (Act V of 1898), secs. 116

DEDAR BUX *v.* SYAMAPADA MALAKAR.

4 (1) (h), *190, cl.* (a), (c)—*Cognizance—Jurisdiction of Magistrate to summon persons not named in complaint, on evidence for prosecution—Cl.* (c), *sec. 190, scope of—Complaint and complainant, meaning of.*

A complaint was filed against several persons before the Magistrate under secs. 342, 363, I. P. C., by the husband of a girl against whom the offences were said to have been committed. The Magistrate ordered the complainant to prove his case, but before the date fixed the complainant filed a petition withdrawing the complaint. The Magistrate, however, examined witnesses on the date fixed and found that there was no satisfactory evidence against the persons complained against, but he summoned two other persons under secs. 342, 363, 353, I. P. C., holding that there was evidence against them :

Held—*That the Magistrate took cognizance under cl. (1)* (a) *of sec. 190, Cr. P. C., and had jurisdiction to try the persons summoned by him.*

A Magistrate having taken cognizance of a complaint can also proceed against another person, who although not mentioned in the complaint, appears on the evidence for the prosecution to have been concerned in the commission of the offence.

Cl. (c) *of sec. 190 deals with cases where there has been neither a formal complaint nor a police report, and independently of these the Magistrate takes the initiative upon information received from any person other than a police officer or upon his own knowledge or suspicion.*

It is clear from the definition of "complaint" in cl. (h), *sub-sec. (1) of sec. 4, Cr. P. C., that it is not necessary that the complainant should always be the party directly aggrieved by the commission of the offence and the husband of the girl was a competent person to apply to the Magistrate with a view to his taking action under the Code.*

That in the circumstances of the case the Magistrate was right in ordering examination of witnesses in order to ascertain if there was any substance in the petition of withdrawal and in the complaint.

This was a Reference under sec. 438, Cr. P. C., from the Sessions Judge of Hooghly, recommending that the order of the Deputy Magistrate of Hooghly, dated the 20th November 1913, issuing summons on each of the accused under secs. 342, 363 and 352, I. P. C., be set aside for the reasons set forth in his letter of reference.

The facts will appear from the letter of reference, the material portion of which is set out below :

"On the 15th September 1913, Syamapada Das Malakar lodged a petition of complaint under secs. 342 and 363 of the Indian Penal Code before Babu S. C. Sen, Deputy Magistrate of Hooghly, against (1) the Hon'ble Maulvi Mazharal Anwar, (2) his wife, (3) and (4) his two daughters. On examination by the Deputy Magistrate the said Syamapada Malakar stated that his wife, Siddheswari Dasi, a girl of 11 years of age, was missing about the middle of Asarh last (latter end of June or beginning of July 1913) from her mother's house at Bali in the town of Hooghly, that on information received from one Nanda Madak and one Suren Madak that the girl was seen by them at Maulvi Anwar's house, Sudhir Ranjan Kar, brother of the girl, lodged information before the Police, that on hearing this Maulvi Anwar sent away the girl from his house, that the girl returned to her father's house the preceding Saturday (13th September 1913), that she told

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the complainant that when one day she was supplying flowers to shops near Anwar Sahib's house, the latter 'signed to her and took her to his house and made her a Mahomedan, and made her eat food forbidden to Hindus and kept her confined in his house so long.' After the examination of the complainant the Magistrate recorded the following order on the 15th September 1913: 'The charge is a serious one and is against a highly respectable inhabitant of this town. The complainant has got back his wife who is said to be only 11 years of age. Complainant will prove his case on the 30th instant.' This, under sec. 202, implies that the complainant was distrusted. On the 17th September 1913, long before the date fixed for the preliminary enquiry, the complainant Syamapada made a petition for withdrawing the case saying that he had come to know on enquiry that his wife, advised by some bad people during his absence, had made untrue statements through fear, that he would not be able to prove the truth of the complaint, that the accused were innocent and that he did not want to prosecute the case, which should be dismissed. The application was ordered to be put up on the date fixed.

"On the 30th September 1913, which was fixed for the hearing of the case, the following order was made: 'The complainant is present. He applied before, saying he was unwilling to proceed with the case. This is a serious charge. The witnesses must be examined. Summon them and fix the case for the 3rd October next.' After 3 adjournments and examining the girl and the witnesses the Magistrate recorded the following order on the 20th November 1913: 'Read Police papers and the evidence. The real complainant in this case is the girl herself named Siddheswari Dasi. From her statement and the statement of other witnesses it appears that there is no satisfactory evidence against the persons complained against. There is, however, evidence against one Dedar Bux who is said to have made the girl a Mahomedan and another woman, a maid-servant named Bason. These two persons Dedar Bux and Bason will be summoned under sec. 342, I. P. C., and sec. 363, I. P. C., and sec. 352, I. P. C. Fix case for the 2nd December next.'

"This order of the 20th November 1913 is recommended for revision for the reasons given below:—

"The Magistrate says he has taken cognizance of the case under sec. 190 (*a*), Criminal Procedure Code, that is, on a complaint, and wanted the complainant to prove his case. The complainant said that he could not prove the case, and that the persons complained against were innocent. After this, in a case taken cognizance of on a complaint, there was nothing else to do than to dismiss the complaint under sec. 203. The order of the 30th September was without jurisdiction in a complaint case, as the complainant declined to prove his case, which he admitted was not true. The seriousness of the allegations made and the position of the persons involved in them might perhaps have made a further inquiry desirable; but that, I apprehend, could not be done as a continuation of the complaint case. It appears that there was a Police inquiry into the matter, but nothing came out of it. And the only way in which such further action as might be considered to be desirable in the ends of justice could be taken, would be, so far as I understand the scheme of the Crimi-

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nal Procedure Code, on the motion of the Magistrate himself under sec. 190 (1), (*c*), a power which the present Magistrate does not possess. In his explanation the learned Magistrate takes up a position which seems to show that he was thinking of *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (1). But the facts are different here. There it was a case on a Police report, of which the Magistrate had full seisin; it was not a case on a complaint, governed by secs. 202 and 203 of the Criminal Procedure Code, and what is more pertinent, there was no repudiation of the complaint before even the preliminary inquiry was held, and before any process had issued. I recommend that the whole proceeding be quashed, and the complaint dismissed under sec. 203 of the Criminal Procedure Code."

Babus Dasarathi Sanyal, Debendra Narayan Bhattacharjee and *Gour Chandra Pal* for the Petitioners.

This is a reference by the Sessions Judge for the quashing of the summons against the accused.

[TEUNON, J.—Do you ask us to quash the proceedings on the merits?]

The Judge has made a reference on one point, but the whole record is before your Lordships and having regard to the peculiar circumstances of the case I ask your Lordships to quash the proceedings on the merits.

The Magistrate should have dismissed the complaint, because the complainant when called upon to prove his case appeared in Court and wanted to withdraw. Whatever the Magistrate did thereafter was on his own responsibility.

The only fact alleged against Dedar Bux who is one of the two persons summoned is that he converted the girl to Mahomedanism. But this is neither kidnapping nor wrongful confinement for which offences summonses have been issued.

This case was started on the complaint of the husband, and the Magistrate holds the erroneous view that the girl wife was the real complainant. If the case is found false, she will say that she never set the law in motion.

[SHARFUDDIN, J.—Although only four persons were named by the complainant, the Magistrate has taken cognizance of the offence and he has summoned the Petitioners on the evidence—that is the difficulty in your way.]

[*Mr. Orr.*—I have only to refer your Lordships to *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (1), *Jagat Chandra Mozumdar* v. *Queen-Empress* (3)].

There is also a case in *Khudiram Mookerjee* v. *Empress* (2). In the case in *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (1), there was a police report. In the information on which investigation was started, the accused was mentioned, though not by name.

[TEUNON, J.—The case in *Jagat Chandra Mozumdar* v. *Queen-Empress* (3) was not on a police report.]

The observation in that case is *obiter*.

[TEUNON, J.—That may be so; but what about the case in *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (1).]

The case was not properly argued at the Bar. One would expect the case in *Khudiram Mookerjee* v. *Empress* (2) to be cited. The facts of the present case are distinguishable. Mr. Justice Prinsep in his commentary says that the case may require further consideration.

(1) 4 C. W. N. 367 (1900).

(2) 1 C. W. N. 105 (1896).

(3) I. L. R. 26 Cal. 786 (1899).

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There is another case decided by Prinsep and Hill, JJ., *Raghab Acharya* v. *Empress* (4).

[SHARFUDDIN, J.—That case is against you.]

As regards the question why your Lordships should interfere at this stage, I refer to *Chandiproshad* v. *Abdur Rahman* (5). As observed by the then Chief Justice, whenever it is brought to the notice of this Court that a person is being subjected to the harassment of an illegal prosecution, it is the bounden duty of this Court to interfere.

The present case is one of harassing prosecution and should be quashed. This Court has always the power of quashing *mala fide* prosecutions. What can be more *mala fide* than what appears in the present case, namely, that a little girl was caught hold of by intriguing people who had this case started.

Mr. Orr for the Crown.

I do not agree that *Jagat Chandra Mozumdar* v. *Queen-Empress* (3) is *obiter dictum*. (Refers to p. 788.) The facts are like those of this case. *Charu Chandra Das* v. *Narendra Krishna Chakrabartty* (1) is somewhat different, but the principle is there.

[SHARFUDDIN, J.—*Khudiram Mookerjee* v. *Empress* (2) is against you.]

[TEUNON, J.—The case in *Khudiram Mookerjee* v. *Empress* (2), was not also argued at the Bar. So *Khudiram Mookerjee* v. *Empress* (2) and *Charu Chandra Das* v. *Narendra Krishna Chakrabartty* (1) are on the same footing.]

Babu Dasarathi Sanyal in reply.—*Jagat Chandra Mozumdar* v. *Queen-Empress* (3) is really *obiter*. A decision on a point of law on which the case is not decided is *obiter dictum*. The case was decided on an altogether different ground.

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

This is a reference made to this Court by the Sessions Judge of Hooghly. The facts which have led to the present reference are these: one Syamapada Malakar complained to the Magistrate against four persons, namely, the Hon'ble Maulvi Mazharal Anwar, his wife and his two daughters under secs. 342 and 363, I. P. C. His complaint was that his 11 years old wife, named Siddheswari Dasi, was missing from the middle of the month of Asarh, that is to say, the latter end of June or beginning of July 1913, that she returned on the 13th September 1913 and told him that while she was near the house of Maulvi Mazharal Anwar, he made a sign to her, took her to his house, made her a Mahomedan and further made her eat food forbidden to a Hindu and kept her confined in the house. On the filing of this complaint the Magistrate passed the following order: "The charge is a serious one and is against a highly respectable inhabitant of this town. The complainant has got back his wife who is said to be only 11 years of age. Complainant will prove his case on the 30th instant." On the 17th September 1913, long before the date fixed for the enquiry, the complainant made a petition for the withdrawal of the case saying that he had come to know on enquiry that his wife had made untrue statements through fear, that he would not be able to prove the truth of the complaint, that the accused were innocent and that he did not want

(1) 4 C. W. N. 867 (1900).
(2) 1 C. W. N. 105 (1896).
(3) I. L. R. 26 Cal. 786 (1899).
(4) 3 C. W. N. ccxxix (1899).
(5) I. L. R. 22 Cal. 181 (1894).

to prosecute the case which should be dismissed. This application was ordered to be put up on the date fixed, which was the 30th September. On the 30th September 1913 the following order was passed—"The complainant is present. He applied before, saying he was unwilling to proceed with the case. This is a serious charge. The witnesses must be examined. Summon them and fix the case for the 3rd October next." On the 20th November 1913 the following order was passed by the Magistrate—"Read police papers and the evidence. The real complainant in this case is the girl herself, named Siddheswari Dasi. From her statement and the statement of other witnesses it appears that there is no satisfactory evidence against the persons complained against. There is, however, evidence against one Dedar Bux who is said to have made the girl a Mahomedan and another woman, a maid-servant named Bason. These two persons, Dedar Bux and Bason, will be summoned under sec. 342, I. P. C., and sec. 363, I. P. C., and sec. 352, I. P. C. Fix the case for the 2nd December next." It is this order that has been referred to us for revision. The question is whether the Magistrate took cognizance of the case under sec. 190, cl. (1) (*a*) or under cl. (1) (*c*) of that section. If he had taken cognizance of the case under cl. (1) (*c*) of the section, he should have proceeded to observe the formalities provided in sec. 191, Cr. P. C. If he took cognizance under cl. (1) (*a*), the Magistrate had jurisdiction to try Dedar Bux and Bason against whom he issued processes. The Magistrate in question, we may observe, is not empowered by the Local Government to take cognizance under cl. (*c*) of sec. 190, Cr. P. C. The original complaint was no doubt not against Didar Bux and Bason Bibee, but the Magistrate had already taken cognizance of the offence mentioned in the complaint. From the evidence before him he came to the conclusion that there was not satisfactory evidence against the four persons mentioned in the complaint, but there was evidence against Dedar Bux and Bason Bibee of the offences under secs. 342, 352 and 363, I. P. C. The offences under the two former sections are compoundable, while the offence under the last is not compoundable. The complaint was of very serious offences; and this complaint was soon followed by a petition of withdrawal by the complainant and not by the girl against whom the offences were said to have been committed. We are of opinion that the Magistrate was right in ordering examination of witnesses in order to ascertain if there was any substance in the petition of withdrawal and in the complaint.

Now, the next question is whether the Magistrate could take cognizance of the offence against Dedar Bux and Bason Bibee which came to light in the evidence given by the witnesses. The Magistrate in his explanation has relied on the case of *Charu Chaadra Das* v. *Narendra Krishna Chackravarti* (1). The learned Sessions Judge, however, in his letter tries to distinguish the facts of this reported case from those of the present case by pointing out that the reported case was on a police report of which the Magistrate had full seisin and that there was no repudiation of the complaint in that case. The present case, however, is on a written complaint by the husband of the girl Siddheswari Dasi. The expression "complaint" has been defined in cl. (*h*), sub-sec. (1) of sec. 4, Cr. P. C. It is clear from the definition that it is

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not necessary that the complainant should always be the party directly aggrieved by the commission of the offence. The really aggrieved party is the complainant's wife. But according to the definition, the husband is a competent person to apply to the Magistrate with a view to his taking action under the Code.

In the above reported case the complainant had lodged his complaint before a Railway police officer against four Babus. At the time of the police enquiry the complainant had indentified one Bhutnath Mookerjee as one of the accused. This accused was sent up for trial and was convicted and sentenced. At the trial it appeared upon the evidence of one of the witnesses that Charu Chandra Das and Atul Krishna were concerned in the crime. The Deputy Magistrate issued summonses and instituted proceedings against these two. Against this a Rule was obtained from this Court. It was held that the Magistrate did not act without jurisdiction. It was also held in that case that the Magistrate had cognizance of the offence. The case having been duly referred to him and having cognizance of the offence it was his duty to proceed to deal with the evidence brought before him and to see that justice was done in regard to any person who might be proved by the evidence to be concerned in that offence. No doubt, in the reported case the complaint was made to a police officer who made a report. The present case was upon a complaint. In the reported case as well as in the present case cognizance of the offence was taken on the evidence produced on behalf of prosecution. If the Magistrate had received information from any person other than a police officer or on his own knowledge or suspicion he could not take cognizance of the offence as he would undoubtedly be barred under cl. (*c*) of sec. 190 of the Code. Cl. (*c*) deals with cases where there has been neither a formal complaint, nor a police report and independently of these the Magistrate takes the initiative upon information received from any person other than a police officer or upon his own knowledge or suspicion. In the present case he took the initiative on a complaint and in the reported case on a police report; and in both the cases, the Magistrate issued processes against the persons whose names transpired in the prosecution evidence during the trial. We are, therefore, of opinion that the decision on this point in the reported case is equally applicable to the present case.

We have been referred to an unreported case which was revision case No. 419 of 1899, decided on the 14th July of that year, as an authority showing that whenever a Magistrate takes cognizance of an offence which comes to light only on the evidence recorded by him, he takes such cognizance under cl. (*c*) of sec. 190. In this unreported case one Bonomali was the accused. But from the evidence given by the witnesses for the defence of Bonomali, it appeared that another person named Raghab was concerned in the same transaction or offence. The Deputy Commissioner proceeded against Raghab and examined witnesses who had been already examined in the trial of Bonomali as witnesses for the prosecution against Raghab. It was held "although as it has been held the Magistrate is competent at the trial against one person to proceed against another who may appear upon the evidence taken to be concerned in that offence and that in doing so, it cannot properly be regarded that he is acting within the terms of sec. 190, cl. (*c*), so as

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to enable the accused person to object to that Magistrate proceeding further in the case, still in laying down this view of the law it was contemplated that the two persons should be on trial together in the same case or for the same offence. It was never intended that this rule should be applied to a case where the trial of the second accused was not for the same offence for which the first accused was tried, but on other evidence adduced on behalf of the defence of the first accused." It was further held that such proceeding cannot be regarded as a proceeding upon a complaint or any other foundation upon which the case originally proceeded. It must be regarded as being within the terms of sec. 190, cl. (1) (*o*). It is clear, therefore, on the authority of this unreported case also, that a Magistrate having taken cognizance of a complaint can also proceed against another person who, although not mentioned in the complaint, appears on the evidence for the prosecution to have been concerned in the commission of the offence. In this unreported case it was held that the Magistrate had taken cognizance under sec. 190, cl. (*c*), not because Raghab was not mentioned in the complaint, but because his name did not transpire in the evidence for the prosecution. His name in connection with the offence came to light in the statements of witnesses on behalf of Bonomali, the other accused. This case, therefore, also supports the view taken in the case of *Charu Chandra Das* v. *Narendra Krishna Chackravarti* (1). There is, however, the case of *Khudiram Mookerjee* v. *Empress* (2). In this case one Khudiram had been summoned before a Deputy Magistrate as a witness for the prosecution in a case instituted against one Kurso and the Magistrate in the course of the trial, upon the facts disclosed by the evidence of another witness for the prosecution implicating Khudiram in the commission of the offence complained of, placed him on the trial along with the accused in that case. It was held that the Magistrate had taken cognizance under sec. 191, cl. (*c*) [now sec. 190, cl. (1) (*c*)]. We have also been referred to the case of *Jagat Chandra Mozumder* v. *Queen-Empress* (3). On a perusal of this case we find that the question involved in the present case was not decided.

On a full consideration of the law and authorities placed before us we are of opinion that in the present case the Magistrate took cognizance under clause (1) (*a*) of sec. 190 of the Code. We are supported in this view by the first two authorities mentioned above.

For the above reasons, we cannot accept the recommendation of the learned Sessions Judge and we decline to interfere.

Let the record be returned.

(1) 4 C. W. N. 367 (1900)
(2) 1 C. W. N. 105 (1896).
(3) I. L. R. 26 Cal. 786 (1899).

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Contents.

NOTES.

Mr. Justice Sundar Lal.

The Government of India is to be congratulated on having appointed Mr. Sunder Lal to act in the place of Mr. Justice Banerji in the Allahabad High Court. The elevation of Mr. Sundar Lal to the Bench will be welcomed both by the public and the profession. Although the present appointment is a temporary one, Mr. Sundar Lal has accepted it, and we have no doubt that he has done so from a sense of duty. No one in the Allahabad High Court enjoyed a more extensive practice; but it is a well-recognised tradition of the Bar that no lawyer practising in any Court should refuse a seat on the Bench when it is offered to him. But members of the Bar are surely at liberty to refuse officiating appointments. It is, therefore, very commendable on the part of Mr. Sundar Lal that he has not refused even an officiating appointment. We must, however, say that men of his ability and professional reputation should be elevated to the Bench at a much earlier part of their carrer. It would be an advantage both to the State and the public, if the Government would adhere to the principle of this appointment in filling up vacancies on the High Court Benches in future. It is noteworthy that the *Times* in its recent article on the Judicial System in India also urges the Government never to make judicial appointments from considerations other than ability and character.

Appointment of Mr. Camell as Officiating Second Presidency Magistrate.

We notice that Mr. Camell, Bar.-at-Law, has been appointed to officiate as the Second Presidency Magistrate in place of Mr. Keays who is going on leave. Mr. Camell was a law reporter, and the selection is a good one. He has been placed in charge of the Southern Police Court in Kyd Street.

Codifying the Hindu Law of Wills.

We invite the attention of the Government of India and of the legal profession to a short article contributed to our columns by Sir John Trevelyan, (*ex*-Judge of the Calcutta High Court, and the author of a well-known commentary on the Hindu Wills Act, and of an excellent treatise on Hindu Law) upon the urgent necessity of a revision of the Hindu Wills Act of 1870. The reasons assigned by him, though brief, are so convincing that it is unnecessary to dilate upon them here. We need only add that a learned Hindu commentator of the Act also has been complaining in our columns about the revolution in the Hindu ideas of devolution of property that is being brought about by the operation of some of the provisions of the Succession Act which are foreign to juristic notions prevailing amongst the Hindus. We believe, the legal profession in India have long been of the same opinion as Sir John Trevelyan, and they accord a hearty welcome to his suggestion. The Act should be divorced from the Indian Succession Act and replaced by a self-contained codification of the Hindu Law of Wills. The provisions of the Succession Act should be modified and amended in the light of judicial decisions and then judiciously incorporated into the new Code, taking care that they do not militate against the Hindu ideas of devolution and vested and contingent interests in property. If need be, the Government should entrust the task of preparing a draft Code to a representative committee or commission composed of practical lawyers and judges from different parts of India, as was done in the case of the Civil Procedure Code of 1908. The draft Code should then be circulated and the opinion of the legal profession and the High Courts in the different Provinces should be obtained, before it is considered and passed by the Imperial Legislative Council.

Judicial Reform in India.

The London *Times* devoted a long article on Judicial Reform in India in its issue of the 25th of May last. Although we cannot subscribe to the opinions expressed there, under different heads and sub-heads, upon the various aspects of the present system of judicial recruitment, still we welcome it as an admission evidently proceeding from a well-informed and influential quarter that the need for reform is urgent and cannot be put off indefinitely without serious prejudice to the prestige and efficiency of British administration of justice in India. The article opens with the hackneyed theme of the absence of legal training in the case of the members of the Indian Civil Service and the consequent disadvantages they labour under in the discharge of their judicial duties. The complaints under this head cover grounds already well threshed out by such veteran members of the Service as Sir Robert Fulton and Sir Henry Prinsep. The remedy suggested has also no novelty about it. The self-same suggestion that members of the Service should be given leave and allowances on a more liberal scale re-appears in a more amplified form. There is, however, some novelty in the further suggestion for the appointment by Government of a sort of supervisor to check the quality and progress of the legal training of officers availing themselves of leave for the purpose. The scheme, however, savours of impracticability, since it is common experience that a man after he has taken to some avocation in life is ill-fitted to revert to a life of tutelage. Adverting to recruitment of Judges from the legal profession in India, the *Times* candidly admits that it is the Indian lawyers who have come to the forefront of the profession since some time past and that it would be an advantage to the State to recruit the High Court Judges from amongst them. The recommendation of the *Times* that such appointments should be offered to the best qualified men irrespective of class or creed will surely meet with public support and, we hope, will also commend itself to Government.

New Rules regarding Police Courts in Calcutta.

The current issue of the *Calcutta Gazette* contains new rules defining the ordinary local limits of the jurisdiction of the several Police Courts in the town of Calcutta and providing for the distribution of business and the place and time of sitting of those Courts. These rules which have been framed by the Chief Presidency Magistrate under sec. 21, sub-sec. (1) of the Code of Criminal Procedure and have been sanctioned by the Governor in Council supersede the old rules on the subject.

Henceforth complaints and cases arising in the thanas of Shampukur, Kumartoli, Burtala, Sukea Street and Jorabagan and within the jurisdiction of the Calcutta Port-police, Division I, shall ordinarily be heard at the Northern Police Court in Nimtola Street. Complaints and cases arising in the thanas of Jorasanko, Barabazar, Colootola, Waterloo Street and Bowbazar, and within the jurisdiction of the Calcutta Port-police, Division II, shall ordinarily be heard at the Central Police Court and those arising in the thanas of Muchipara, Puddopukur, Fenwick Bazar, Taltola, Collinga, Park Street, Victoria Terrace and Hastings and within the jurisdiction of the Calcutta Port-police, Division III, shall ordinarily be heard at the Southern Police Court in Kyd Street. The rules provide that in case of emergency any Presidency Magistrate may hold his Court at such place and hours as he may consider best suited to meet the requirements of the public service. The Magistrates in charge of the Northern and Southern Police Courts may divide the work between themselves and the Honorary Magistrates who reside within the areas respectively assigned to these Courts. The Honorary Magistrates shall take cognizance of such complaints and cases as may be made over to them by these Magistrates. The Chief Presidency Magistrate will distribute the work at the Central Police Court and during the casual or other absence of any Magistrate or in the event of any pressure of work occurring in any Court or for any other reason the Chief Presidency Magistrate may arrange for the distribution of the work among other Presidency Magistrates.

THE HINDU WILLS ACT, 1870.

Has not the time arrived when the Government of India might be expected to compose a Code of law applicable to Hindu Wills throughout British India?

Since the Act of 1870 became law, the volume of decisions on Hindu Wills has been large, and many of them have accentuated the serious defects which existed in that Act.

The Hindu Wills Act of 1870 only applies to a portion of British India, *viz.*, what was then the Province of Lower Bengal and the towns of Bombay and Madras. The other parts of India are entitled to require their law on this subject to be put into shape, and there is no reason why the Law of Hindu Wills should not be uniform throughout British India.

To take one matter only, a will by word of mouth is valid except in cases to which the Act applies. It must now rarely happen that a Hindu makes a will otherwise than in writing. There are no recent cases in which the Courts have given effect to such wills. The difficulties of proof are too great.

It will be difficult to find in the Indian Statute Book any Act which has been put together in so unsatisfactory a way as that which was employed in the composition of the Hindu Wills Act. The bulk of the Act consists of sections of the Indian Succession Act, which are applied to the Hindu Wills governed by the Hindu Wills Act. The Indian Succession Act was enacted for the benefit of persons who are governed by a system of personal law entirely different from that of the Hindus.

The result of this form of legislation has been that the Courts have had in many cases to declare that particular sections which have been expressly applied to the Hindus by the Wills Act cannot be so applied. Whether this view will eventually be taken by the Judicial Committee, may be open to question. Many of the illustrations also are wholly unsuited to Hindu Wills. There is, however, no real doubt that the Legislature did not intend to make any substantial alteration in the Hindu Law of Wills. They have succeeded in inciting a considerable amount of costly and unnecessary litigation.

It would be quite possible to compose a Code suited to Hindu Wills throughout British India, or if such a Code be composed it should be self-contained and should not incorporate the provisions of any other enactment.

There is a further reason for reconsidering the Hindu Wills Act. During the more than 46 years since it has been enacted the Courts have construed many Hindu Wills. Those decisions should form the basis of a new enactment. Moreover, the practice of Will-making has considerably increased among Hindus, and the subject has become of much greater importance than it was in 1870.

CURRENT INDIAN CASES.

(CRIMINAL.)

Indian Penal Code, sec. 423.

RE MANIA GOUNDAN, I. L. R. 37 Mad. 47.

The section makes punishable the act of a person who dishonestly or fraudulently executes an instrument which purports to transfer any property and which contains any false statement relating to the consideration for such transfer or relating to the person or persons for whose use or benefit it is really intended to operate.

It is clear that the law does not make punishable every false statement contained in an instrument of transfer. It must be a statement relating to the consideration or to the person to be benefited thereby.

Coasting Vessels Act (XIX of 1838).

EMPEROR *v.* HARIDAS LAKHMIDAS, I. L. R. 38 Bom. 111.

Under sec. 4 of the Act, a second registration is quired whenever any change takes place in the name the owner of any harbour craft, for example, in the case of a son carrying on the business of the father who owned a craft and took out a certificate of registry in his own name under sec. 7 of the Act.

Review.

THE STUDENTS' GUIDE TO MUKTEARSHIP EXAMINATION. *By Kishori Mohan Das, Muktear, Dacca. Price Rs. 2-8.*

This is a handbook for the guidance of Muktearship students in preparing for their examination. It contains the rules and regulations of the Muktearship examination and all the questions set at that examination from its commencement in 1870 up to 1913, with answers.

The answers, so far as we have been able to examine them, seem to be accurate, concise and to the point. Students preparing for the Muktearship examination will, we expect, get considerable assistance from the book.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Wolf* v. *R. H. Halford & Sons (Limited).* Before LORDS SUMNER, LORD JUSTICE KENNEDY AND MR. JUSTICE A. T. LAWRENCE. 16th March 1914.

A shop-keeper's puff is no warranty—Caveat Emptor.

The Plaintiff claimed damages for breach of warranty of a ring purchased by him. The Plaintiff's complaint was that the Defendants stated at the time of the sale that he was obtaining thoroughly good value. The Defendants denied giving any warranty by those statements.

The trial Judge held that what was stated was a mere puff such as might properly be used by any shop-keeper and that there was no evidence to go to the jury.

The Court affirmed that view and Lord Sumner in the course of his judgment, observed :—

There were really two questions here—the one being in what circumstances were the statements made, and the other, with what intention were they made. It was in evidence that this particular stone had been purchased by the Defendants for £105 and sold by them to the Plaintiff for £155, and it was said that contracts for sale of precious stones stood on a very special footing. He thought, it was quite plain that if what was said here was held to be a warranty, the doctrine of *caveat emptor* would very largely disappear. It would be a formidable matter for any tradesman to consider, if this was held to be a question for the jury. In commending his goods to customers he might be sued for breach of warranty unless the goods were disposed of on the slot principle.

Fortunately, in this matter, he was guided by authority which had laid it down that the test to be applied was whether it was intended as appearing from all the evidence that the affirmation should be treated as a warranty. That test had been affirmed and adopted by the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton*, ([1913] A. C., 30). It was a question for the Court to consider whether there was any evidence. This was not like the case of the sale of the picture [*Power* v. *Barham*, (4 A. and E., 473)]. In his judgment the statements made here by Mr. Halford on behalf of the Defendants belonged to the category of opinions. Looking at the evidence given in the present case, he thought it was more consistent with the view that it was an expression of the tradesman's honest intention to recommend his goods, and there was nothing to show any intention to warrant.

Mr. Compston, K. C., and *Mr. Drucquer* for the Plaintiff.

Mr. Pollock, K. C., and *R. J. Willis* for the Defendants.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before SHARFUDDIN and TEUNON, JJ. REV. No. 616 OF 1914. DIAN BHUYAN, Accused, Petitioner *v.* THE KING-EMPEROR, Opposite Party. 21st May 1914.

Indian Railways Act, sec. 129—Rash or negligent act.

This was a Rule granted on the 17th of April 1914 against an order of P. H. Waddell, Esq., Joint Magistrate of Midnapur, dated the 10th of March 1914, convicting Petitioner under sec. 129, Railways Act, and sentencing him to one month's rigorous imprisonment, an application for the reference of which order to the High Court was rejected by W. N. Delevingne, Esq., Sessions Judge of Midnapur, on the 3rd of April 1914.

Their Lordships delivered the following judgment in this case—

In this case the Petitioner was convicted under sec. 129 of the Indian Railways Act and sentenced to one month's rigorous imprisonment. The negligence charged against him is that he drove his cart over a railway crossing in front of an approaching train with the result that there was a collision in which his cart was destroyed and he himself narrowly escaped.

It appears from the evidence on the side of the prosecution that the gate at the crossing was open, and it also appears from the evidence of the 1st witness that when in answer to the invitation of the open gate the Petitioner proceeded to cross, the train was not in motion, but was standing at the distant signal. Under these circumstances we are unable to understand how it has come to be found that the Petitioner was either rash or negligent. On the contrary it appears to us that the negligence is entirely on the side of some Railway officer.

The Rule is made absolute, and the conviction and sentence are set aside. The Petitioner will now be discharged from his bail.

Babu Monmotho Nath Mukerjee for the Petitioner.

CIVIL APPELLATE JURISDICTION. Before STEPHEN AND MULLICK, JJ. APPEAL FROM APPELLATE ORDER No. 513 OF 1911. RAM LAL PAHARI, Decree-holder, Appellant *v.* BABU LAL BARIK and another, Judgment-debtors, Respondents. 25th May 1914.

Decree, execution of—Benamidar, *application by—Step in aid of execution—Indian Limitation Act (IX of 1908), Sch. I, Art. 180—Assignment.*

In 1904 one Narayan Panday obtained a money-decree. He died in the year 1907, and in the same year two of his sons who were minors applied for execution of the decree. After various proceedings the application for execution was struck off and execution was never granted by the Court. After this had happened, the present Appellant brought a suit in May 1909 for declaration against the sons of Narayan Panday that the decree obtained by the latter was obtained on his behalf, that is to say, that Narayan Panday was his *benamidar* in the matter. This was decreed on compromise in the same year and the terms agreed upon were that Narayan Panday was the *benamidar* and that the Appellant should have the power to execute the decree. On the 1st October 1910, an application was made for execution, but was refused on the ground that it was time-barred. It was argued in appeal that the application by the sons of Narayan Panday, dated the 7th December 1907, was a step in aid of the execution which had the effect of extending the period of limitation so as to include within it the present application.

Held, that the application was not a step in aid of execution, A *benamidar* had no power to execute the decree.

Deno Nath Chuckerbutty v. *Lalit Coomar Gungopadhaya* (I. L. R. 9 Cal. 633) followed.

Balkishen Das v. *Bedmati Koer* (I. L. R. 20 Cal. 388) distinguished.

That the compromise of July 1909 did not operate as an assignment.

Babu Surendra Mahhub Mullick for the Appellant.

Babu Rajendra Prosad for the Respondents.

A. T. M. *Appeal dismissed.*

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD MOULTON, LORD PARKER OF WADDINGTON. SIR JOHN EDGE. MR. AMEER ALI. 1914, 24, April.	MUSAMMAT HIRAN BIBI and others, Appellants, *v.* MUSAMMAT SOHAN BIBI, Respondent.

Hindu Law—Alienation—Settlement of dispute by compromise—Hindu widow who is party if thereby alienates property in excess of her powers.

A dispute between the daughters of a deceased Hindu on the one hand and the widow of his alleged adopted son on the other, each party claiming to be solely entitled to the estate, was settled by a compromise, each party getting thereunder a share in the family property. In a suit by a daughter of the alleged adopted son (as one of the reversionary heirs expectant on her mother's death) to set aside the compromise as beyond the competence of a limited owner like her mother:

Held—*That the compromise was in no sense of the word an alienation by a limited owner of the family property, but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties.*

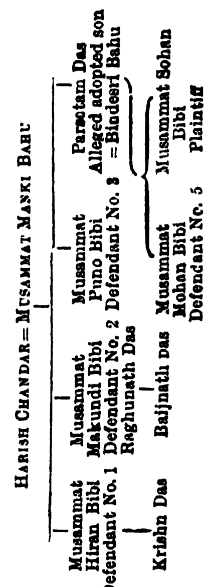
LALA KHUNNI LAL *v.* KUNWAR GOBIND KRISHNA NARAIN (1) *followed.*

This is an Appeal from a Judgment and Decree, dated the 6th April 1911, of the High Court of Judicature for the North-Western Provinces, Allahabad, which partly affirmed and partly reversed a Judgment and Decree, dated the 26th July 1909, of the District Judge of Benares.

The Plaintiff instituted the suit for a declaration that her reversionary interests in certain moveable and immoveable property were not affected by a compromise, dated the 27th May 1896, and a decree, dated 28th May 1896, passed in accordance with it.

The facts of the case may be shortly stated as follows :—

The litigation related to the estate of one Harish Chandar, whose relationship to the parties will appear from the following pedigree :—



Harish Chandar died in 1856, leaving him surviving his widow, who succeeded him and three daughters. In 1860 she adopted Parsotam Das on the condition, it was alleged by her, that she was to remain the owner of her husband's property during her lifetime. On the 9th December, 1871, she made a Will by which she made allowances in favour of the said Parsotam Das and his children and in order to perpetuate the name of her husband she dedicated and endowed 16 annas of mauza Sheodasa to *Sri Thakurji*. During her lifetime she remained the manager and superintendent of the temple and the endowed property,

(1) L. R. 38 I. A. 87 : s. c. 15 C. W. N. 545 (1911).

MUSAMMAT HIRAN BIBI *v.* MUSAMMAT SOHAN BIBI.

and by a Will, dated the 24th January 1893, she provided that after her death her son-in-law Raghunath Das was to be the manager and superintendent of the temple and the endowed property. These dispositions of property were made with the knowledge and consent of Parsotam Das. Parsotam Das executed a document, dated the 29th March 1881, by which he recognised and consented to the dispositions made by her under the Will, dated the 9th December 1871, and relinquished all right or claim to the properties comprised in the Will.

He died shortly after December 1883.

Musammat Manki Bahu died on the 1st June 1893, leaving her three daughters her surviving. The deceased lady left some valuable moveables including Government Promissory Notes about which there arose a dispute between her daughters on the one side and the widow and daughters of Parsotam Das on the other.

In 1895 Musammat Puno Bibi instituted a suit against the said Bindesri Bahu. Musammat Hiran Bibi and Musammat Makundi Bibi were also made *pro formâ* Defendants to the suit She alleged that the daughters of Harish Chandar, her father, were entitled to the whole of his estate, and that the said Parsotam Das, deceased, and his widows and daughters had absolutely no right thereto. She claimed that she together with her two sisters was the owner of certain Government Promissory Notes of which Bindesri Bahu had taken unlawful possession and which she sought to recover by her suit.

The said Bindesri Bahu contested the suit and filed a written statement on the 21st March 1895. She pleaded that Parsotam Das was the lawfully adopted son of Harish Chandar, deceased, and that both under the Hindu Law and the Will of her husband, dated the 9th December 1883, she was the absolute owner of the whole estate of Harish Chandar to the exclusion of the Plaintiff and her sisters.

The suit was settled by a compromise, dated the 27th May 1896, and a decree in accordance with it was made by the Court on the 28th May 1896. The compromise provided that the Government Promissory Notes were to be divided among the Plaintiff and the Defendants in a certain proportion specified therein, and that the management and supervision of mauza Sheodasa which was endowed for the worship of *Thakurji* was to continue in the hands of the present Defendants.

On the 15th January 1906, the present suit was instituted by Musammat Sohan Bibi in the Court of the Subordinate Judge of Benares. Musammat Hiran Bibi, Musammat Makundi Bibi and Musammat Puno Bibi were the principal Defendants and Musammat Bindesri Bahu and Musammat Mohan Bibi were *pro formâ* Defendants. In her plaint the Plaintiff alleged that her father, Parsotam Das, was the lawfully adopted son and heir of Harish Chandar, that after her father's death her mother succeeded to a life estate therein, and that after her death she and her sister would be the next reversionary heirs. She further alleged that the compromise, dated the 27th May, 1896, had been made by her mother without consideration and without any right. She claimed a declaration that the said compromise and the decree based thereon be declared null and void and of no effect as against her reversionary interests in mauza Sheodasa and Barhi Haveli (a stone-built house) and certain other properties specified by her in the plaint.

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The principal Defendants contested the suit and filed written statements.

Both sides produced oral and documentary evidence, which was recorded by the District Judge, who delivered his judgment on the 4th March 1907.

He found that the compromise was binding upon the Plaintiff, and observed as follows :—

"In the present instance fraud or collusion is not specifically, at any rate, pleaded ; nor do I think that either is implied. Certainly neither has been proved. I have not the least ground for believing that the compromise entered into by the Plaintiff's mother was either fraudulent or collusive. I have examined the record of the case in which the compromise was effected and find that it bears every appearence of having been genuinely contested. The suit was pending for close on eighteen months. During that time, it is proved, the husband of the Plaintiff here conducted the case of her mother and actually signed the compromise now impugned. At that time the Plaintiff and her husband were living, and have all along since been living, with her mother. It has also been proved that the Plaintiff herself was actually present when the compromise was discussed. Even if she were then a minor, which is not beyond doubt, she was at least 16 or 17 years of age and able to understand the import of the discussion, and undoubtedly was at the time aware when the compromise was filed. Had there been any fraud or collusion on the part of her mother, it is unlikely in the extreme that her husband would have permitted the compromise, and would certainly not have signed it. Nor do I think he would have done so, had it not been, as it has the appearance of having been, made in order to settle for ever all disputes as to what were obviously, in view of the Wills which had been made by Manki Bahu and the relinquishment of the rights by Parsotam Das (all of which were admitted by the parties to that suit), doubtful rights. The fact that it is he who is now prosecuting the Plaintiff's claim precludes the idea that he was at that time in collusion with the Plaintiff's mother and utterly heedless of his own wife's interests. Under such circumstances it is not possible to hold that the compromise was without consideration, or that the Plaintiff's mother had no authority to enter into it, and I am of the opinion, as already stated, that it undoubtedly binds the Plaintiff and that, in face of it, this suit cannot succeed."

He also held that the suit was governed by Article 120 of the Limitation Act, 1877, and that it was barred by time. He accordingly made a decree dismissing the suit with costs.

Against the said decree the Plaintiff appealed to the High Court of Judicature for the North-Western Provinces, Allahabad, which (Sir John Stanley, C. J., and Banerji, J.) delivered judgment on the 12th February, 1909. The learned Judges of the High Court held that Parsotam Das was the lawfully adopted son of Harish Chandar, and that the said compromise was not binding upon the Plaintiff and that the suit in so far as it related to immoveable property was not barred by limitation. They accordingly made a decree remanding the suit to the Court below for determination of the remaining issues. In the course of their judgment, they observed as follows :—

"The question is concluded by the decision of this Court in *Gobind Krishna Narain* v. *Khunni Lal* (2). In that case

(2) I. L. R. 29 All. 487 (1907).

MUSAMMAT HIRAN BIBI *v.* MUSAMMAT SOHAN BIBI.

it was held that a compromise made by a person holding a Hindu widow's estate in the property of her deceased husband is not binding on the reversioners, even though it has been followed by a decree of Court and that the reversioners can only be bound by a decree made after full contest in a *bonâ fide* litigation. In the present case the previous litigation was not decided after contest and the matter in dispute was only settled by a compromise entered into by Bindesri Bahu, who held only a widow's estate, if any. In *Ram Sarup* v *Ram Dei* (3), it was held that a compromise of this nature amounted to an alienation of the property dealt with by it. Having regard to these rulings, the Plaintiff's suit was maintainable and the Court below was wrong in holding that she was precluded by reason of the compromise and the decree from sustaining her claim. We may observe that on this point the learned advocate for the Respondent has addressed no argument to us.

"As to the plea of limitation, the transaction being an alienation, Art. 125 of Sch. II of the Limitation Act, 1877, clearly applies in so far as the claim relates to immoveable property. As the suit was brought within 12 years of the date of the compromise and the decree, it is clearly within time as regards the immoveable property claimed. As to the moveable property claimed, that article does not apply and the claim to have the alienation set aside is time barred."

On remand the said District Judge found the issues against the Plaintiff and dismissed the suit. But the High Court came to a contrary conclusion and allowed the claim. Hence this appeal, which was heard *ex parte*.

(3) I.L. R. 29 All. 239 (1906).

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dube* for the Appellants submitted that the High Court had erred in holding that the compromise, dated the 27th May 1896, was not binding upon the Plaintiff. The decision on which the High Court relied [*Gobind Krishna Narain* v. *Khunni Lal* (2)] was reversed by the Judicial Committee: *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain* (1). The facts of the present case come within that decision. It was a compromise of doubtful claims of the various contending parties, and the Hindu widow was entitled to settle them by a compromise. All the existing members of the family were parties thereto. There was no fraud or collusion. It bore all the marks of a family settlement, and was in no sense an alienation of the property.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—In this case their Lordships are of opinion that the facts bring it within the decision of *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain* (1), in other words, that the compromise in question is in no sense of the word an alienation by a limited owner of the family property, but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside, that the decree of the District Judge should be restored,

(1) L. R. 38 I. A. 87 : s. c. 15 C. W. N. 545 (1911).
(2) I. L. R. 29 All. 487 (1907).

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and that the Appellants should have their costs of this appeal and the costs of the suit in both Courts.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Appellants.

B. D. *Appeal allowed with costs.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN. LORD MOULTON. SIR JOHN EDGE. MR. AMEER ALI. 1914, Heard, 20, April. Judgment, 11, May.	PETER CHARLES ERNEST PAUL and another, Appellants, *v.* WILLIAM ROBSON and ors., Respondents.

Ancient lights—Nature of right—What amounts to infringement—Act done should amount to nuisance.

The easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription.

The owner of the dominant tenement obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings.

There is no infringement of the right, unless what is done amounts to a nuisance.

JOLLY *v.* KINE (2) *has established that the law as formulated by* LORD DAVEY *in* COLLS'S *case* (1) *is the law laid down by that decision.*

This was an appeal from a Judgment of the Calcutta High Court, dated the 1st August 1911, which is reported in *Paul* v. *Robson* (5) where the facts are fully stated.

The Appellants claimed that the Respondents had interfered with the enjoyment of their light and air in such a manner as to amount to an actionable nuisance. The trial Judge, Stephen, J., dismissed the suit. He held that although light coming to the Plaintiffs' premises from the east had been obstructed by the Defendants' new building, sufficient quantity of light and air had still been left for the ground and middle floors of the Plaintiffs' premises, sufficient for the purpose of carrying on the business of a shop or office. In short, he found that there was no nuisance caused.

On appeal Sir L. Jenkins, C. J. (Woodroffe, J. concurring) affirmed those findings; they said as follows:—

"Agreeing as I do with the learned Judge's estimate of their evidence, I do not think it necessary to discuss it in detail. It will be sufficient that I should express my conclusion which is that I find, that though there is an abridgement of direct light from the east, there still remains a sufficiency of light for the ordinary purposes of this house and that even the diminution of light to the rooms Nos. 2 and 3 on the ground floor, to which windows Nos. 10, 13 and 16 belong, does not to such a material extent detract from the value of those rooms considered as an integral part of the Plaintiffs' premises, as materially to affect the suitableness of those premises for the purposes for which they may reasonably be regarded as available.

"Though the argument before us has practically been limited to a discussion of the easement of light, complaint is also made of the interference with the access of air to the Plaintiffs' premises, but as to this part also of their case the Plaintiffs have failed to establish an actionable nuisance.

(1) [1904] A. C. 179.
(2) [1907] A. C. 1.
(5) I. L. R. 39 Cal. 59 (1911).

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"The result then is that I hold that the Plaintiffs have not proved that their premises have been materially affected or injured, or that there has been a sensible deprivation of light and air, sufficient to render the occupation of the premises uncomfortable, or to prevent their being used for purposes of business as beneficially as before.

"Further than this I hold that the Plaintiffs have failed to prove that the selling or letting value of the premises has been diminished : in fact the indications are, if any thing, the other way."

Hence this Appeal.

Messrs. Upjohn, *K. C.*, *Hudson*, *K. C.*, and *Venson* for the Appellants.

Mr. L. DeGruyther, *K. C.*, and *Mr. Dunne* for the Respondents.

Mr. DeGruyther took a preliminary objection. He submitted that there were concurrent findings of fact by both the lower Courts, *first*, that no actionable nuisance had been proved by the Plaintiff, and *second*, that no damage had been sustained by the Plaintiff by reason of any interference with the Plaintiffs' enjoyment of light and air. He urged that the Appellants ought not to be allowed to question the concurrent findings of fact. The arguments for the Appellants should be confined to the question of law alone. During the argument reference was made to the following cases: *Karuppanan Servai* v. *Srinivasan Chetti* (6), *Mirza Sajjad Husain* v. *Nawab Wazir Ali Khan* (7).

Mr. Upjohn, *K. C.*, for the Appellants, submitted that the learned Judges of the Courts below had taken a wrong view of the law, and that the findings of fact so arrived at could not be conclusive. The usefulness of each room in the building must be assured to the Plaintiff and it was no defence in law to say that the Plaintiff had a large house. He submitted that the true test was whether the premises were *as fit as before*, after the deprivation of light and air. He relied upon the opinions of Lord Macnaghten and Lord Lindley, in *Colls's* case (1). Lord Davey's judgment was applicable to an ordinary case, but here the rooms could not be used for the ordinary purpose and the ground-floor rooms could not be used for business as profitably as before. The Courts below had erred in omitting to ascertain the quantity of light and air the Plaintiffs enjoyed before the interference. They ought to have held that the Plaintiff was entitled to such light and air as would enable him to use it for all purposes for which he used it previously. In any view of the case the Courts below were wrong about the two rooms on the ground floor. Counsel cited and discussed the following authorities. *Colls* v. *The Home and Colonial Stores, Limited* (1), *Kine* v. *Jolly* (8), *Jolly* v. *Kine* (2).

Mr. Hudson, *K. C.*, further submitted that room No. 3 had suffered most injuriously. It had only one window and there was no concurrent finding as regards that room. The Courts below ought to have considered the usefulness of that room by itself, and not looked at the building as a whole. He referred to *Griffith* v. *Richard Clay* (9).

Counsels for the Respondents were not heard in reply.

(6) L. R. 29 I. A. 38 (1901).
(7) L. R. 39 I. A. 156, 161 (1912).

(1) [1904] A. C. 179.
(2) [1907] A. C. 1.
(8) [1905] 1 Ch. 480, 497.
(9) [1912] 2 Ch. 291, 298.

PETER CHARLES ERNEST PAUL *v.* WILLIAM ROBSON.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—The action in which the present appeal is brought is an action in which the Appellants sued the Respondents for infringement of certain rights of light possessed by them in connection with premises known as 7, Esplanade, East, Calcutta, of which they owned the freehold. The Respondents had erected a building known as 8, Esplanade, East, Calcutta, lying to the east of the Appellants' premises, and so situated that the western walls of the Respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the Appellants' building. The ground on which the Respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the Appellants had acquired rights of light thereby for the windows on the east side of their premises. The new buildings of the Respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the Appellants, and it is in respect of this interference with the access of light to their windows that the Appellants brought the action.

The action came on for trial with witnesses before the Hon'ble Mr. Justice Stephen, sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its Ordinary Civil Jurisdiction, and on the 29th day of March 1911 he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its Appellate Jurisdiction, and on the 1st day of August 1911 judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of First Instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact, though the expressions used may not be in all cases indentical. Their Lordships, therefore, would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the Appellants, and whether, accordingly, the test which they applied as to whether those rights had been infringed was the correct one. This is a pure question of law, and it was admitted by counsel for the Appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls* v. *The Home and Colonial Stores, Limited* (1), when considered in connection with the later decision of the House of Lords in *Jolly* v. *Kine* (2).

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls's* case (1). It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible

(1) [1904] A. C. 179.
(2) [1907] A. C. 1.

PETER CHARLES ERNEST PAUL *v.* WILLIAM ROBSON.

right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's* case (1), and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future.

Mr. Justice Stephen takes as expressing the law laid down by this decision the following quotation from the opinion of Lord Davey in that case :—

"The owner . . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind . . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance ?"

And the Court of Appeal although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of First Instance. They accept in full the finding in fact of the Judge of First Instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision. The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might, if they stood alone, indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken, therefore, that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point, it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in the case of *Jolly* v. *Kine* (2). In that case Mr. Justice Kekewich had found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room affected was "still a well-lighted room." He, gave judgment for the Plaintiff. On appeal to the Court

(2) [1907] A. C. 1.

of Appeal there was a division of opinion among the Judges. Romer, L. J., held that under the decision in *Colls's* case (1) the finding that it was still a well-lighted room was fatal to the Plaintiffs' claim. Vaughan Williams and Cozens Hardy, L. JJ., held to the contrary. On appeal to the House of Lords, their Lordships were equally divided and accordingly the appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor gives his opinion on the law as laid down in *Colls's* case (1) in the following words :—

"The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752, in *Fishmongers' Company* v. *East India Company* (3), that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded.

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand Lord Robertson was of opinion that the appeal should be allowed and in his opinion says :—

"I adhere, as I did in *Colls's* case (1), to the definition given by Lord Davey in entire accordance with the judgments of the other noble and learned Lords. According to that definition the quantity of light to which right is acquired in 20 years is 'what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.'"

(1) [1904] A. C. 179.
(3) 1 Dick. 168 (1752).

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the Appeal, and referring to the decision in *Colls's* case (1), he says :—

"It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling-house, or in the case of a particular room in his dwelling-house, through the windows of that room, an amount of light which, to use the words of James, L. J., in *Kelk* v. *Pearson* (4), is 'sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment' of his dwelling-house, or of the room in it, as the case may be, no nuisance has as regards him been created, and no legal wrong has been inflicted upon him."

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's* case (1), he shows by the language which he uses that he thoroughly agrees with it, and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly* v. *Kine* (2), there is therefore an authoritative exposition of the decision in *Colls's* case (1), and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the Appellants should have sought to treat the decision in *Jolly* v. *Kine* (2), as throwing some doubt upon the interpretation of the decision in *Colls's* case (1), operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is

(1) [1904] A. C. 179.
(2) [1907] A. C. 1.
(4) L. R. 6 Ch. 809 (1871).

PETER CHARLES ERNEST PAUL *v.* WILLIAM ROBSON.

that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted "according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's* case (1).

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the Appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it, and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

Solicitors: *Messrs. Westbury, Preston* and *Stravridi* for the Appellants.

Solicitors: *Messrs. Watkins* and *Hunter* for the Respondents.

Appeal dismissed with costs.

(1) [1904] A. C. 179.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2528 OF 1910.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 4 and 17, April.
Judgment, 17, April.

RAM CHANDRA BHANJA, Defendant, Appellant,
v.
NANDANANDANANANDA GOSSAIN, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 106—Scope of enquiry under—Title if can be determined.

A Revenue Officer in deciding disputes between rival proprietors under sec. 106 of the Bengal Tenancy Act is confined to the question of possession alone and is not competent to determine the question of title.

PADMALAV *v.* LUKHI RANI (1) *followed.*

This was an Appeal preferred on the 7th of August 1910, against a decree of J. Cornes, Esq., Special Judge of Zilla Midnapur, dated the 1st of March 1910, affirming a decree of Babu Rampada Chatterji, Assistant Settlement Officer of Midnapur, dated the 11th of January 1909.

The material facts will appear from the judgment.

Mr. H. N. Sen and *Babu Jnanendra Nath Sarkar* for the Appellant.

Babu Jyotish Chandra Hazra for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal on behalf of the first Defendant in a suit instituted by the Plaintiff-Respondent under sec. 106 of the Bengal Tenancy Act. The case for the Plaintiff is that the disputed lands are comprised in his Mauza Taka Bakra,

(1) 12 C. W. N. 8 (1907).

RAM CHANDRA BHANJA *v.* NANDANANDANANANDA GOSSAIN.

Tauzi 1980, and that though he is in possession thereof, they have been erroneously declared by the Settlement Officer to be in the possession of the first Defendant as included in his Mauza Nayabushan, Tauzi 1981. The Courts below have investigated the question of title and held that the disputed lands form part of the mauza of which the Plaintiff is the proprietor; but upon the question of possession, they have not recorded any clear finding. The occupants of the lands are the second and the sixth Defendants; and it has not been found by either Court whether they held as tenants under the Plaintiff or the first Defendant. Notwithstanding the absence of such a finding the Courts below have made a decree in favour of the Plaintiff.

In support of the present appeal by the first Defendant, it has been contended on the authority of the decision in *Padmalav* v. *Lukhi Rani* (1), that the Courts below have misapprehended the scope of the investigation under sec. 106 of the Bengal Tenancy Act, that they have determined the question of title between rival proprietors which they were not competent to decide in a suit instituted under that section and that they have left undecided the only question they were competent to investigate, namely, the question of present possession. In our opinion, this contention is well-founded and must prevail.

On behalf of the Respondent the decision in *Padmalav* v. *Lukhi Rani* (1) has been criticized, and it has been suggested that the matter should be referred to a Full Bench for decision. We are of opinion that no ground has been established for such reference. Mr. Justice Woodroffe in the case mentioned held that in a suit under sec. 106 of the Bengal Tenancy Act the question to be investigated is one of possession of the disputed land, and that the Plaintiff is entitled to have the record corrected in accordance with such possession. Mr. Justice Coxe held that in a proceeding under the Bengal Tenancy Act no question of title between rival proprietors, considered merely as proprietors, can legitimately arise. The Statute deals with the relations of landlords and tenants, and it is no part of its purpose to regulate disputes between rival proprietors, except in so far as such disputes affect their relations with their tenants. We entirely agree in the view taken by Mr. Justice Coxe that the revenue officer, in deciding disputes between rival proprietors under sec. 106 of the Bengal Tenancy Act, is confined to the question of possession alone. We are of opinion that this is the correct exposition of the law, and we would ourselves have independently adopted the same view, even if the point had not been previously decided in *Padmalav* v. *Lukhi Rani* (1). The decisions in *Gulab Misser* v. *Kalanund Singh* (2), *Pandab Dowari* v. *Anand Kesun* (3), *Mukti Nath* v. *Rameshur* (4) and *Kali Sundari* v. *Girija Sankar* (5), which recognise the principle that the question of title is open for examination in a civil suit, lead to the same conclusion. In this view it is clear that the decision of the Special Judge cannot be supported.

The result is that the appeal is allowed, the decree of the Special Judge set aside and the case remanded to him in order that he may determine upon the evidence

(1) 12 C. W. N. 8 (1907).

(1) 12 C W. N. 8 (1907).
(2) 14 C. W. N. 884 (1910).
(3) 14 C. W. N. 897 (1910).
(4) 15 C. W. N 57 (1910).
(5) 15 C. W. N. 974 (1911).

on the record whether the Plaintiff or the first Defendant was in possession of the disputed land through their tenants who are parties Defendants to the suit. As the object of the suit is to have the record, as finally published, amended, the question of possession must necessarily be considered from the standpoint, whether the record, as finally published, is correct. The costs of this appeal will abide the result.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3982 OF 1910.

COXE, J.
D. CHATTERJEE, J.
1914,
Heard, 2, March.
Judgment, 10, March.

DEONANDAN PERSHAD, Plaintiff, Appellant,
v.
UDIT NARAIN SINGH and others, Defendants, Respondents.

Hindu Law—Alienation by Hindu widow—Suit by vendee to recover property after widow's death from stranger—Proof of legal necessity, if necessary—Suit for possession—Symbolical possession delivered to Plaintiff more than 12 years ago, as against Defendant—Presumption of continuance of possession—Finding that no actual possession ever obtained—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Recovery of rent decrees against raiyats within 12 years, if possession.

An alienation by a Hindu widow without legal necessity is voidable but not void, and until the reversioner (including in that term the Crown if there is no nearer reversioner) decides to avoid it or to treat it as a nullity, it stands good, and the alienee is entitled to recover possession from a stranger without being required to prove legal necessity.

BEJOY GOPAL v. KRISHNA MAHISHI (2), MADHUSUDAN v. ROOKE (1) *referred to.*

(1) 11 C. W. N. 424 (1907).
(2) I. L. R 25 Cal. 1 (1897).

Delivery of symbolical possession is conclusive evidence, as between the parties, that possession was delivered, but is not in the least conclusive evidence that the possession so delivered continued. There may be a presumption that such possession would continue until the contrary was proved, but that is all.

Where it was found that the Plaintiff to whom symbolical possession was delivered never got actual possession, the finding can only mean that the possession delivered did not continue at all, so that Art. 142 and not Art. 144 of the Limitation Act applied to the case.

Where it appeared that the Plaintiff had recovered rent decrees from raiyats within 12 years of the suit and the decrees were not open to question as collusive and fraudulent, the Plaintiff's possession of the lands held by the raiyats through them within the statutory period of limitation was established.

This was an Appeal preferred on the 8th of December 1910, against a decree of J. C. Twidell, Esq., District Judge of Zilla Bhagalpur, dated the 26th of August 1910, affirming that of Babu Ram Lal Dutt, Subordinate Judge at Monghyr, dated the 19th of February 1910.

The material facts will appear from the judgment.

Dr. Rash Behary Ghose, Babus Provash Chandra Mitter and *Kulwant Sahay* for the Appellant.

Babus Jogesh Chandra Ray, Karunamoy Bose for *Babu Khettra Mohan Sen,* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

COXE, J.—The property in suit originally belonged to one Rukmini. She mortgaged it, and the mortgagee in the

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end sold it in execution of a decree on the mortgage. It was purchased by a predecessor-in-interest of the Plaintiff. The Defendants are successors-in-interest of Rukmini's brothers to whom she is said to have transferred the property. The Plaintiff has sued for possession. The suit has been dismissed by the Courts below, partly on the ground that the Plaintiff has not made out his title, and partly on the ground that the Defendants have acquired a title by adverse possession. The Plaintiff appeals.

On the first point, I think that the Plaintiff is entitled to succeed. The Courts below hold that he has not succeeded in proving that Rukmini's mortgage was made for legal necessity. But the Defendants are not the reversioners. The alienation, if made without legal necessity, was voidable, but not void. Until the reversioner, including in that term the Crown, if there is no nearer reversioner, decides to avoid it or to treat it as a nullity, it stands good. This, I think, is the result of the decisions in *Madhusudan* v. *Rooke* (1) and *Bejoy Gopal* v. *Krishna Mahishi* (2).

As to the question of adverse possession, it is argued that the Courts below have wrongly applied Art. 142 instead of Art. 144 of the Schedule to the Limitation Act. So far as regards the *kamat* land, it does not appear to me that this question really arises on the findings of fact arrived at by the Courts. The Defendants have always claimed adversely to the Plaintiff and his predecessors since long before 1882. In that year it was decided that the Plaintiff's predecessors were entitled to possession during Rukmini's lifetime. It was not decided, whether or not they were entitled to possession afterwards. They obtained, however, formal delivery of possession. But the District Judge finds, and it is a finding of fact, with which we cannot interfere, that although the Plaintiff's predecessor "got symbolical possession through the Court in 1883 in pursuance of the order of the District Judge, it is quite certain that he never got actual possession. Now of course the formal delivery of possession, as no doubt the learned District Judge was well aware, is conclusive evidence between the parties that possession was delivered. It is perhaps somewhat of a legal fiction in many cases, but it is a very valuable one as it affords a starting point for limitation. But it cannot be denied that it is often little more than a fiction, and it is not in the least conclusive evidence that the possession so delivered continued. There may be a presumption that such possession would continue until the contrary was proved, but that is all. The District Judge's finding that the Plaintiff's predecessors never got actual, as distinguished from symbolical, possession, can only mean that the possession delivered did not continue at all, and that the Defendants, except for the unimportant interval while possession was being formally delivered, remained in actual occupation of the land. Such a finding of fact is fatal to the mere presumption referred to above. Such possession could not but be adverse. There is no reason to suppose that the Defendants have ever changed their claim, and where possession is exercised by the actual cultivation of the ground, the Plaintiff, who admittedly has never been in possession of the *kamat* land, must necessarily have known that the possession of the Defendants was adverse.

Now as regards the land held by raiyats, limitation is saved, in my opinion, by the rent decrees obtained by the Plaintiff's

(1) 11 C. W. N. 424 (1907).
(2) I. L. R. 25 Cal. 1 (1897).

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predecessor in 1901. The Defendants in those suits are admittedly tenants of the land. It was finally decided in those suits that the relationship of landlord and tenant existed between them and the Plaintiff's predecessor. That being so, I do not see how it can be said that the Plaintiff's predecessor was not then in possession. The tenants were admittedly in possession, and their possession was his possession. The Respondents have not shown that those decrees were fraudulent and collusive. Indeed, it was found in those suits that the tenants were colluding with the present Respondents. If the tenants had attorned to the Plaintiff, their possession would have been his possession. It seems to me that the same result must follow, if it is decided in a suit between the parties that they are his tenants.

The appeal will accordingly be allowed in part. The Plaintiff will get a declaration of his proprietary right in the land, covered by the rent decrees of 1901, but otherwise the suit will fail.

D. CHATTERJEE, J.—I agree.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 271 OF 1912.

COXE, J. RAY, J. 1913, 8, July.	DWARKA DHAKAI, Defendant No. 1, Appellant, *v.* MATHUR LAL MAJUMDAR and another, Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 188—Suit by co-sharer landlord for additional rent, if maintainable—Parties—Right of suit.

Where a co-sharer landlord brought a suit for arrears of rent and also for additional rent on the basis of a kabuliyat executed by the tenant in favour of the entire body of landlords agreeing to pay additional rent for additional area, and made his co-sharers parties to the suit:

Held, *that the suit for additional rent was not maintainable, as it was not brought by all the landlords jointly under sec. 188 of the Bengal Tenancy Act;*

Held also, *that the existence of the stipulation in the kabuliyat about the payment of additional rent did not take the suit out of the Bengal Tenancy Act.*

GOPAL CHANDRA *v.* UMESH NARAIN (1), BAIDYANATH *v.* ILIM (2) *followed.*

GOBINDA CHANDRA *v.* HAMIDULLAH (4), *distinguished on the ground that there was an entirely separate agreement between the tenant and the individual co-sharer landlord which did not exist in the present case.*

The entire body of landlords must join as Plaintiffs in a suit under sec. 188 of the Bengal Tenancy Act.

JATINDRA NATH *v.* PRASANNA KUMAR (3) *referred to.*

This was an appeal preferred on the 4th June 1912 against an order of Babu Chandra Bhusan Banerjee, Subordinate Judge of Zilla Khulna, dated the 28th March 1912, reversing an order of Babu Hem Chandra Basu, Munsif at Bagerhat, dated the 29th of June 1911.

The facts of the case will appear from the judgment.

Babus Nil Madhab Basu and Jadu Nath Kanjilal for the Appellant.

Dr. Sarat Chandra Bysak for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—The Plaintiff in this case is a

(1) I. L. R. 17 Cal. 695 (1890).
(2) 2 C. W. N. 44: s. c. I. L. R. 25 Cal. 917 (1897).
(3) 15 C. W. N. 74 (1910).
(4) 7 C. W. N. 670 (1903).

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co-sharer landlord, and his case is that the tenants had executed a *kabuliyat* in favour of the 16 annas landlords agreeing to pay rent for 15 bighas of land. There was a stipulation that the tenant should pay additional rent for additional land. Accordingly the land was measured and was discovered to be 25 bighas instead of 15 bighas. He, therefore, sued for the whole rent, including the rent due on the additional area making his co-sharers parties to the suit. The Munsif held that the suit was not maintainable under sec. 188 of the Bengal Tenancy Act. This decision was set aside in appeal by the additional Subordinate Judge, and the Defendant appeals.

It appears to me that the point is concluded by authority. The decisions in *Gopal Chandra v. Umesh Narain* (1) and *Baidya Nath* v. *Ilim* (2) are both clear authorities that a suit of this nature can only be brought by all the landlords under sec. 188 of the Bengal Tenancy Act; and it was held in *Jatindra Nath* v. *Prasanna Kumar* (3) that when a suit must be brought by the whole body of landlords under sec. 188, it is not sufficient if the co-sharers who are unwilling to join as Plaintiffs are joined as Defendants. It appears to us, therefore, that so far as the claim for increased rent is concerned, we are bound by these decisions to hold that the suit is barred by sec. 188 of the Bengal Tenancy Act.

It has been argued, *firstly*, that sec. 52 only applies to cases in which the area in excess for which rent had been previously paid is included within the original holding, and that the section does not apply to cases in which new land has been taken. It appears to me that this is an impossible construction of the plain terms of the section.

Secondly, it has been argued that this is not a suit under the Bengal Tenancy Act at all, inasmuch as there is a separate kabuliyat between the parties; and reference has been made to the case of *Gobinda Chandra* v. *Hamidulla* (4), in which it was held by Prinsep, J., agreeing with Ghosh, J. (Geidt, J., dissenting) that in the circumstances of that case sec. 188 did not bar the suit. But that case may be distinguished on the ground that there was an entirely separate agreement between the tenant and the individual co-sharer landlord who was the Plaintiff which does not exist in this case. The case of *Baidya Nath* v. *Ilim* (2) to which I have already referred shows that the existence of an agreement does not necessarily take the suit out of the Tenancy Act, and it appears to me that it would be unreasonable to hold that it should. It is provided by the Tenancy Act and it must be common knowledge, that a tenant is bound to pay additional rent for additional land and is entitled to reduction of rent if the area is reduced. If the landlord and tenant include a stipulation to that effect in their contract, it certainly seems to me unreasonable that the existence of such a stipulation should oust the application of the Tenancy Act from which it was in all probability derived. Reference has been made to another case, namely, that of *Dintarini* v. *Broughton* (5), but that case is clearly distinguishable, because there the liability of

(1) I. L. R. 17 Cal. 695 (1890).
(2) 2 C. W. N. 441 ; s. c. I. L. R. 25 Cal. 917 (1897).
(3) 15 C. W. N. 74 (1910).
(2) 2 C. W.N. 44 : s. c. I. L. R. 25 Cal. 917 (1897).
(4) 7 C. W. N. 670 (1903).
(5) 3 C. W. N. 225 (1896).

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the Defendant was said to have come into existence before the passing of the Bengal Tenancy Act. It appears to me now clearly settled that a suit of this nature must be brought by the whole body of landlords, and that accordingly so far as that point is concerned, the appeal must be allowed and the decision of the Subordinate Judge set aside. This decision, however, does not take away the right of the Plaintiff to the original rent which has accrued due during the years in suit, and the case must accordingly go back to the Court of first instance in order that that Court may decide how much of that rent is due and unpaid.

The Appellant will be entitled to his costs in this Court and of the Court below. The hearing fee is assessed at two gold mohurs.

RAY, J.—I agree.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 203 OF 1912.

FLETCHER, J.
RICHARDSON, J.
1914,
Heard,
25, March.
Judgment,
16, April.

SRIMATI NOGENDRA BALA CHOWDHURANI, Plaintiff, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Defendant, Respondent.

Bengal Drainage Act [VI (B. C.) of 1880], secs. 36, 36A, 38—Costs of drainage construction—Apportionment—Person made liable, engagement to pay in instalments by—Recovery by certificate from purchaser.

The provisions of the Public Demands Recovery Act for summarily recovering the amount due from a landholder under an engagement entered into under sec. 38 of the Bengal Drainage Act can only be put in force against the person who gave it.

They cannot be enforced against a person who has subsequently purchased his properties and who has not been made liable for the costs of construction under sec. 36A of the Bengal Drainage Act.

This was an appeal preferred on the 26th of June 1912 against the decree of Babu Latu Behary Bose, Subordinate Judge of Hooghly, dated the 30th of April 1912.

The appeal arises out of a suit to declare a certificate issued against the Plaintiff under the Public Demands Recovery Act to be illegal, inoperative and without jurisdiction.

The certificate was issued in respect of certain sums alleged to be due in respect of the Rajapur Drainage scheme which was executed upon, amongst others, properties belonging to the Mukherjees of Janai. The amount had been declared payable by the Mukherjees who also entered into an engagement under sec. 37 of the Bengal Drainage Act agreeing to pay the said amount in certain instalments.

The Plaintiff subsequently purchased the property of the Mukherjees affected by the scheme at a sale by a Receiver appointed in a suit for partition amongst the Mukherjees.

The certificate was originally issued against the Mukherjees, but subsequently the Receiver, and later on the Platntiff, was substituted in the place of the Mukherjees.

Hence this suit, which was first dismissed on the ground that sec. 244 of the Civil Procedure Code of 1882 was a bar to its maintainability. The High Court on appeal set aside this decision, and on remand the Subordinate Judge again

dismissed the suit on, amongst other grounds, that the amount due under the certificate was a first charge upon the property benefitted under secs. 31, 37 and 38 of the Drainage Act, and no purchaser could avoid payment of the sum for which the certificate was filed.

The Plaintiff preferred this appeal.

Dr. Rash Behary Ghose and *Babus Sarat Chunder Ray Chaudhury* and *Dhirendra Krishna Ray* for the Appellant.

Babu Ram Chunder Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an appeal by the Plaintiff from the judgment of the second Subordinate Judge of Hooghly, dated the 30th of April 1912, dismissing her suit.

The suit was brought by the Plaintiff for the purpose of obtaining a declaration that a certificate purported to have been made against her on behalf of the Secretary of State for India in Council under the Public Demands Recovery Act, 1895, was illegal and invalid.

The Plaintiff purchased the property described in the schedule to the plaint on the 15th of April 1905 at a sale held by a Receiver appointed by this Court in its Original Jurisdiction.

The property in question formerly belonged to a family of Mukherjees, some of whom instituted a suit for partition in this Court. In that suit a Receiver was appointed and under the orders of the Court, a portion of the estate was sold for liquidation of the debts of the estate. The Plaintiff became the purchaser at that sale, and the sale to her was duly confirmed by the Court.

Under the provisions of the Bengal Drainage Act, 1880, certain works known as Rajapur Drainage scheme were executed for the improvement of, amongst other properties, the property subsequently purchased by the Plaintiff. For the payment of the amount that they were liable to pay under the terms of the Act, three of the Mukherjees executed on the 4th of February 1908 in favour of the Secretary of State for India in Council an instalment bond. The Mukherjees subsequently made default in payment of certain of the instalments under the bond, and thereupon under the provisions of the Public Demands Recovery Act, 1895, a certificate was filed in the Collectorate against them, the certificate being No. 507 of 1900-1901. When the estate passed into the possession of the Receiver, his name was added or substituted in the certificate in the course of the year 1903-1904 and after the purchase by the Plaintiff, her name was added or substituted on the record on the 9th of July 1906. The Plaintiff objected to this procedure, but the Revenue authorities declined to interfere. Thereupon the Plaintiff instituted this suit.

When the case first came on for hearing, the learned Subordinate Judge dismissed the suit on the preliminary grounds that sec. 244 of the Code of Civil Procedure of 1882 was a bar to the suit, and further that the suit was barred by limitation. The Plaintiff preferred an appeal to this Court, and the order of the learned Subordinate Judge was reversed and the case remanded for trial in the lower Court.

The case that we have now to deal with is on the footing that the amended certificate is a certificate filed against the Plaintiff.

This question must be dealt with quite apart from the charge given by the Bengal Drainage Act, 1880, for the expenses of

works executed under the terms of the Act.

The only point we have to consider in this appeal is, was the certificate validly made against the Plaintiff? The answer to that question depends on whether or not the Plaintiff is a person "liable to pay the public demand."

Now sec. 28 (*c*) of the Bengal Drainage Act, 1880, directs that the Commissioners after making the classification therein mentioned shall proceed to apportion the total cost of construction upon the improved lands and shall draw up a statement showing the amount payable by each landholder.

Sec. 31 of the Act provides that the total sum so made payable with interest shall be a first charge upon such lands.

By sec. 36 it is enacted that whenever the Commissioner of the Division shall confirm any apportionment and report, or whenever one month shall elapse from the publication of any report without any appeal having been preferred, he shall pass an order declaring the sums payable in respect of the lands and the persons liable to pay the same to be determined.

As soon as any apportionment has been determined, the Collector is authorised by the terms of sec. 37 of the Act to cause a notice to be served upon any landholder who has not paid the sum payable by him, requiring him within one month to pay such sum with interest or to enter into an engagement for the payment by instalments over a period of not more than 10 years of such sum together with interest on the instalments for the time being remaining unpaid.

Under the terms of this section the Mukherjees executed in favour of the Defendant the instalment bond of the 4th of February 1908.

Sec. 38 provides (amongst other things) that if any landholder having entered into such an engagement fails to discharge any instalment payable thereunder, such instalment together with interest shall be recoverable under the provisions of any law for the time being in force for the recovery of public demands.

It is very obvious that under the terms of this section the person liable to satisfy the "engagement" entered into with the Defendant is the person or persons who gave it, and that under the terms of the section the provisions contained in the Public Demands Recovery Act, 1895, for summarily recovering the amount remaining due under the terms of the "engagement" can only be put in force against the persons who gave it. The Plaintiff in this suit is not such a person.

The Bengal Drainage Act, 1880, has, however, been amended by the Bengal Drainage (Amendment) Act, 1902, and under the provisions of the amending Act a new sec. 36A has been inserted in the Act authorising the Collector to revise an order passed under sec. 36 as to the names of the persons liable to pay by reason (amongst others) of any change having taken place in the ownership or joint ownership of the land.

The learned Senior Government Pleader has informed us that no such revision has taken place in the present case, and, therefore, it is not necessary to consider what liability, if any, the Plaintiff would have been under, if the order made under sec. 36 of the Act had been revised by the Collector.

In the result, the present appeal must be allowed and a decree passed in favour of the Plaintiff declaring the certificate invalid as against her.

The Defendant must pay to the Plaint-

iff her costs both in this Court and the Court below. We assess the hearing fee at Rs. 500.

Richardson, J.—I have read this judgment and agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

Appeal from Original Order No. 579 of 1911.

Woodroffe, J. Carnduff, J. 1914, 22, April.

Rajani Nath Rakshit, Opposite Party, Appellant,
v.
Kusum Kamini Mazumdar & ors., Judgment-debtors, Respondents.

Civil Procedure Code (Act V of 1908), Or. XXI, r. 90—"Immoveable property"—Whether sale of some of properties sold can be set aside—Substantial loss with regard to some if vitiates sale as to whole.

Where four lots of immoveable properties were sold in execution and it was found that there was substantial injury caused to the judgment-debtors with regard to one of the lots, but not with regard to the other three:

Held—*That in Or. XXI, r. 90, "immoveable property" means any one of the immoveable properties, the sale of which is liable to be set aside upon the grounds mentioned in the section.*

That the Court was not bound to set aside sale of all four lots by reason of irregularity and substantial loss caused thereby with regard to one of them.

Macnaghtan v. Mahabir Pershad Singh (1) *referred to.*

This was an appeal from an order of H. Walmsley, Esq., District Judge of Mymensingh, dated the 20th June 1911.

The facts of the case are shortly as follows:—

Four lots were put up to sale in execution of a decree. The findings of the District Judge with regard to each were as follows:—

(1) With regard to lot No. 1, it was impossible to say whether the price obtained was adequate or not.

(2) With regard to lot No. 2, the property was valued at Rs. 1,800 and was sold for Rs. 470 only. The difference between the value was so great as to amount to substantial injury.

(3) With regard to lot No. 3, the price at which the property was sold was not unreasonable.

(4) With regard to lot No. 4, the price was adequate.

The material irregularity complained of was with regard to non-service of fresh sale proclamation under Or. XXI, r. 69 (2), although the adjournments were obtained at the instance of the judgment-debtors, but there was no waiver referred to in the rule. The District Judge concluded as follows:—

"My conclusion is that regarding the second property the Petitioner has sustained substantial injury. The history of the case shows that adjournments were given again and again and the result must have been to encourage the belief that the property would never be sold. The consequence was that the absence of a fresh sale proclamation had a most prejudicial effect.

I cannot discriminate between the properties to confirm the sale of one and cancel the sale of another." In this view the sale of all the lots was set aside.

(1) I. L. R 9 Cal. 656, 662 (1882)

RAJANI NATH RAKSHIT *v.* KUSUM KAMINI MAZUMDAR.

Babus Kritant Kumar Bose and *Bepin Chunder Bose* for the Appellant.

Babus Gobind Chunder Dey Roy and *Biraj Mohan Majumdar* (for Deputy Registrar) for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—This appeal arises out of an order passed upon an application to set aside a sale.

Four properties were put up for sale, which are mentioned in the judgment of the District Judge. The learned District Judge set aside the sale as regards all these four properties. Now, as regards properties Nos. 1 and 4, there is no appeal before us and therefore the order of the District Judge stands.

As regards property No. 2, it is admitted that there were irregularities, but the contention has been that there is no evidence which shows that substantial injury which the Judge has found to exist in this case was caused by the irregularities referred to in the judgment. I think that the facts to which the learned Judge refers in his judgment supports the conclusion at which he has arrived as regards this property, and therefore his order setting aside the sale as regards property No. 2 stands.

The main question in this appeal is as regards property No. 3. No doubt, the irregularities alleged may have affected this property as much as other properties put up at this sale, but it must be found that substantial injury was caused by such irregularity, and the learned Judge found on the evidence that as regards property No. 3, no substantial injury has been proved.

We have been referred by the learned Pleader for the Respondent to some facts connected with the second sale which took place after the Judge's order. I am not sure that we are entitled to look at those facts, but if we do, the result of that second sale seems to support the Judge's order now under appeal; for, according to the learned Pleader for the Respondent, whilst at such second sale properties Nos. 1 and 2 were sold at an increased price of Rs. 890 and property No. 4 was sold at an increased price of Rs. 550, property No. 3 with which we are now concerned fetched only Rs. 80 more than Rs. 420 at the first sale which the learned Judge found not to be unreasonable. The question now is whether under these circumstances the sale should also be set aside as regards property No. 3. There is no question but that if at this sale, property No. 3 had alone been sold, there would have been no ground for setting aside the sale. But the argument is that because property No. 3 formed part of a lot of four properties and the sale has been set aside as regards the other properties, therefore the sale as regards property No. 3 must also be set aside, although it has not been shown that any substantial injury has been suffered. The learned Judge has gone upon this ground and says that though there has been no injury in respect of property No. 3 or properties Nos. 1 and 4, yet he is unable to discriminate between the properties and confirm the sale of one and cancel the sale of another and on that ground he set aside the whole sale.

If, however, we look at the words of the section, they would appear to justify us in this case in dealing with property No. 3 separately from the others; for the section says that where any immoveable property has been sold, application may be made

to Court to set aside the sale. The question then is what is the meaning of "immoveable property"? Does "immoveable property" mean all the immoveable properties which are to be put up for sale at one and the same time, or does it mean any one of such immoveable properties the sale of which is liable to be set aside upon the grounds mentioned in the section? I do not see anything in the wording of the section, which, under the circumstances of this case, preclude us from giving effect to the contention of the Appellant, and we have asked the Respondent to refer us to any reported authority which would prohibit us from adopting the course which we have been asked to pursue; but no such authority has been produced. On the contrary, we find that in the case of *Macnaghten* v. *Mahabir Prosad Singh* (1), the High Court which had previously set aside the sale of twenty properties which were sold at an execution sale, subsequently on review withdrew its order as regards six of those properties so that the effect was as though the High Court had in the first instance set aside the sale as regards fourteen properties under one auction sale and not as regards the remaining six properties. It is true that the order of the High Court was reversed by the Privy Council upon other grounds, but there is nothing in the Privy Council judgment to indicate that they disapproved of the High Court judgment on the ground that it was not proper for the High Court to set aside the sale as regards some of the properties put up at one auction sale and not others. Had that course been illegal, doubtless exception would have been taken to the High Court judgment also on this ground, but there is no evidence of that. Therefore, it appears to me that we are justified in accepting the argument addressed to us by the Appellant as regards the property No. 3, namely, estate No. 2593, taluk Shibkali.

(1) I. L. R. 9 Cal. 656, 662 (1882).

As regards this particular property, I would set aside the order of the District Judge setting aside the sale and direct that the sale of property No. 3 should stand.

As regards the Appellant and the Judgment-debtors, each party will bear his own costs. As regards the purchaser of the property No. 2, the Appellant must pay his costs. The hearing fee is assessed at three gold mohurs. We make no order as to costs of the lower Courts.

CARNDUFF, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 64 OF 1913.

JENKINS, C. J.
D. CHATTERJEE, J.
1914,
25, March.

BISHESHUR RAY CHOWDRY, Defendant, Appellant,
v
RAJENDRA KUMAR SINGH, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 50, 105—Question of enhancibility of rent if a question under sec. 105—Presumption under sec. 50—Kabuliyat executed since Permanent Settlement—Confirmatory lease.

Where in a proceeding for settlement of rent under sec. 105 of the Bengal Tenancy Act, the Settlement Officer held that the rent of the tenant was not enhancible by reason of the application of sec. 50 of the Bengal Tenancy Act, and the Special Judge on appeal held that the tenure having originated in a kabuliyat of 1238, the rent was enhancible:

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Held—*That the question decided being a question relating to an incident of the tenancy did not come under sec. 105 of the Act and a second appeal was not barred by sec. 109A of the Act*;

That as the kabuliyat was a document by which a previously existing lease was recognised, the presumption under sec. 50 of the Act applied.

This was an appeal under sec. 15 of the Letters Patent, preferred on the 9th of May 1913 against a decree of Newbould, J., dated the 14th of April 1913, in S. A. No. 2158 of 1910 preferred from a decree of P. E. Cammiade, Esq., Special Judge of Backerganj, dated the 9th of April 1910, confirming a decree of Babu Sirish Kumar Shome, Assistant Settlement Officer of Backerganj, dated the 10th of December 1909.

After the preparation of record-of-rights, an application under sec. 105, Bengal Tenancy Act, was made by the Plaintiff-Respondent (the landlord) for assessment of fair rent in respect of a tenure which consisted of a fractional share of 7 annas 7½ gandas of a taluk named Raghu Durgadas and which was recorded as a permanent tenure in the khatian prepared by the Settlement Officer, on the allegation that the rent of the tenure was liable to be enhanced, and that there was also an increase in the area. The Defendant pleaded that the rent of his tenure was under the provisions of sec. 50 of the Bengal Tenancy Act not liable to enhancement inasmuch as the rent had not been changed from the time of the Permanent Settlement and also pleaded that there was no increase in area. The Defendant proved payment of rent at a uniform rate for more than 20 years and relied upon the presumption arising from this under the provisions of the second paragraph of sec. 50 of the Bengal Tenancy Act to prove payment of rent at the same rate from the time of the Permanent Settlement. To rebut this presumption the landlord Plaintiff put in a kabuliyat, dated the 13th Pous 1238, corresponding to the 27th December 1831, to show that the tenure was first created on that date and urged that this would disprove the presumption. The Assistant Settlement Officer held on a construction of this kabuliyat that it did not show that the tenure was created for the first time in 1831, but that it was merely a "confirmatory" lease. He, however, held that the Plaintiff had succeeded in proving an increase in the area and granted a decree for increased rent on account thereof. On appeal, the Special Judge found that the Plaintiff had failed to prove an increase in the area of the tenure, but he construed the kabuliyat of 1831 as creating a new tenure, and held that the presumption arising from the payment of a uniform rent for over 20 years was rebutted by it and further according to his interpretation of the document the rent payable was not fixed, but variable, and he granted a decree for enhancement of rent at the same amount as was fixed by the Settlement Officer. The Defendant preferred a special appeal to the High Court, and Newbould, J., held that no second appeal lay, as under sec. 109A of the Bengal Tenancy Act no order for assessment of rent under sec. 105 was appealable.

The judgment of Newbould, J., was as follows :—

NEWBOULD, J.—This is a second appeal against a decree enhancing rent of a tenure. The Settlement Officer held that the presumption under sec. 50 (2) of the Bengal Tenancy Act applied, but that the

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tenure was liable to enhancement, because there has been an increase of area. The lower Appellate Court differed from these findings, but upheld the enhancement, on the ground that the provisions of sec. 50 (2) did not apply and the rent of the tenure was liable to enhancement.

A preliminary objection has been taken that no appeal lies. It appears to me that this objection is sound. My attention has been drawn to certain cases in which it has been held in cases of a somewhat similar nature that an appeal did lie. But it seems to me that these cases are distinguishable, because in all these cases some question under sec. 106, Bengal Tenancy Act, was also involved. The present case is clearly a case under sec. 105, and the decision is simply a decision settling rent. The words of sec. 109A are clear that no appeal lies against a decision settling rent, and I, therefore, hold that no appeal lies in these cases. I accordingly dismiss the appeal with costs.

[Against this judgment the Defendant preferred this Letters Patent Appeal. The appeal was first heard on the 20th March 1914 before the Chief Justice and Imam, J.]

Babu Tara Kishore Chowdhury (with him *Babu Atul Krishna Ray*) on behalf of the Appellant contended that though the proceedings commenced nominally under sec. 105 of the Bengal Tenancy Act, yet the contentions raised by the parties and the matters decided by the lower Courts had reference to the incidents of the tenure. The question decided is whether the rent of the tenure is enhancible at all. This is not a question of assessment of rent under sec. 109A, Bengal Tenancy Act. See *Prithi Chand* v. *Basarat Ali* (1).

(1) I. L. R. 37 Cal. 30 F. B.: s. c. 13 C. W. N. 1149 (1909).

Babu Mahendra Nath Ray (with him *Babu Bisbhusan Dutt*) for the Respondent.—The case is surely one under sec. 105 of the Bengal Tenancy Act.

[JENKINS, C. J.—Is not the question as to whether rent of the tenure is enhancible or not a question regarding the incidents of the tenure? Is it a question merely of assessment of what rent is fair?]

It may be a question of the incidents of the tenure, but the proceedings were under sec. 105 of the Bengal Tenancy Act.

[JENKINS, C. J.—This does not matter. The question of incidents does not come properly under that section.]

At all events no question regarding the amount of rent assessed should be allowed to be raised in the appeal.

Babu Tara Kishore Chowdhury.—I do not propose to raise any question as to the amount of rent.

[JENKINS, C. J.—Then the judgment of Newbould, J., is set aside.]

[The second appeal was heard on the merits on 25th March 1914 before the Chief Justice and D. Chatterjee, J.]

Babu Tara Kishore Chowdhury (with him *Babu Atul Krishna Ray*).—The kabuliyat of 1831 expressly shows that the person who executed it had come to acquire in different ways a 7 as. and 7½ gandas share of a taluk already in existence, and the kabuliyat was merely a recognition by the then landlord of the interest of the person who executed the kabuliyat in that share and the opening of a separate account with reference to that share. Hence it is not the creation of a new tenure. No doubt, the case of *Uday Chandra Kaji* v. *Nripendra Narayan Bhup* (2) takes a contrary view, but the learned Judges who decided that case have themselves refused to follow it as an

(2) 13 C. W. N. 410 (1909).

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authority for the broad proposition laid down therein. In the case of *Grant* v. *Ram Rekha* (3), Sharfuddin, J., who was one of the Judges who decided the case of *Uday Chandra Koji* v. *Nripendra Narayan Bhup* (2), cited with approval the judgment reported in *Mulluk Chand* v. *Satish Chandra* (4), wherein it is stated that the case of *Uday Chandra Kaji* v. *Nripendra Narayan Bhup* (2) is authority only for the proposition that in some cases where after dividing a tenure the parties intend to create a new tenure, then only the presumption under sec. 50, Bengal Tenancy Act. does not apply in the case of tenure-holders. No doubt, if a kabuliyat for a portion of the lands constituting a tenure is executed, containing new terms altogether and the parties intend that this should be regarded as the origin of a new tenancy, the presumption arising from payment of a uniform rent for over 20 years under sec. 50 (2) might not arise. Coxe, J., who was the other learned Judge who was a party to the decision in *Uday Chandra Kaji* v. *Nripendra Narayan Bhup* (2) said, with reference to this case in the case of *Jyoti Proshad* v. *Darby* (5), that that decision would not apply to any case where the division of the tenure was made prior to the passing of the Bengal Tenancy Act. Therefore both the learned Judges who decided the case of *Uday Chandra Kaji* v. *Nripendra Narayan Bhup* (2) have refused to follow it as an authority for the broad proposition laid down there. It is now therefore no longer any authority against me. *Madhu Mala* v. *Alfazuddi* (6) was also referred to in this connection. Sec. 88, Bengal Tenancy Act, expressly recognises division of a tenure and a distribution of the rent made with the consent of both the landlord and the tenants. Division according to this section certainly does not mean the destruction of the old tenure and the creation of new ones. Sec. 50, cl. (3) therefore is not to be applied to cases which are cases merely of division and distribution of rent and come within the purview of sec. 88, but refers to cases of creation of new holdings on new terms whether those holdings comprise only portions of pre-existing holdings or are made up of lands of old holdings and other new lands.

If then mere division of a tenure does not constitute the destruction of old tenure and the creation of a new one, the kabuliyat in the present case clearly does not prove the creation of a new tenure in 1831 and so the presumption is not rebutted.

It is immaterial whether the rent fixed by the kabuliyat was variable or not under the terms of the kabuliyat ; for as a matter of fact there has been no change in rent ever since then and there has been no evidence of change of rent before 1831. If in point of fact the rent has not been changed, the presumption applies.

On a proper construction of the kabuliyat, it ought to be held that there is no clause in it providing for variation of rent.

Babu Mahendra Nath Roy (with him *Babu Bibhusan Dutt*).—The kabuliyat properly construed means that the rent is variable, and if variable no presumption can arise.

[JENKINS, C. J.—Sec. 50 (1) speaks of

(2) 13 C. W. N. 410 (1909).
(3) 14 C. L. J. 110 (1910).
(4) 14 C. W. N. 335 (1909).
(5) 16 C. W. N. 241 (1911).
(6) 13 C. W. N. 962 (1909).

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tenancy being held as a matter of fact on payment of rent at a uniform rate irrespective of the original terms of the tenancy.]

The kabuliyat of 1831 is the creation of a new tenancy. It appears from the kabuliyat that the executant purchased or otherwise acquired different shares of three distinct tenures and a new tenure must be considered to have been created by the amalgamation of these shares into one.

[JENKINS, C. J.—This is not the case made by the other side, whose case is that it was a division of one tenure into different parts. But if what you say is correct, can you say that the interest of the executant which is all that the word tenure means was acquired for the first time by this kabuliyat?]

The interest of the executant might have existed from before in the several parts of the three distinct tenures, but the interest in the parts taken together as a whole was the creation of this kabuliyat.

I also rely on the case of *Uday Chandra Kaji* v. *Nripendra Narayan Bhup* (2) and the arguments used therein.

Babu Tara Kishore Chowdhury in reply.—The case of both parties in the lower Courts was that there was only one tenure originally, *viz.*, taluk Raghu Durgadas and the tenure of the Defendant consisted of a 7 as. and 7½ gandas of that taluk. Even if there were three different taluks, it would not make any difference in the argument. The interest was not new, but had existed from before.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—In our opinion the judgment of Mr. Justice Newbould as also the decree of the lower Appellate Court must be set aside for these reasons. We are satisfied that the Appellant, who is the Defendant in the suit, is a tenure-holder, and that he and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit. From that it follows that, until the contrary is shown, the tenure-holder and his predecessors-in-interest have held at that rent or rate of rent from the time of the Permanent Settlement; and, if that be so, then sub-sec. (1) of sec. 50 of the Bengal Tenancy Act protects the Defendant from an increase of rent except on the ground of an alteration in the area of the tenure. The only question, therefore, is whether the contrary has been shown. For that purpose reliance has been placed on the kabuliyat, dated the 13th Pous 1238, one of the exhibits in the case. The true meaning of this document has been the subject of considerable discussion before us, but this at least emerges clearly from the discussion that the document is the recognition of a previously existing interest and not the creation of a new one. Therefore it does not show the contrary required by sub-sec. (2) of sec. 50.

The result then is that in so far as the lower Appellate Court has decided in favour of an enhancement of rent, the decree was erroneous. In so far as it decided that there had been no alteration in area, it must be upheld as it is a finding of fact which has not been controverted. The Plaintiff's suit must, therefore, be dismissed.

Each party will bear his own costs throughout.

Appeal allowed.

(2) 13 C. W. N. 410 (1909).

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 37 OF 1912.

JENKINS, C. J.
MOOKERJEE, J.
1913,
10, July.

PEARI MOHAN SHAHA and ors., Plaintiffs, Appellants,
v.
DURLAVI DASSYA and others, Defendants, Respondents.

Judgments and orders not inter parties—Res judicata—*Estoppel—Evidence—Relevancy.*

Plaintiff purchased certain properties at a sale in execution of a money decree against A. A's mother B, whose claim to the property under a kobala alleged to have been executed by the original owner D had been dismissed in execution proceedings also failed in a suit instituted by her against Plaintiff and others under sec. 283 of the Civil Procedure Code of 1882, it having been found that B was really a benamidar for A. Plaintiff, on proceeding to take possession, was opposed by D. In a suit by the Plaintiffs to recover the property from D:

Held—*That the orders and decrees in the previous litigation were relevant to the issue as to title, and though not* res judicata *between the parties were admissible in evidence.*

RAMAMURTI DHORA *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (1) *referred to.*

This was an appeal preferred on the 26th of March 1912 against the decree of D. Chatterjee, J., dated the 27th February 1912, in Appeal from Appellate Decree No. 1641 of 1909, which was preferred on the 6th August 1909 against the decree of Babu Aditya Charan Chackrabartty, Subordinate Judge, 1st Court of Mymensingh, dated the 1st May 1909, affirming the decree of Babu Sarat Chandra Ghose, Munsif, 2nd Court, Netrakona, dated the 24th August 1908.

(1) I. L. R. 36 Mad. 141 (1911).

The material facts were these :—

The Plaintiffs were the decree-holders-auction-purchasers of certain properties in a proceeding in which the sons of one Pateswari were the judgment-debtors. Pateswari preferred a claim under sec. 278, C. P. C., against the attachment, alleging that the properties were in fact hers by transfer from her mother Durlavi. The claim being dismissed, Pateswari brought a regular suit in order to have her title declared which was dismissed and the dismissal was confirmed on appeal. On the predecessor of the Plaintiff applying for mutation of names in the Collectorate, he was opposed by Durlavi alleging title in herself and the application was refused by the Collector. Hence the suit for the declaration of title by the Plaintiffs. The suit was decreed by the 1st Court and the appeal was also dismissed by the Subordinate Judge. On second appeal Mr. Justice Digambar Chatterjee set aside the judgments of the lower Courts and remanded the case to the Court of 1st instance for re-trial, if the costs of the Defendants were put in within a fixed period in the Court of the Munsif.

There was default in paying the costs, and the Munsif ordered the dismissal of the suit in terms of the order of Mr. Justice Chatterjee.

The judgment of D. Chatterjee, J., was as follows :—

D. CHATTERJEE, J.—One Durlavi inherited certain properties from her sons. She had 2 daughters : one of them died and the son of the deceased daughter being afraid of the whole property going to the other daughter induced Durlavi to execute 2 kobalas one in favour of the

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surviving daughter Pateswari in respect of $\frac{4}{7}$ths of the estate and the other in respect of $\frac{3}{7}$ths in favour of his wife and another. These kobalas are said to have been benami for the daughters' sons who had incurred debts.

The Plaintiffs' father having got a decree for money against the sons of Pateswari sold $\frac{4}{7}$ths of the properties in execution and purchased it himself on the 22nd August 1903 after a claim by Pateswari under sec. 278 of the Civil Procedure Code had been rejected. Pateswari then brought a regular suit for the establishment of her title under the kobala executed by Durlavi, but her suit was dismissed on the 4th of March 1904 and her appeal was dismissed on the 21st of June 1904. Durlavi was no party to this suit, but she deposed on behalf of her daughter and admitted the execution of the kobala and receipt of consideration. The sale to the Plaintiffs having been confirmed in the meantime, they applied for the registration of their names in the Collector's books and were opposed by Durlavi. Their application was refused, and they bring the present suit for the declaration of their title and recovery of possession on the allegation that the kobala executed by Durlavi was benami in the name of Pateswari in favour of her sons whose rights they had purchased. Neither Pateswari nor her sons were made Defendants, the only Defendant being Durlavi who had suceeeded in defeating their application before the Collector.

Both the Courts below have decreed the suit, and Durlavi appealed to this Court. The present Appellants who are the sons of Pateswari have been substituted in place of Durlavi deceased along with her other grandsons. It has been contended on their behalf that the finding of the lower Appellate Court that Durlavi conveyed her right to Pateswari and had no rights left of her own is not sufficient for supporting the decree that has been passed; that the decrees in the suit of Pateswari were not admissible against Durlavi and on the findings the suit should have been dismissed. It is conceded that the decrees in Peteswari's suit were not binding on Durlavi who was not a party to the same, but it is contended that they are admissible as title-deeds in favour of the Plaintiffs; that upon the finding of the lower Appellate Court the title passed to Pateswari and the decrees show that Pateswari had no title as against the Plaintiffs: the learned Vakil for the Plaintiffs-Respondents argues that when a Defendant pleads *jus tertii* it is open to the Plaintiff to show that he has good title as against the *tertius*, *i. e.*, the third party set up by the Defendant. In the present case, however, the Defendant Durlavi did not plead the title of Pateswari, nor did the Plaintiffs claim title through Pateswari. The estoppel of Pateswari by the judgment in her suit does not create any title in the Plaintiffs as against the Defendant Durlavi. The effect of acceding to the argument of the Respondent would be to give effect to two contradictory judgments: the judgment in Pateswari's suit decides that Pateswari had no title—that she was a benamidar: the judgment in the present case decides that title passed to Pateswari. I am not aware of any principle of law upon which this can be allowed. Whether Durlavi had any title or not, she is in possession and the Plaintiffs must make out their title in her presence before they can be allowed to oust her; they must prove in this case that the Appellants whose rights they purchased had the rights which they

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claim at the date of their purchase. The pleadings raised the question, and one of the issues framed was—Issue No. 5. Did the Defendant execute any document in favour of her daughter Pateswari as a benami transaction? Did any title pass thereunder to her grandsons? Is that document binding upon her? The learned Munsiff says—" The onus is on the Plaintiffs to prove the benami; this they have not attempted to do." Seeing the view that both the lower Courts have taken of the effect of the decree in Pateswari's suit, it is quite probable that the Plaintiffs were misled in adducing no evidence on the point. The best course in the interests of justice therefore would be to give them an opportunity of adducing evidence on this part of the case. This, however, must be on terms as it is through their mistake that the case has to be sent back. I therefore set aside the judgment and decree of the lower Appellate Court and send the case back to the first Court for re-trial after giving the parties an opportunity of adducing further evidence. The Respondents must pay the costs of the Appellants both in this Court and in the lower Appellate Court within one month from their receipt of notice of the arrival of the record in the Court of first instance. If the said costs are not paid within that time, this appeal will be decreed with costs. Notice of the arrival of the record in the Court of first instance will be given to the Appellants. The costs in the first Court will abide the result.

[On this appeal under sec. 15 of the Letters Patent.]

Babu Dwarka Nath Chackravarti (with *Babu Jotindra Nath Lahiri*) for the Appellants.—The Defendant set up title in a third person, and we have proved that the third person, *viz.*, Pateswari had no title as against us. We have proved our title by showing that Durlavi had parted with her interest in favour of either Pateswari or her sons, and against both we have the judgment in the previous proceedings. I submit, thus the links in my title are established. The judgment *inter alios* is admissible in evidence. Though it is not *res judicata*, it has evidentiary value and we have nothing against it. See secs. 9 and 13, Indian Evidence Act, also *Denomani Chowdhrani's* case (3). I submit that the judgment supplies a link in the chain of titles at least as a conveyance would. I rely upon *Ramamurti Dhora* v. *The Secretary of State for India in Council* (1).

Babu Tarak Chandra Chackravarti for the Respondents.—The Plaintiff was bound to prove his title. There is no question of Durlavi's title.

[JENKINS, C. J.—The title of the Plaintiff is mixed up with your title.]

The Plaintiffs have not even attempted to prove whether Durlavi's kobala was merely a *benami* in favour of the sons of Pateswari.

[JENKINS, C. J.—But both Pateswari and her sons are bound by the previous proceedings: sec. 283 of the old Civil Procedure Code.]

[*Babu Dwarka Nath Chackravarti*, after judgment was delivered, submitted that the order of the Munsif dismissing the suit in the terms of the order of Chatterjee, J., should also be set aside.]

The following JUDGMENT was delivered by—

JENKINS, C. J.—This is an appeal under cl. 15 of the Letters Patent from a judg-

(1) I. L. R. 36 Mad. 141 (1911).
(3) 6 C. W. N. 386: s. c. I. L. R. 29 Cal. 187 (1901).

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ment of Mr. Justice Digambar Chatterjee, whereby he reversed the decree of the lower Appellate Court and remanded the case for re-trial.

The Plaintiff claims to be a purchaser at an execution sale, and on the strengh of that purchase he has brought this suit for a declaration of his title to a $\frac{4}{7}$ths share of Taluk No. 12437 of the Mymensingh Collectorate and also for possession.

The Defendant against whom the suit is brought is a lady named Durlavi Dassya who unquestionably was at one time entitled to the property in suit, and the Plaintiff's claim relates to a title alleged to be derived from her. In 1897, this lady executed a kobala which purported to be in favour of her daughter Pateswari. The land in suit was then attached in execution of a decree obtained against Pateswari's sons. A claim to the property was advanced by Pateswari, but it was rejected. Thereupon, Pateswari brought a suit as contemplated by sec. 283 of the Civil Procedure Code of 1882 making as parties the decree-holder and her sons. This suit failed in the Court of first instance, and on appeal the decree of dismissal was confirmed. It was in these execution proceedings that the Plaintiff bought the property in 1904. There was opposition offered to the Plaintiff by the Defendant Durlavi Dassya; so this suit has been brought.

The Defendant's contention was that she never parted with the property, and if she had established that, there would have been a complete answer to the claim. It has, however, been held by the lower Appellate Court that the kobala was executed by her in 1897, and that it was an effective kobala, and so the title passed out of her. The question then is whether the Plaintiff has made out a title to the property.

The lower Appellate Court has decided this in the Plaintiff's favour, and for that purpose has relied on the result of the litigation which commenced with the claim in the execution proceedings and terminated in the suit and on the orders and decrees in that litigation.

Mr. Justice Chatterjee appeared to think that that was not a sufficient foundation for the Plaintiff's title, and so it was that he reversed the decree of the lower Appellate Cou t.

Before us it has been contended that this was erroneous, but the Defendant-Respondent maintains that it was correct.

There is a decision in a recent issue of the Indian Law Reports, Madras Series [*Ramamurti Dhora* v. *The Secretary of State for India in Council* (1)], which practically covers this case, for it was there decided in circumstances substantially resembling the present, that a party could not set up a title at variance with what had been determined in a previous litigation although his opponent in the suit then before the Court had not been a party to the previous litigation. And, in disposing of the case, it was said, "The question does not depend on the application of the doctrine of *res judicata* between the parties as expounded in sec. 13 of the Civil Procedure Code. That section does not cover all cases of estoppel by judgment. We must hold that the Plaintiffs cannot be permitted to prove that they are the owners of the land in question. They have therefore no cause of action." Though I do not for one moment question the propriety of the result in that suit, I hesitate to act on that line of reasoning, and more parti-

(1) I. L. R. 36 Mad. 141 (1911).

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cularly when I bear in mind what was said by the Privy Council in the case of *Gokul Mandar* v. *Pudmanund Singh* (2). Their Lordships there dealing with the topic of *res judicata* remarked as follows:—"They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

But I think there is another and sounder basis on which our decision must go in favour of the Appellant. It is not disputed before us that the decrees in the previous litigation are relevant as evidence, nor indeed can this be disputed when regard is had to the long line of authorities of which it will suffice for me to refer to the decision in *Denomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (3) decided by the Privy Council, *Brew* v. *Haren* (4) and *Davies* v. *Lowndes* (5), so that what we have to see is whether, as they were admissible, they were not a sufficient basis for the judgment of the lower Appellate Court. Now, the Judge of the lower Appellate Court seems to me to have perceived with clearness that there was not a *res judicata* as between the parties to this litigation, but the learned Judge says, and I think correctly, that as between the parties to the previous litigation the decrees were binding. That appears to me to be a correct view of the law, and I may here refer not inappropriately to sec. 283 of the Civil Procedure Code of 1882, which says that "the party against whom an order under secs. 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." The result of the former suit we know was that the claimant's alleged right was negatived. So then we have this result that as between the decree-holder, Pateswari, and her sons there has been an adjudication by Court, which affirms the right of Pateswari's sons, and negatives the right of Pateswari. Why that should not be, in the circumstances of this case, cogent evidence I fail to see. Indeed the Defendant herself has not made any suggestion in the course of this litigation as to how things stand as between Pateswari and her sons. Her contention throughout has been that the title did not pass away from her. So we have this result that as against the adjudication in favour of Pateswari's sons, there is no evidence of any sort or any contention brought in rebuttal of the result of that litigation, and the decree in which it resulted. It appears to me that in these circumstances, and having regard to the facts with which we have to deal in this case, the result of that litigation is at least as cogent against the Defendant as would have been an instrument of transfer executed by Pateswari, the ostensible owner, in favour of her sons. I wish to make it clear that, in the view I take, I cannot regard the decree in the previous litigation as amounting to *res judicata* which would bar all possibility of evidence on the part of the Defendant. It would, I conceive, have been open to the Defendant to show that, notwithstanding that decree, there were circumstances either vitiating the result

(2) 6 C. W. N. 825: s. c. I. L. R. 29 Cal. 707 at p. 715 (1902).

(3) 6 C. W. N. 386: s. c. I. L. R. 29 Cal. 187 (1901).

(4) Ir. Rep. 9 Com. Law 29; 11 Com. Law 198.

(5) 6 Man. and Gr. 471 (1843).

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of that litigation or affecting its result so as to prevent its operation in favour of Pateswari's sons. But we have nothing of that sort in this case, as, we merely have on one side the evidence furnished by the orders and decrees in the previous litigation, and nothing by way of rebuttal of that, on the other.

In these circumstances, I think, the necessary conclusion is that we must hold that the Judge of the lower Appellate Court had evidence which justified the conclusion at which he arrived, and it was erroneous to have interfered with his decree.

We must accordingly set aside the judgment of Mr. Justice Chatterjee and restore the decree of the lower Appellate Court, and the Appellants must get their costs of both appeals in this Court.

It has been brought to our notice that there has been an order by the Munsiff consequent upon the judgment of Mr. Justice Chatterjee. The order necessarily is of no effect and inoperative.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1587 OF 1913.

SHARFUDDIN, J.
CHAPMAN, J.
1913,
2, December.

KEDAR BISWAS, Petitioner,
v.
MATHURA NATH MITRA, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 439, 517, 520—Restoration of moveable property—Charge of theft—Malkhana register, order passed in, making over property to complainant—Acquittal by High Court—Subsequent order of Magistrate refusing to revise order in Malkhana register—Revision by High Court.

Certain properties, alleged to be stolen properties, were found in the house of the Petitioner who was tried and convicted of theft. These properties were in the custody of the Court and after the judgment of the Sessions Judge affirming the conviction of the Petitioner, the trying Magistrate passed an order in the Malkhana register to the effect that the properties should be made over to the complainant. No order was passed on the record of the case. The Petitioner moved the High Court against the conviction and sentence and was acquitted. After his acquittal by the High Court the Petitioner applied to the trying Magistrate for the restoration of the properties to him, but the Magistrate held that he could not revise his previous order in the Malkhana register. The Petitioner then moved the High Court and obtained a Rule:

Held—*That the Malkhana register forms no part of any criminal case, unless it is brought on the record in a legal way and the order in complainant's favour recorded in it was not one under sec. 517, Cr. P. C., but the order refusing to revise that order was an order under sec. 517, Cr. P. C., and the High Court had jurisdiction to revise it under sec. 520, as also under sec. 439, Cr. P. C.*

The intention of the Legislature in cl. (3) of sec. 517 is that an order under sec. 517 should not be carried into effect until it really becomes final either by there being no appeal within the prescribed period or by any final order by a Court of final jurisdiction.

That after the accused is acquitted of theft or burglary, the proper order to make is to direct that the property found in the possession of the accused should be restored to him. The complainant in that case could go to the Civil Court, file a suit and secure an injunction.

*That, in the circumstances of the case, the absence of a prayer by the Petitioner as to the restoration of the properties in his

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previous application to the High Court was no bar to his getting relief in this Rule.

This was a Rule granted on the 23rd September 1913, against an order of Babu Susil Kumar Ganguly, Deputy Magistrate of Jessore, dated the 6th August 1913.

The facts will appear from the judgment.

Babu Tarakeshur Pal Choudry for the Petitionor.

Babu Sirish Chandra Chaudhuri for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the District Magistrate and the Opposite Party to show cause why the articles taken from the Petitioner's house should not be returned to him on the grounds mentioned in the petition.

It appears that certain properties were found in the Petitioner's house which the complainant alleged had been stolen from his house when a burglary and theft had been committed. The evidence as to the identity of the accused with the commission of the crime was the evidence of a witness who said that he had recognised the accused from his voice. The accused was convicted by the trying Court and on appeal to the Appellate Cou t the conviction was upheld. Thereupon the present Petitioner moved this Court with the result that the following order was passed by this Court: "We have perused the explanation of the Magistrate in answer to the Rule; we are not satisfied that the conviction of the Petitioner is sound. We therefore make this Rule absolute and set aside the conviction and sentence passed on him and he will be forthwith released from jail." This is an acquittal by this Court. It further appears that the Petitioner was convicted in the above case on the 11th March 1913, and that conviction of the accused was upheld by the Sessions Judge on the 21st April 1913. It appears from the Malkhana register that on the 29th April 1913, the trying Magistrate passed an order to the effect that the properties which were then in the custody of the Court should be made over to the complainant of that case who is the Opposite Party in the present Rule. Admittedly no order under sec. 517 was passed on the record of the case. In the Malkhana of a Magistrate all kinds of properties either confiscated or which are the subject of some offence are kept and then after the decision they are restored to the parties entitled to them. The Malkhana register forms no part of any criminal case, unless it is brought on the record in a legal way. Subsequent to the passing of this order on the Malkhana register the Petitioner moved this Court and this Court acquitted the accused. On the 2nd July, sometime after the acquittal by this Court, the Petitioner applied to the trying Court for the restora ion of the properties on the ground that these properties were brought into Court from his possession and that he was entitled to have them restored to him inasmuch as he was acquitted of the offence by the High Court. The Magistrate thereupon sent the matter to the Police. The Police thereupon wrote to the Magistrate in the following terms :—"The property in question is claimed by both the complainant and the accused. I do not know to whom it will be returned. There is an order already made in the Malkhana register to the effect that the property to be returned to the complainant. Order as to whom it will be returned solicited." This letter

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

Sir Lawrence Jenkins presides over the Criminal Sessions which commences its sittings from date.

Judicial Reform in India.

In our last issue we have said that we are unable to accept all the recommendations made in the issue of the *Times* newspaper of the 25th May last, regarding the reform of "Judicial Administration in India" as either feasible or desirable from the point of view of public interest. But all the same, we must say that the closing lines of the article will meet with the approval of even those who may take exception to the remedies suggested. The article concludes thus:—

"The present break-down of public confidence in the Courts is a menace to Civil Government. The greatest optimist cannot regard it with equaminity. It may be said that the remedies suggested will not be sufficiently immediate in its effect. The answer is that this is not a reason for a continuance of inaction. The longer reform is delayed, the more urgent and difficult will the problems become. No time is to be lost. A vigorous beginning should be made now, lest the procrastination should make more drastic and dangerous measures inevitable."

As for the remedies suggested, after suggesting special means of training for members of the Indian Civil Service, which we have pointed out in our last issue to be hardly feasible, the article proceeds to suggest that a third of the appointments to the High Court Benches should be reserved for Indian Advocates, Pleaders and Subordinate Judges. We do not take any exception to this, provided that a radical reform is made regarding the recruitment of the Subordinate Judiciary and steps are taken to ensure their rapid promotion to the position of District Judges, and those amongst them who display special merit are promoted to the High Court Benches in their prime of life and not at the fag end of their careers. But after offering this sop to the Indian public, the article proceeds to make the most extraordinary suggestion that the proportion of the Barrister Judges should be reduced to one-fourth. The provision in the existing Charters of the High Courts provides that not less than one-third of the Judges of any Chartered High Court should be Barristers. There is also a similar provision with regard to members of the Indian Civil Service. So if the proportion of Barrister Judges of the High Court are fixed at one-fourth, the proportion of Civilian Judges would necessarily increase. We are positive that the public will view any such change with great alarm and there would be great public opposition to any such innovation.

The Secretary of State and his Council should spare no pains or trouble to appoint High Court Judges from amongst such members of the English Bar as would be glad to accept a County Court Judgeship. Members of the English Bar with a fair amount of practice and of considerable learning have been known to accept Judgeships in the Colonies. A strong body of English Barrister Judges would always keep the Indian High Courts up to the mark. The provision in the existing Charters should on no account be altered, but a fair proportion of the Barristers' appointments should be given to members of the English Bar prastising in India. With regard to the remaining one-third, the appointments should be distributed amongst Barristers and Vakils practising in the Indian High Courts. The lawyer element on the Bench should on no account be reduced below two-thirds of the total number of Judges. Should there be any attempt to vary the existing proportion, the reform will be regarded in India as retrogressive and will rouse a tremendous amount of opposition.

The advantage to be derived from reducing the number of Barrister Judges is said to be that in that case Indians will not proceed to England in large numbers to qualify themselves for the Bar. But we doubt if any Indian youth joins the Inns of Court with the very remote object of obtaining a seat on the Bench. They join the Inns of Court with the very laudable object of acquiring western culture and education and of earning a living by taking to an honourable profession. If this avenue of employment is closed to them, the influx of Indian youths to Europe and America will increase, and Continental and American education will not surely promote in them the sobering influence of English legal training. Indian youths trained in England may return home with ideas of constitutional freedom; others, who are trained in the Continent or in America, imbibe from there extreme political ideas. So if this bugbear about Indian Barristers were discarded from this scheme of Judicial Reform, the rest of it would meet with general public approval. Subject to the above qualification, we reproduce below the following suggestion in the *Times* for the recruitment of High Court Judges more largely from amongst Indian Advocates :—

As to the other elements from which the High Court may be constituted, reform of the present method is essential. To begin with, the rank of Advocate of an Indian Court should be recognized as a qualification for promotion to the High Court Bench. As a first step, in place of one-third of the Court being reserved for Barristers, one-third should be allotted to Advocates of the Indian High Courts, or Pleaders or persons who have been Subordinate Judges, and not less than one-fourth to Barristers. At the same time, a firm stand should be made against the system of political rotation which gives to candidates of a particular nationality a lien on a vacancy in any Court, whether they are suitable or not.

Speech of the Attorney-General at the Annual Meeting of the Barristers' Benevolent Association.

The Attorney-General at the annual meeting of the Barristers' Benevolent Association made a speech which is remarkable for its outspokenness in some respects. Senior members of the Bar are apt to advise their juniors that the surest way to success at the Bar lies in industry, perseverence and the study of the law. Sir John Simon has, we find, somewhat unceremoniously, exploded this myth and suggested that the conditions of success in the legal profession are not unoften due to causes very different from those which determine success in other callings in life. The learned Attorney-General said :—

"He believed that there were many occupations, where it was true to say that a man, who was not obviously disqualified and would apply his mind to it, would meet with fair success before he came to the end of his time and, apart from some exceptional misfortunes, put himself in a safe, though not in a prominent, position. That was not true of their profession."

So far we are quite at one with the Attorney-General; but we think he was somewhat unduly hard on the leaders when he observed, "considering how great was the body of advocates at the English Bar . . . ., though it is true that many of them did not make great fortunes, some few, some happy and largely undeserving few, did do so."

But the Attorney-General only gave utterance to the strong sense of honour and the deep sense of fraternity which has long prevailed amongst the members of the Bar and which make them take a legitimate pride in the profession to which they belong and which form the strongest bond of union amongst them, when he said :—

"The Bar is, in a real sense, a brotherhood. It is bound together, or ought to be bound together by traditions of mutual good feeling which were truly fraternal. It is one of its most striking and splendid attributes as a profession that, though every man who succeeded in it was engaged in constant and, it might be, in strenuous altercation with some other member in the face of the public, he all the time regarded him, in the real sense as a friend of his own on whose honour and faith he could absolutely rely, whose word was his bond, and who, therefore, had, if misfortune struck him down, that special and peculiar claim which every well-organised community recognised existed as between those who were friendly and brotherly.

Liability of the Secretary of State to be Sued for Damages for alleged Defamation in Orders passed by Government.

A. M. Ross v. *The Secretary of State for India* I. L. R. 37 Mad. 55 is a decision on the liability of the Secretary of State to be sued for damages for alleged defamation in orders passed by Government. The Plaintiff who was the agent of the Assam Labour Supply Association in certain districts in the Madras Presidency sought to recover damages from the Secretary of State for India in Council in respect of two orders made by the Collector of Ganjam and for alleged defamation of the Plaintiff. By one of the orders complained of a local agent working under the Assam Labour and Emigration Act was suspended and the depôt maintained by him closed to recuriting, while by the other the local agent was dismissed. The alleged defamation of the Plaintiff by the Governor of Madras in Council was in respect of a Government order passed on the appeal of the Plaintiff and other interested parties against the Collector's orders above referred to. The order of the Government was in the

following terms:—"Government see no reason to doubt that there had been illegal recruitment in the agency tracts of the Ganjam District by sirdars working under the Assam Labour Supply Association and are of opinion that the conduct of Mr. Ross (the Plaintiff) in that matter has not been wholly above suspicion."

On a consideration of the reported cases and the statutes on the subject, the Court dismissed the Plaintiff's suit with costs. Wallis, J., in the course of an elaborate and well-considered judgment pointed out that as regards liability to be sued, the Secretary of State was in no position different from that of the old East India Company before the passing of the Government of India Act, 1858, and it was on the Plaintiff to show that he would have had a cause of action against the East India Company if the case had arisen before 1858. The liabilities of the East India Company, his Lordship said, could not have been any less than those of the Crown in England on a petition of right, and this being not a case in which a petition of right would lie against the Crown at the instance of the Plaintiff and as the Company would not have been liable for the acts of its servants merely on the ground that they were done in the course of employment and as the acts complained of in this case were not shown to have been ratified by the Secretary of State who had succeeded under sec. 3 of the Government of India Act, 1858, to the powers of the Court of Directors, the Plaintiff's suit must fail.

As regards the cause of action on the order of the Governor in Council, his Lordship was of opinion that no suit lies against the Secretary of State for a libel published by the Madras Government at all events, unless it be shown that the publication was made under the orders of the Secretary of State or on his behalf and afterwards ratified by him. Even if the suit had been brought against the Members of the Madras Government at the date of the order and the High Court had jurisdiction to entertain such a suit, it must still have failed on the ground that the publication having been made by such Government in the execution of its duty and without exceeding it, was absolutely privileged.

CURRENT INDIAN CASES.

(CRIMINAL.)

Commitment, reasons for.

EMPEROR v. NANJI SAMAL, I. L. R. 38 Bom. 114.

In a case triable either by the Magistrate or by the Court of Session, reasons for commitment must include not merely reasons for not discharging the accused, but reasons for sending him before the Court of Session. Failure to comply with the law in this respect would amount to no more than an irregularity, if the case were one which plainly ought to be committed to the Sessions, but when the case is not one which ought to have been committed, it is an illegality.

Criminal Procedure Code, sec. 125.

RE MARE GOWD, I. L. R. 37 Mad. 125 (F. B.)

The words of the section are very wide. If the District Magistrate in the exercise of a sound judicial discretion is of opinion that the bond ought never to have been required, that is a sufficient reason for cancelling the bond.

Nabu Sirdar v. *Emperor*, I. L. R. 34 Cal. 1, followed.

Criminal Procedure Code, sec. 106—Jurisdiction of Appellate Court.

RE SALAI GOUNDEN, I. L. R. 37 Mad. 153 (F. B.)

The jurisdiction of an Appellate Court to order a person who has been convicted of one of the offences mentioned in sub-sec. (1) of sec. 106 is not restricted to cases where the conviction was by one of the Courts specified in the sub-sec. The words "an Appellate Court" are quite general and indicate that the powers given by the section may be exercised by the Courts mentioned in sub-sec. (1) and by any Appellate Court.

Criminal Procedure Code, sec. 195.

BEARDSELL v. NILGIRI, I. L. R. 37 Mad. 107.

During the course of certain insolvency proceedings, the accused filed an affidavit before the Official Assignee in Madras, in which he asserted the genuineness of the execution of a promissory note and the deposit of the title-deeds. Subsequently, the promissory note and letter were produced in the Insolvency Court.

Held—That for a prosecution under secs. 465, 467, 471, I. P. C., the sanction of the Insolvency Commissioner was necessary and not that of the Official Assignee. The Official Assignee does not become a Civil Court, merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent, or because persons aggrieved by decisions of his can appeal to the Court from those decisions, and the provisions of the Insolvency Act do not suggest that he ought to be considered a Court subordinate to the Court which by secs. 3 and 6 of the Insolvency Act is the High Court or some officer appointed under sec. 6 of the Insolvency Act.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—*Elizabeth Peters* v. *Jones*. Before MR. JUSTICE AVORY. 21st March 1914.

The principle on which an action for seduction is based—The legal fiction of master and servant.

The Plaintiff Mrs. Peters had a girl, 22 years of age, who was adopted by her and who used to do some domestic work in the house. The girl used to be given a small allowance by Mr. Peters. The Court held that Mrs. Peters, who had no separate property and did not pay her, was not the mistress

of the girl and could not therefore maintain an action for seduction. The learned Judge discussed the principle upon which an action for seduction is maintainable. He said :—"The principle on which this action is maintained is, I believe, not that there must be the relationship of parent and child, or any *quasi*-relationship of parent and child, but that the relationship necessary is merely that of master and servant."

"If I had had any doubt about that principle I should turn to the case of *Hamilton* v. *Long* (1903) 2 I. R. 407, where the facts in my judgment give rise in principle to the very question of law that has to be determined in this case. In that case, a daughter was seduced while her father and mother were alive and while she was living in their house. A child was born after the father's death, and the daughter continued to live with the widow. It was found as a fact that the daughter rendered ordinary household services to her mother after her father's death. In these circumstances, it was held that an action could not be maintained by the widow either by virtue of the common law or the Married Woman's Property Acts. Now it is admitted to be the law that to maintain this action the relationship that justifies the maintenance of the action must exist at the time of the seduction and also at the time of the illness consequent upon it that deprives the Plaintiff of the girl's services. That being so, the Court in *Hamilton* v. *Long* (*supra*) had to determine whether services were rendered to the mother at the time of the seduction, and, if they were, whether the mother could maintain the action. The effect of the judgment was that as the father was alive and the daughter living in his house at the time of the seduction, he alone was the person who could have maintained the action, and that the mother could not, because at the time of the seduction the services were rendered to the father and not to the mother. If I had had any doubt upon the point, I should have willingly followed this decision of Lord Chief Justice O'Brien, Mr. Justice Madden, and Mr. Justice Gibson ; for although the decision is not binding upon me, it is of great authority.

Now that decision was in fact approved in the Irish Court of Appeal (*see* [1905] 2 I. R., 552) by Lord Chancellor Ashbourne and Lords Justices Fitzgibbon, Walker, and Holmes. I should be quite content to follow that decision, even if I did not entertain exactly the same view of the principle upon which this action is maintainable; it can only be maintained by proof of an actual contract of service or of an implied contract of service. The relationship of parent and child gives rise to the legal fiction that there is an implied contract of service. The legal relationship of father and child does not by itself justify the maintenance of the action, but only the legal fiction that a child living with the parent is a servant. And an action is maintainable where the daughter is under 21 years of age without any proof of actual services rendered ; but after that age is passed, there must be proof of actual services."

Mr. Lewis for the Plaintiff.

Hunter for the Defendant.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before FLETCHER AND RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE NO. 2381 OF 1912. KISHA BAN, Appellant *v.* SRIMATI RANIMOYI DEBI, Respondent. Heard, 6th and 7th April. Judgment, 26th May 1914.

Limitation—Application for decree absolute—Right, accrual of, before Act V of 1908 came into force—Application after Act V of 1908 came into force.

The question in Appeal was whether an application for an order absolute for sale, of a decree *nisi*, dated the 28th September 1898, was barred by limitation.

The application for order absolute was made after the Code of Civil Procedure, 1908, came into operation.

Held, that the application was not barred by limitation, as there was no period of limitation within which the Plaintiff was bound to apply. That the effect of the Code of Civil Procedure, 1908, was not to take away the vested right that a party had to apply to have his decree for sale made absolute.

Kaunsilla v. *Ishri Singh* (7 A. L. J. R. 420) followed.

Dutto Atmaram v. *Shankor Dattatrya* (I. L. R. 38 Bom. 32) dissented from.

Gopeshwar Pal. v. *Jiban Chandra* (18 C. W. N. 804) referred to.

Babu Jyotis Chandra Hajra for the Appellant.

Babu Brojo Lal Chuckerbutty for the Respondent.

A. T. M. *Appeal dismissed.*

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is dated the 5th of July. The Magistrate in his explanation says that this register is the Malkhana register. Then we find, on the 9th July there is an order by the Magistrate in the following terms: "Court Inspector will please report after perusal of the judgment." Then the Court Sub-Inspector wrote to the Peshkar Babu asking him to supply the record. Then there is a letter by the Court Inspector, named A. Sen, dated the 20th July 1913, in the following terms.—"I have gone through the record of the case. In view of the Sessions Judge's finding all properties seem to belong to the complainant to whom they should be returned. Evidence for a conviction might not be sufficient. But that does not alter the situation." And we find there is an order by the Magistrate: "I am of the same opinion." Against that order the Petitioner moved this Court for the restoration of the properties in question to him.

On behalf of the Opposite Party, it has been contended that the order passed by the trying Magistrate on the 29th of April was a legal order, and that this Court has jurisdiction to interfere with the order. We are, however, of a different opinion. The order of the 29th of April was either an order under sec. 517, Cr. P. C., or it was not. If it was an order under sec. 517, Cr. P. C., this Court has jurisdiction to interfere with that order under sec. 520 of the Cr. P. C. That is to say, we can pass an order staying the carrying out of that order. If the order of the 29th April was not an order under sec. 517 on the ground that it was not passed on the record and that it was not passed in the presence of the parties in that case, it may not be an order under sec. 517, Cr. P. C. But on the 2nd of July, the present Petitioner applied to the trying Magistrate for the restoration of these properties, and certain order has been passed on that petition. It was to the effect that that Court was not in a position to revise the order of the 29th April. This is no doubt an order under sec. 517, Cr. P. C., and this Court has jurisdiction to interfere with it under sec. 520, Cr. P. C. It has also been contended on behalf of the Opposite Party that the matter before us is under sec. 439, Cr. P. C. But the learned Vakil for the Petitioner informs us that the application to this Court was not made under sec. 439, but under sec. 520, Cr. P. C. In either case this Court has got jurisdiction. "Sec. 435, Cr. P. C., clearly provides that the High Court . . . . may call for and examine the record of any proceedings before any inferior Criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded as passed and as to the regularity of any proceedings of such inferior Court." Sec. 439 provides that "In the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge, the High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by secs. 195, 423, 426, 427 and 428." When we refer back to sec. 423, we find thus: "The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the Appellant or his Pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under sec. 417 the accused, if he appears, the Court may, if it considers

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that there is no sufficient ground for interfering, dismiss the appeal or may [cl. (*a*)] make any amendment or any consequential or incidental order that may be just or proper." So any order passed under sec. 517, Cr. P. C., may be amended by us under cl. (*d*), sec. 423, Cr. P. C.

Lastly, it has been contended that the present Petitioner moved this Court against his conviction and sentence in the original case. He did not apply for the restoration of the properties in the event of his acquittal by this Court. It seems to us that it is quite clear from the record that nobody knew that the Magistrate had passed any order in favour of the complainant in that case for the restoration of the properties; evidently the order of the 29th April was an order outside the case, and something like an instruction given by the Magistrate to a Subordinate Officer as to how he should deal with certain properties. The Petitioner's own application which he filed on 2nd July does not mention that any order has been passed and that order should be set aside on the ground of his acquittal by the High Court. It seems to us doubtful that even the complainant knew that such an order was passed. Sec. 517, cl. (3) provides that "when an order is made under this section in a case in which an appeal lies, such order shall not (except when the property is live stock or is subject to speedy and natural decay) be carried out until the period allowed for presenting such appeal has passed, or, when such appeal is presented within such period, until such appeal has been disposed of." Clearly the intention of the Legislature is this, that on passing an order like the one in the present case, the order should not be carried out at once, that is to say, the properties although ordered to be given to a party should not be made over to him until either the period of limitation for preferring an appeal has expired, or the appeal filed has been disposed of. The intention of the Legislature seems to be that until the order really becomes final either by there being no appeal within the prescribed period or by any final order by a Court of final jurisdiction, the property is to be kept in the custody of the Court, that is to say, if an order has been passed as in the present case that the property should be made over to the complainant, that order should not be carried out at once, because it is possible that this order may become infructuous on the accused being acquitted by a Court of higher jurisdiction, for in that case the order will have to be changed.

After an accused has been acquitted of the offence of theft or burglary, the proper order to make is to direct that the property found in the possession of the accused should be restored to him. The complainant in that case could go to the Civil Court, file a suit and secure an order of injunction.

For the above reasons we make this Rule absolute. The properties in question should be made over to the Petitioner.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 31, March.
Judgment, 7, April.

GHAUDHRI ABDUL MAJID, Appellant,
v.
JAWAHIR LAL and, others, Respondents.

Limitation Act (XV of 1877), Sch. II, Arts. 179, 180—Mortgage suit—Decree for sale, affirmed by High Court on appeal—Appeal to Privy Council dismissed for non-prosecution—Application for order absolute—Limitation—High Court decree if merged in Order in Council—Right to execute, barred by limitation, if revived by the Civil Procedure Code (Act V of 1908).

Where a decree for sale, passed in a mortgage suit on 12th May 1890, was affirmed on appeal by the High Court on 8th April 1893, and an appeal from the decree of the High Court to His Majesty in Council was dismissed for want of prosecution on 13th May 1901 :

Held—*That an application for an order absolute to sell the mortgage properties was barred, under Art. 179 of Sch. II of the Limitation Act of 1877, at the expiry of three years from the date of the High Court's decree, the only decree for sale in existence, the operation of which had not been stayed and which did not become merged in any decree of His Majesty in Council.*

The order dismissing the appeal to His Majesty in Council for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from.

No provision of the Civil Procedure Code of 1908 operated to revive the right to enforce the decree, which had already become time-barred.

ABDUL HAMID *v.* JAWAHIR LAL (1) *reversed.*

This was an Appeal from a judgment of a Full Bench of the Allahabad High Court (Sir J. Stanley, C. J., and Banerji and Chamier, JJ.) in the case of *Abdul Hamid* v. *Jawahir Lal* (1). The facts of the case which appear from their Lordships' judgment were briefly as follows :

The mortgagee obtained a decree (preliminary) for sale which was affirmed on appeal by the High Court on the 8th April 1893. The mortgagor then appealed to His Majesty in Council, but the appeal was dismissed for non-prosecution on the 13th May 1901. An order of His Majesty in Council was duly made dismissing the appeal, but there was no order as to costs. The decree-holder applied to the first Court for an order absolute for sale. The judgment-debtor pleaded among other things that the proper procedure was to apply to the High Court under sec. 610, C. P. C., for enforcing His Majesty's Order in Council. This objection prevailed, and the decree-holder then applied to the High Court under sec. 610 to transmit the Order in Council to the Court of first instance for execution, and that order was accordingly made. On the 11th June 1909, the decree-holder filed the present application before the Subordinate Judge for an order absolute for sale. The judgment-debtor objected that it was barred by limitation. The Subordinate Judge held that as the decree-holder was enforcing His Majesty's Order in Council, the period of limitation was 12 years under Art. 180 of Act XV of 1877. The Full Bench of the High Court affirmed that view. [See *Abdul Hamid* v. *Jawahir Lal* (1)]. Sir J. Stanley, C. J., in the course of his judgment observed as follows :—

(1) I. L. R. 33 All. 164 (1910).

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"This application was met by the objection on behalf of the judgment-debtor that the application was barred by limitation, that the only decree which was capable of execution was the decree of the High Court passed on the 8th of April 1893, that the order of their Lordships of the Privy Council did not affirm that decree, but merely dismissed the appeal for want of prosecution and that there was no order or decree of the Privy Council which was capable of execution.

"If this contention be correct, then the application for execution is barred by Art. 178 or 179 of the Second Schedule to Act XV of 1877, corresponding to Arts. 181 or 182 of Act IX of 1908. If, on the other hand, the order of the Privy Council is an order which can be executed, the application of the decree-holder is governed by Art. 180 of Act XV of 1877, corresponding to Art. 183 of Act IX of 1908. This last mentioned article provides a period of 12 years within which an order of His Majesty in Council may be enforced. If the order of His Majesty of the 13th of May 1901 is treated as an affirmance of the decree of this Court, it seems to me that it is the decree or order of the final Court of Appeal and is an order which can be executed, and as 12 years have not elapsed since the date of that order, the application of the creditor is not barred by limitation. The question is not without authority. In *Pitts* v. *La Fontaine* (2), it was held by their Lordships of the Privy Council that when a decision of the Judicial Committee has been reported and sanctioned and embodied in an Order of Council, it becomes the decree or order of the final Court of Appeal, and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.

"In *Luchmun Prasad Singh* v. *Kishun Prasad Singh* (3), it was held by a Full Bench of the Calcutta High Court on a reference by Mitter and Maclean, JJ., that although an order of Her late Majesty in Council only confirms a decree of the Court below, that order is the paramount decision in the suit, and any application to enforce it is in point of law an application to execute the order and not the decree which it confirmed. The question before the Court in that case was whether Art. 179 or 180 of Sch. II of Act XV of 1877 governed an application to enforce an order of Her Majesty in Council affirming a decree of the High Court on its Appellate Side. Garth, C. J., who delivered the judgment of the Court, observed: 'Although an order of Her Majesty in Council may confirm the decree of the Court below, that order is undoubtedly the paramount decision in the suit, and any application to enforce it is in point of law an application to execute the order and not the decree which it confirmed.' Then he observes that before the decree-holder 'can obtain execution, he must apply to the High Court under sec. 610 of the Code to transmit the order of Her Majesty to the Court whose duty it is to issue execution and it is clear from the language of that section that the Court to which the order is transmitted has to execute not its own decree, but the order itself. If this were not so, there would seem no necessity for applying to the High Court at all.'

"In this case it will be observed, the order of the Privy Council affirmed the decree of the High Court, and it may be

(2) L. R. 6 A. C. 482 (1881).

(3) I. L. R. 8 Cal. 218 (1882).

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said that there was no such affirmance of the decree of the High Court in the present case. This, I think, is not so. The dismissal of the judgment-debtor's appeal for want of prosecution must, I think, be treated as an affirmance of the decree of the High Court.

"The question whether the dismissal of an appeal for want of prosecution was a decree affirming the decision of the Court immediately below within the meaning of sec. 596 of the former Code of Civil Procedure was considered in the case of *Beni Rai* v. *Ram Lakhan Rai* (4). That section falls within Chap. 45, which treats of appeals to His Majesty in Council, and it prescribes the requirements for such an appeal and amongst others enjoins that where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law. My Brothers Knox and Banerji held that a decree dismissing an appeal for want of prosecution was a decree affirming the decision of the Court immediately below within the meaning of sec. 596.

The decision of the Privy Council in *Tassaduk Rasul Khan* v. *Kashi Ram* (5) lends support to the view taken in the last mentioned case. In that case a preliminary objection was taken on behalf of the Respondents to the hearing of an appeal before their Lordships on the ground that the order giving leave to appeal was not in accordance with the Code of Civil Procedure. The suit in that case was for specific performance of an agreement and the Court below had decreed specific performance. On appeal the only order of the Appellate Court was in these terms:—'It is ordered and decreed that this appeal be dismissed and the Respondent's costs of this appeal * * * are to be paid by * * * Appellant.'

"It was held that in order to 'affirm the decision of the Court below' within the meaning of sec. 596, it is sufficient for the Appellate Court to affirm the decree; it need not also affirm the grounds of fact on which the judgment was passed and that where the decree of the Appellate Court was that the appeal be dismissed, but the reasons given were not the same as those of the lower Court in respect of some matters of fact, the Appellate Court by the dismissal affirmed the decision of the lower Court within the meaning of the section. This decision appears to me to lend strong support to the argument addressed to us on behalf of the Respondent, that the dismissal of an appeal operates as an affirmance of the decree of the Court from which the appeal is preferred, and it is immaterial on what grounds it is dismissed. It seems to me therefore that we ought to treat the order of His Majesty in Council as the final order in the litigation and the order which alone is capable of enforcement."

Mr. Justice Banerji said as follows:—"This order of His Majesty is the final order in the cause and is the order which must be enforced. The necessary effect of an order dismissing an appeal from the decree of a subordinate Court is an affirmance of that decree. Therefore, when an appeal to His Majesty in Council is dismissed, the necessary result is that the decree of the Court below is affirmed, whatever the reason for the dismissal may be. It was held in *Beni Rai* v. *Ram Lakhan Rai* (4), that a decree of the High Court dismissing an appeal for want

(4) I. L. R. 20 All. 367 (1898).
(5) I. L. R. 25 All. 109 (1902).

(4) I. L. R. 20 All. 367 (1898).

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of prosecution was a decree affirming the decision of the Court below. I was a party to this ruling, and I see no reason to alter the opinion therein expressed. To the same effect is the decision of their Lordships of the Privy Council in *Tassaduk Rasul Khan* v. *Kashi Ram* (5), referred to in the judgment of the learned Chief Justice. In that case, the decree of the Appellate Court was, as the report of the case shows, 'that the appeal should be dismissed with costs.' It was held that the Appellate Court affirmed the decision of the lower Court. The principle of these cases applies to the present case, and applying that principle it cannot but be held that the order of His Majesty dismissing the Appellant's appeal affirmed the decree of this Court."

Hence this appeal.

Mr. G. R. Lowndes for the Appellant submitted that the present application was barred by limitation. The period of three years from the 8th April 1893 had expired. His Majesty's order in Council was not a substantive decree in the cause. The appeal was dismissed for non-prosecution. There was even no order as to costs. The decree, dated the 8th April 1893, was not affected by the abortive proceedings in Appeal. There was no affirmance of that decree by His Majesty. The Courts below had erred in holding that the decree-holder had 12 years within which to apply. There was nothing in the Order in Council which could be enforced or was in fact being enforced. The application was made after the new Code of Civil Procedure (Act V of 1908) and the Limitation Act (IX of 1908) had come into force. These new Acts applied to the present case. In that view the present application was not an application for execution of a decree. It was an application under Or. 34, r. 5 of the Civil Procedure Code to obtain a final decree for sale. It was barred by Art. 181 of the new Limitation Act. In any case, the application was barred under sec. 48 of the new Code of Civil Procedure after the expiry of 12 years from the 8th of April 1893. Art. 180 or 183 had no application. The case of *Beni Rai* v. *Ram Lakhan Rai* (4) did not govern the present application. The Order of His Majesty in Council was not a judicial order affirming the decree of the High Court.

Mr. L. DeGruyther, K. C., and *Mr. Bhagwandin Dubé* for the Respondent submitted that neither the new Code of Civil Procedure nor the new Limitation Act governed the present case. The present application was an application in execution of a decree under sec. 89 of the Transfer of Property Act, 1882. It was not an application under Or. 34, r. 5 That rule applies to those cases only in which a preliminary decree is passed under Or. 34, r. 4. In other words, both the preliminary decree and the final decree must be made under the new Code. Here the decree for sale was made under the Transfer of Property Act, 1882, and that Act alone was applicable. It was settled law that an application under sec. 89 for an order absolute for sale was an application in execution of a decree. Art. 180 of Act XV of 1877 was applicable. The Order of His Majesty in Council was the final decree and order in the cause. It was a decree or order affirming the decree of the High Court. The reasons on which it was based were immaterial. Under the Code of Civil Procedure, 1882, when a first or second appeal is lodged, the period

(5) I. L. R. 25 All. 109 (1902).

(4) I. L. R. 20 All. 367 (1898).

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of limitation begins to run from the date of the decree or order of the Appellate Court, whether the appeal is dismissed for default, or is allowed to be withdrawn. It was not necessary that the dismissal of the appeal should be a judicial termination for the purpose of extending the period of limitation. His Majesty in Council was seised of the appeal, because a petition of appeal had been filed. The Order in Council dismissed the appeal, and its effect would be the same if the appeal were dismissed on the ground of limitation or want of prosecution or some other ground. It was a judicial order of affirmance and not an executive order of the Registrar. There could be no doubt that if an Appellate Court in India had dismissed an appeal for non-prosecution, the period of limitation would run from the date of the dismissal under Art. 179 of Act XV of 1877. The decree of the High Court here was merged in the Order in Council which the Respondents were seeking to enforce. Reliance was placed upon the following authorities: *Gobardhan Das* v. *Gopal Ram* (6), *Kristo Kinkur Roy* v. *Burrodacaunt Roy* (7), *Shivlal Kalidas* v. *Jumaklal Nathiji Desai* (8), *Nanchand* v. *Vithu* (9), *Beni Rai* v. *Ram Lakhan Rai* (4), *Ram Narain Joshi* v. *Parmeswar Narain Mahta* (10), *Luchmun Prasad Singh* v. *Kishun Prasad Singh* (3).

Further, if the present application was not an application in execution of a decree, it was purely an application under sec. 89 of the Transfer of Property Act, 1882. For such an application no period of limitation was prescribed by Act XV of 1877. Reliance was placed on *Tiluck Singh* v. *Parsotien Prosad* (11), *Rahmat Karim* v. *Abdul Karim* (12). The present case was distinguishable from the case of *Batuk Nath* v. *Munni Dei* (13).

Here an Order in Council was duly made on the report of the Lords of the Judicial Committee.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—In this case the relevant facts necessary and sufficient to determine their Lordships' decision on the appeal are very simple and are undisputed.

The Appellant is in the position of mortgagor and the Respondents of mortgagees under a mortgage, dated 3rd September 1868. In 1889, a suit was commenced before the Subordinate Judge of Allahabad to enforce that mortgage, and on 12th May 1890 a decree was passed by him for the sale of the property, unless payment was made on or before 12th August 1890. An appeal was brought from that decree to the High Court, and on 8th April 1893 that appeal was dismissed and the decree of the Subordinate Judge confirmed. The mortgagor obtained leave to appeal to this Board, but did not prosecute his appeal, and on 13th May 1901 the appeal was dismissed for want of prosecution.

The present appeal relates to an application to the Subordinate Judge, dated 11th June 1909, for an order absolute to sell the mortgaged properties; in other words, for an order directing enforcement of the order *nisi* which had been confirmed by

(3) I. L. R. 8 Cal. 218 (1882).
(4) I. L. R. 20 All. 367 (1898).
(6) I. L. R. 7 All. 366 (1885).
(7) 14 M. I. A. 465 (1872).
(8) I. L. R. 18 Bom. 542 (1893).
(9) I. L. R. 19 Bom. 258 (1894).
(10) L. R. 30 I. A. 25 (1902).
(11) I. L. R. 22 Cal. 924 (1895).
(12) I. L. R. 34 Cal. 672 (1907).
(13) 18 C. W. N. 740 (1914)

CHAUDHRI ABDUL MAJID *v.* JAWAHIR LAL.

the decision of the High Court of 8th April 1893. It is not necessary to go into the particulars of this application, because their Lordships are of opinion that any such application was barred by the Statute of Limitation, Article 179, at the expiry of three years from the date of the decree, and therefore before the passing of the Code of Civil Procedure of 1908, under which the present proceedings purported to be taken, and their Lordships have no doubt whatever that inasmuch as the right to enforce the decree had once been barred, no provisions of the Civil Procedure Code, 1908, operate to revive it.

The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of 13th May 1901 by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was 12 years from 13th May 1901 by virtue of Art. 180 of the Indian Limitation Act. Their Lordships see no foundation for this contention, which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the Appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was, in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is, the decree, dated 8th April 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed, and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The Respondents' right is therefore barred by limitation.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and that the application of 11th June 1909 should be dismissed and that the respondents should pay the costs of that application and of the appeal to the High Court as well as of this appeal.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Respondents.

B. D. *Appeal dismissed with costs.*

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 1, May.
Judgment, 12, May.

SHEO SHANKAR RAM and ors., Appellants,
v.
MUSAMMAT JADDO KUNWAR and others, Respondents.

Hindu Law—Mortgage, suit on—Managing members of joint Hindu family made Defendants—Co-parceners not made parties, if bound by decree—Suit by latter for redemption, if lies—Transfer of Property Act (IV of 1882), sec. 85.

There are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound.

Where the members of a joint Hindu

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family other than the managers sued for redemption of mortgages which the mortgagee had already foreclosed by suits in which the managing members of the family had been made parties and the other members were not made parties, the mortgagee not having had notice of their interests, and there was not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself:

Held—*That no question under sec. 85 of the Transfer of Property Act arose in the case, as the mortgagee was not aware of the Plaintiffs' interest, and the suit for redemption was properly dismissed.*

JADDO KUNWAR v. SHEO SHANKAR RAM (1) *affirmed.*

This was an Appeal from a judgment, dated the 8th July 1910, of the Allahabad High Court (Tudball and Chamier, JJ.) in the case of *Jaddo Kunwar* v. *Sheo Shankar Ram* (1).

One Bhuabal Bhagat and his descendants who were joint in every respect carried on an ancestral grocery business under the style of Bhuabal Bhagat Bhoj Ram. They also did a little money-lending and owned some zemindari properties. After the death of Bhuabal and four of his sons, the management of the business and property came into the hands of the remaining son, Hira Ram, and Dhundha Ram, the son of one of the deceased sons. These two persons advanced money belonging to the family upon a mortgage, dated 4th July 1894, of some villages already mortgaged to the Respondent Jaddo Kunwar, and on 26th July 1894, they purchased with family funds certain other villages previously mortgaged to the same mortgagee. The latter in 1895 sued upon her mortgages and obtained two decrees, one for sale and another for foreclosure. Hira Ram and Dhundha Ram were parties to the suits, but the Plaintiffs who were the sons of Hira Ram and Dhundha Ram and the son, grandson and the great grandson of another son of Bhuabal who had pre-deceased Hira Ram were not made parties. In the present suit the Plaintiffs claimed a decree for redemption of all the properties mortgaged to the Respondent Jaddo Kunwar. The Subordinate Judge of Ghazipur, Mr. Chajjumal, gave the Plaintiffs a decree on 18th December 1912 for redemption of so much of the property as was covered by the mortgage of 4th July 1894. The Respondent Jaddo Kunwar appealed to the High Court

Both the Courts in India concurrently found that Hira Ram and Dhundha Ram were the managers of the family property and business and that the Respondent when she sued on her mortgage was not aware of the existence of the Plaintiffs. The High Court decreed the appeal holding upon a review of authorities that where a joint family has been effectively represented in a suit and substantial justice has been done, the Court is not always bound to set aside the execution proceedings merely because every member of the family was not formally made a party.

Mr. L. DeGruyther, K. C., and *Mr. Bhagwandin Dube* for the Appellants submitted that the Appellants were necessary parties to the foreclosure proceedings. If their Lordships held that the managing members effectively represented the whole family, the Appellants' case must fail. Reference was made to ***Kishen Parshad* v. *Har Narain*** (2).

Sir Erle Richards, K. C., and *Mr. Lowndes* for the Respondents were not heard.

(1) I. L. R. 33 All. 71 (1910).

(2) L. R. 38 I. A. 45 (1911).

SHEO SHANKAR RAM *v.* MUSAMMAT JADDO KUNWAR.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—This is an Appeal from a judgment and decree of the High Court of Judicature of the North-Western Provinces, Allahabad, which reversed a decree of the Court of the Subordinate Judge of Ghazipur. The matter in issue is whether the Plaintiffs or some of them are entitled to redeem the mortgaged properties in suit, or whether they are bound by certain foreclosure decrees, dated the 27th of March 1895, which were followed by orders absolute, dated the 3rd of April 1897, upon which possession was taken in August 1897.

So far as is necessary to make clear the question in issue, the facts of the case are as follows. The first and principal Respondent, Musammat Jaddo Kunwar, was the mortgagee of certain properties under a mortgage, dated the 16th September 1887, and of certain other properties by a mortgage of 6th January 1891. In 1895 she brought suits to foreclose those mortgages. But in the interval, Hira Ram and Dhundha Ram, members of a joint Hindu family, had acquired interest in the mortgaged properties partly by purchase and partly by obtaining a usufructuary mortgage. Both these interests were of course subordinate to the mortgage to Musammat Jaddo Kunwar. Although Hira Ram and Dhundha Ram acquired these interests in their own name, they were in fact acquired by them on behalf of the joint family, although the Respondent Musammat Jaddo Kunwar had no notice of this fact at any time material to the question in this action.

Hira Ram and Dhundha Ram were made parties to the foreclosure actions by Musammat Jaddo Kunwar as parties interested in the mortgaged properties, and the foreclosure decrees were pronounced against them. They did not make any attempt to avail themselves of their right to redeem, so that the order absolute was pronounced against them. They were at the time of acquiring the properties and also at all material times in the foreclosure suits the managers of the joint family and they acted as such, both in acquiring the properties and in abstaining from redeeming them. The Appellants, the Plaintiffs in this suit, are other members of the joint family, and they claim that they were, as such members, interested in the mortgaged properties at the time of the foreclosure suits, and that they ought to have been joined therein as parties, and that inasmuch as they were not so joined, the foreclosure decrees do not bind them, and they are entitled now to redeem. The Subordinate Judge found in their favour on this point of principle, but held that they were entitled to redeem their own properties only and not the entire properties comprised in the said mortgages. On appeal to the High Court of Judicature it was held that they were bound by the foreclosure decrees on the ground that the joint family was effectively represented in the suit, and that in such case the Court is not bound to set aside the execution proceedings, where substantial justice has been done, merely because every existing member of the family was not formally a party to the suit.

There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure actions when the managers of a joint Hindu family so effectively represent all other members

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of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself, and no question arises under sec. 85 of the Transfer of Property Act, 1882, because the mortgagee had no notice of the Plaintiffs' interests. Their Lordships have therefore no hesitation in deciding that there is no reason for interfering in the decision of the High Court. They will, therefore, humbly advise His Majesty that this appeal should be dismissed, and that the Appellants should pay the costs.

Solicitor: *Mr. Douglas Grant* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.*, for the Respondents.

B. D. *Appeal dismissed with costs.*

[FULL BENCH REFERENCES]

IN

APPEAL FROM ORDER NO. 455 OF 1907.

APPEAL FROM APPELLATE DECREE NO. 2388 OF 1908,

AND

APPEAL FROM APPELLATE DECREE NO. 2379 OF 1908.

JENKINS, C. J.
STEPHEN, J.
WOODROFFE, J.
MOOKERJEE, J.
HOLMWOOD, J.
1914,
Heard, 15, 16, 17, 18, May.
Judgment, 2, June.

DAYAMAYI
v.
ANANDA MOHAN ROY CHAUDHURI.

Occupancy holding, not transferable by custom—Transfer without landlord's consent, effect of—Purchaser of portion, if may recover from landlord who has dispossessed him—If he may apply to set aside sale of holding—Civil Procedure Code (Act XIV of 1882), sec. 244—"Representative"—Holding, if may be transferred apart from occupancy right.

Apart from custom or local usage, the transfer for value of the whole or a part of an occupancy holding is operative as against the raiyat,

(a) *Where it is made voluntarily,*

(b) *Where it is made involuntarily, and the raiyat with knowledge fails or omits to have the sale set aside.*

A sale is made involuntarily where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made.

The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is the sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) *an abandonment within the meaning of sec. 87 of the Bengal Tenancy Act;* or (b) *a relinquishment of the holding,* or (c) *a repudiation of the tenancy.*

Whether there has been a relinquishment or repudiation or not, depends on the substantial effect of what has been done in each case.

The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat.

A person who without the landlord's consent purchases a portion of an occupancy holding which is not transferable by

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local custom or usage is a person whose immoveable property has been sold and is a representative of the judgment-debtor under sec. 244 of the Civil Procedure Code of 1882.

A transferee of a portion of an occupancy holding not transferable by custom can by suit recover possession from the landlord who has forcibly dispossessed him.

A right of occupancy not transferable by custom or local usage can be transferred, but not the holding apart from the right of occupancy.

These were three Full Bench References arising out of three appeals. In the first of these (Appeal from Order No. 455 of 1907) Srimati Daya Mayi, the Petitioner in the executing Court was the Appellant and Ananda Mohan Roy Chaudhuri and anr., the Opposite Party, were the Respondents. In Appeal from Appellate Decree No. 2388 of 1908, the Plaintiff Shaikh Azim was the Appellant and the Defendants Golak Chung *alias* Chandra Nath Chung and others were the Respondents. In Appeal from Appellate Decree No. 2379 of 1908, Defendant No. 1, Ambika Charan Mandal, was the Appellant, and Ram Charan Pramanik and another, Plaintiffs, and Defendants No. 2 and 3 were Respondents.

The three References were heard consecutively in the above order.

The Reference in the first of these appeals was made on the 14th July 1908 by COXE and DOSS, JJ. It was in these terms :—

COXE and DOSS, JJ.—In this case the Respondent No. 2 was the owner of an occupancy holding which was not transferable by local custom or usage. He sold a portion of it to the Appellant. The landlord afterwards sued for rent and obtained a decree. In execution, he sold the holding and purchased it himself. The Appellant then applied under secs. 244 and 311 of the Civil Procedure Code and sec. 173 of the Tenancy Act to have the sale set aside. The Lower Appellate Court has decided against the Appellant and hence this Appeal.

Two points are taken in Appeal—

First.—That the Subordinate Judge was wrong in holding that the Appellant was not entitled to maintain the application under secs. 311 and 244 ; and

Secondly.—That he was wrong in holding that the decree-holder's purchase was not proved to have been effected on behalf of the judgment-debtor.

Taking the second point first, we think that the decision of the Subordinate Judge on this point is one of fact that cannot be questioned in second appeal.

With regard to the first point, the Subordinate Judge has decided the fourth point laid down for decision in his judgment in favour of the Appellant. That point is thus stated—"Whether the sale notices were suppressed by fraud of the decree-holder." So we may take it as a finding of fact with which we cannot interfere in second appeal that the sale was obtained by the decree-holder by fraud. But the Subordinate Judge holds that the Appellant being a purchaser of a portion of a non-transferable occupancy holding was not entitled to apply under sec. 244 of the Civil Procedure Code at all.

The question whether the Appellant is entitled to apply under sec. 244 depends on the question whether he is a representative of a party to the suit, which depends on the further question whether he has an interest in the judgment-debtor's property which is affected by the decree.

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This is laid down in *Ishan Chandar Sirkar* v. *Beni Madhab Sirkar* (1), which has been followed in several of the cases to which we propose to refer. It is clear enough that if the Appellant has purchased any interest of the Judgment-debtor, that interest is bound by the decree, and the Appellant is so far a representative of the Judgment debtor and is entitled to apply under sec. 244. The question, therefore, narrows itself down to this, namely, whether a person who purchases without the landlord's consent a portion of an occupancy holding not transferable by local custom or usage without the landlord's consent can be said to have purchased any interest at all in the property. The Subordinate Judge has relied on *Nissa Bibi* v. *Radha Kishore* (2). In that case, the applicant to set aside the sale was a mortgagee of the holding, and the learned Judges held that his right to have the sale set aside depended on the question whether or not the holding was transferable by local usage. They remarked—"If such interest was not transferable either according to law, custom or local usage, then we are of opinion that the Appellant could not rightly be regarded as a representative in the proper sense of the word and as falling within the provision of sec. 244, Civil Procedure Code." This finding was necessary for the decision of the case, for by necessary implication in the order of remand the learned Judges directed the lower Court to dismiss the application, if it was found that the holding was not transferable by local usage.

The only distinction that the learned pleader for the Appellant can draw between his case and that quoted is that this is a case of a sale and that was one of a mortgage. But a perusal of the decision itself will show that it refers generally to all transfers. We think there is no real distinction between the cases. A sale of the holding for arrears of rent would have been as fatal to a mortgage as to a sale.

We think, therefore, that if this decision is sound, we are bound to dismiss the appeal and to hold that in the present case, in which the holding is not transferable by custom, the Appellant obtained nothing by his purchase and cannot be regarded as a representative under sec. 244, inasmuch as if he bought no interest, he has no interest to be affected by the decree. There is of course authority for the view that a purchase, such as this, conveys nothing. We may refer to *Bhiram Ali Shaikh Shikdar* v. *Gopi Kanth Saha* (3), *Kuldip Singh* v. *Gillanders* (4), *Sadagar Sarkar* v. *Krishna Chandar Nath* (5).

On the other hand, however, it seems to have been held by necessary implication in *Bhagirath Changa* v. *Sheikh Hafizuddin* (6), *Ambika Nath* v. *Aditya Nath* (7), *Ayenuddin Nasya* v. *Srish Chandra Banerjee* (8) that a purchaser of an occupancy holding not transferable by local custom or usage acquires a good title against his vendor and persons claiming through him, and it has been held further in *Kabil Sardar* v. *Chandra Nath Nag Chowdhury* (9), *Durga Prasad Sen* v. *Doula Gazee* (10),

(1) I. L. R. 24 Cal. 62 (1896).
(2) 11 C. W. N. 812 (1906).

(3) I. L. R. 24 Cal. 355 (1897).
(4) I. L. R. 26 Cal. 615 (1899).
(5) I. L. R. 26 Cal. 937 (1899).
(6) 4 C. W. N. 679 (1900).
(7) 6 C. W. N. 624 (1902).
(8) 11 C. W. N. 76 (1906).
(9) I. L. R. 20 Cal. 590 (1892).
(10) 1 C. W. N. 160 (1894).

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Sheikh Gozaffur Hossain v. *E. Dalglish* (11) that a transfer of a portion of an occupancy holding not transferable by local custom or usage does not entitle the landlord to re-enter on the portion so transferred. In view of these authorities, though they are not expressly referred to, it has been held in *Omar Ali* v. *Basiruddin Ahmed* (12), following *Kunja Behari* v. *Sambhu Chandar* (13), to which *Bunshidhar* v. *Kedar Nath* (14) may be added, that a purchaser of a portion of an occupancy holding, whether transferable or not, is entitled to apply under sec. 310-A, and, therefore, following *Asgar Ali Khan* v. *Asabuddin Kazi* (15) quoted above, under sec. 244. It has been sought to distinguish the present case from *Omar Ali* v. *Basiruddin Ahmed* (12) on the ground that the application in the latter case was under sec. 310 A. The words in both sec. 310-A and sec. 311 are "persons whose immoveable property has been sold", and the whole point is whether the purchaser can be said to have any property at all in the holding. In *Asgar Ali* v. *Asabuddin* (15) the application was under sec. 311 and sec. 244. We think there is nothing in this distinction and that if the decisions in *Omar Ali* v. *Basiruddin Ahmed* (12) and *Asgar Ali* v. *Asabuddin Kazi* (15) are correct, we are bound in the present case to allow the appeal and to hold that the Appellant is a person whose immoveable property has been sold and is a representative of the Judgment-debtor under sec. 244.

We think, therefore, that there is a real conflict of authority and that the appeal ought to be referred to a Full Bench and we refer it accordingly. As Rule 11 of the Rules for References to a Full Bench by implication requires that we should state our own opinion on the point referred, we may say that we agree with the decision in *Omar Ali* v. *Basiruddin Ahmed* (12), and it necessarily follows that we differ from the view taken in *Nissa Bibi* v. *Radha Kishore* (2). We would formulate the point to be decided in the following way :—

"Is a person, who without the landlord's consent purchased from a raiyat, the whole or a portion of an occupancy holding, which is not transferable by local custom or usage, entitled to apply under sec. 244 of the Civil Procedure Code as a representative of the raiyat to have a sale of the holding in execution of a decree for arrears of rent set aside on the ground of fraud?"

[This Reference which was ready for hearing for some time, and had on several occasions before been placed on the Peremptory Board, had to be adjourned for one reason or another. On one of these occasions (there being then pending a number of other references bearing on the position of a transferee of an occupancy holding) the Full Bench, as then constituted, passed this order: "We direct that this reference do stand over generally, and the Reference be treated as including the question whether the Appellant can be considered as a representative of the Judgment-debtor, regard being had to the fact that he purchased before suit and the words 'the whole or' be omitted from the present reference."]

(11) 1 C. W. N. 162 (1896).
(12) 7 C. L. J. 282 (1908).
(13) 8 C. W. N. 232 (1903).
(14) 1 C. W. N. 114 (1896).
(15) 9 C. W. N. 134 (1904).

(2) 11 C. W. N. 312 (1906).
(12) 7 C. L. J. 282 (1908).

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Babu Mohendra Nath Roy (with *Babu Sarat Chandra Ghosh*) for the Appellant.—The terms of the reference have been modified. The application was under sec. 244 as well as under sec. 311, C. P. C. It being a second appeal, the application under sec. 311 could not be considered. The question is to be considered with reference only to sec. 244. This is why the reference has been amended.

The holding was to be sold under a decree of 4th January 1906. I purchased on 17th February 1909. The question when I purchased was of no importance, as the interest I purchased would be extinguished by the sale. I am thus a representative of the Judgment-debtor within the Full Bench ruling in *Ishan Chunder Sirkar* v. *Beni Madhab Sirkar* (1). Assuming I have acquired an interest in the holding, I am, so far as that interest is concerned, bound by the decree. The important question, therefore, is—have I acquired any interest at all? On this point the decisions are not uniform, but the balance of authority favours the view that a purchaser acquires an interest which is not good against the landlord, but good against all other people. Some of the decisions are based on the ground of estoppel, holding that the vendor and persons claiming under him cannot object.

Briefly, the purchaser acquires an interest which is defeasible at the instance of the landlord, but it is an interest in the property.

The decisions against me are those which hold that, except under special local customs, occupancy holdings are not transferable at all, though the transferor may, in special circumstances, be estopped from saying that the transfer conveyed no title.

The older authorities show that occupancy holdings were generally not transferable except by custom.

[THE CHIEF JUSTICE—Suggests that the proper way to describe an occupancy raiyat's interest would be to say, it is a holding in respect of which there are occupancy rights.]

[MOOKERJEE, J.—Asks if he has found any instance in which the question arose between persons other than the landlord and the vendor or vendee.]

Relies on *Asgar Ali* v. *Asabuddin Kazi* (15). Here a portion of the holding was sold. Whether the holding was transferable or not does not appear to have been considered. The purchaser was held to be a representative within sec. 244.

[MOOKERJEE, J.—The case was argued on the assumption that the holding was non-transferable.]

It was followed in *Gopi Nath* v. *Sujani Kanta* (16) and *Haradhan* v. *Girish Chandra* (17), contra, *Makhan Lal Pal* v. *Khudu Khan* (18). See also *Nissa Bibi* v. *Radha Kishore* (2) in which a mortgagee of a transferable holding was held entitled to apply under sec. 244. In *Prosunno Kumar* v. *Bama Churn* (19) which follows the last case, the right was denied to the purchaser of the holding, because the holding was not transferable. Refers to *Nalini Behary Roy* v. *Fulmani Dasi* (20), *Benodini Dassi* v. *Peary Mohan Haldar* (21), *Kunja Behary* v. *Sambhu Chandra* (13), *Omar Ali*

(1) I. L. R. 24 Cal. 62 at p. 71 (1896).

(2) 11 C. W. N. 312 (1906).
(13) 8 C. W. N. 232 (1903).
(15) 9 C. W. N. 134 (1904).
(16) 10 C. W. N. 240 (1905).
(17) 13 C. W. N. 98 (1908).
(18) 10 C. W. N. clxiii (1906).
(19) 13 C. W. N. 652 (1909).
(20) 16 C. W. N. 421 : s. c. 15 C. L. J. 388 (1912).
(21) 8 C. W. N. 55 (1903).

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v. *Basiruddin Ahmed* (12), *Abdul Aziz* v. *Tafajuddin Sheikh* (22). The purchaser of a portion of a non-occupancy holding is one whose interests are affected under Or. 21, r. 90.

The cases may be divided into 2 groups:

(*i*) Those which hold that a purchaser does acquire an interest in the property: *Basarat* v. *Sabullah* (23), *Agarjan Bibi* v. *Panaulla* (24), *Samiruddin Munshi* v. *Benga Sheikh* (25), *Ambika Nath* v. *Aditya Nath* (7).

[THE CHIEF JUSTICE.—The last case is a Land Acquisition case. Refers to *Bhiram Ali Shaikh Sikdar* v. *Gopi Kanth Saha* (3)].

(*ii*) The vendor cannot question the purchaser's right: *Bhagirath Changa* v. *Hafizuddin* (6). If a purchaser acquires a right as against the vendor, that is some interest in property: *Ayenuddin Nasya* v. *Srish Chandra Banerjee* (8), *Hari Das Bairagi* v. *Udoy Chandra Dass* (26), *Agarjan Bibi* v. *Panaulla* (24), *Haro Chandra* v. *Umesh Chandra* (27).

The only position which can be taken up against me is that the transferee of a whole or a portion of the holding acquires no interest whatever. The Court has not gone so far as that.

[MOOKERJEE, J.—Mr. Justice Doss decided that point sitting alone.]

Yes, in *Hari Das Bairagi* v. *Udoy Chandra Dass* (26).

The status of a transferee is not altogether unrecognised in the Act (sec. 73).

[*Dr. Ghose.*—The section refers to a case where the holding is transferable by local custom.]

So far as regards persons other than the landlord, there is no difference between transfer of the whole and that of a part [Secs. 178 (2) (*d*) and 183, Illus. (1)].

[THE CHIEF JUSTICE.—What is transferred—the holding or the right of occupancy?]

Refers to *Jawadul* v. *Ram Das* (28), subsequently affirmed in *Ram Mohan* v. *Sheikh Kachu* (29), decided under sec. 22 (before amendment), but distinguished in *Girish Chandra* v. *Kedar Chandra* (30).

These cases show that in certain cases the holding can be transferred without the right of occupancy. The transferee gets good title, although he is not an occupancy raiyat.

[THE CHIEF JUSTICE—Refers to *Sadagar Sarkar* v. *Krishna Chandra Nath* (5), where the claim of the auction-purchaser of joint possession with the other co-sharers was refused on the ground that the Judgment-debtor had no saleable interest.]

There the purchaser was not acknowledged by the landlord, and the Defendants had taken settlement from the landlord.

Dr. Rash Behary Ghose (with *Babus Mohini Mohan Chakrabarty* and *Gopal*

(3) I. L. R. 24 Cal. 355 (1897).
(6) 4 C. W. N. 679 (1900).
(7) 6 C. W. N. 624 (1902).
(8) 11 C. W. N. 76 (1906).
(12) 7 C. L. J. 282 (1908).
(22) 18 C. W. N. lxxii (1914).
(23) 2 C. W. N. cclxxix (1898).
(24) I. L. R. 37 Cal. 687 : s. c. 14 C. W. N. 779 (1910).
(25) 13 C. W. N. 630 (1909).
(26) 12 C. W. N. 1086 : s. c. 8 C. L. J. 261 (1908).
(27) 14 C. W. N. 71 (1909).
(5) I. L. R 26 Cal. 937 (1899).
(26) 12 C. W. N. 1086 : s. c. 8 C. L. J. 261 (1908).
(28) I. L. R. 24 Cal. 143 (1896).
(29) I. L. R. 32 Cal. 386 (1905).
(30) I. L. R. 27 Cal. 473 : s. c. 4 C. W. N. 569 (1899).

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Chandra Dass) for the Respondent submitted that the right of occupancy cannot be severed from the holding to which it is attached, and this has always been the law in this country. Cases on this point are reviewed in *Agarjan Bibi* v. *Panaulla* (24). See *Narendra Narain* v. *Ishan Chandra* (31), *Suhodra* v. *Maxwell* (32), *Ajodhya* v. *Imambandi* (33), *Hyat Bibee* v. *Akbar Alee* (34), *Bootee Singh* v. *Moorut Singh* (35). It is a right in derogation of that of the zemindar and qualifies it: *Tara Pershad* v. *Soorja Kanto* (36), *Hyder Buksh* v. *Bhupendra Deb* (37), *Jawadul* v. *Ram Das* (28), *Girish Chandra* v. *Kedar Chandra* (30). Sec. 22 does not make a non-transferable occupancy holding transferable, because the purchaser is a co-sharer. The transfer of a non-transferable holding without the right of occupancy is only confined to cases under sec. 22. There is not a single case, where it has been held that the holding can be severed from the right of occupancy: *Uday Chandra* v. *Hari Das* (38), *Hari Das Bairagi* v. *Udoy Chandra Das Bairagi* (26). I rely upon this absence of authority to show that the right is not severable from the holding. If it were, no landlord could recover possession from a purchaser on the ground that he was a trespasser.

(24) I. L. R. 37 Cal. 687 : s. c. 14 C. W. N. 779 (1910).
(26) 8 C. L. J. 261 : s. c. 12 C. W. N. 1086 (1908).
(28) I. L. R. 24 Cal. 143 (1896).
(30) I. L. R. 27 Cal. 473 : s. c. 4 C. W. N. 569 (1899).
(31) 22 W. R. 22 (1874).
(32) 20 W. R. 139 (1873).
(33) 7 W. R. 528 (1867).
(34) S. D. A., 1855, p. 20.
(35) 20 W. R. 478 (1873).
(36) 15 W. R. 152 (1871).
(37) 17 W. R. 179 (1872).
(38) 13 C. W. N. 987 (1909).

Sir Richard Couch did not overlook the point in *Narendra Bahadur's* case (31). All the right the occupancy raiyat has is to occupy and cultivate. He has one right and not two, so as to enable a purchaser to cultivate and yet not to occupy. It would be equivalent to saying that he was an occupancy-raiyat and a non-occupancy-raiyat at the same time.

[THE CHIEF JUSTICE.—Can occupancy right be acquired by contract ?]

It is a creation of statute.

[MOOKERJEE, J.—Formerly it could be acquired only by 12 years' occupation. Now it is different, *e.g.*, in the case of settled raiyats.]

It might follow from this, if the purchaser does acquire an interest and he is a settled raiyat of the village, he would forthwith acquire a right of occupancy.

The relations between a zemindar and a tenant are not purely contractual. An English lawyer will be surprised to hear that tenancies are not assignable, though there is no covenant to that effect.

The position of a purchaser of the whole holding is not the same as that of the purchaser of a portion: *Kuldip Singh* v. *Gillanders* (4), *Bhiram Ali Shaikh* v. *Gopi Kanth Shaha* (3).

[THE CHIEF JUSTICE—Asked whether the transferee of an occupancy right can hold the land as licensee against the transferor.]

The raiyat is entitled to underlet, though subject to some restrictions ; but in the case of the under-raiyat he is not a licensee. He has an interest in the land. A vendee is not a licensee.

[THE CHIEF JUSTICE—Refers to *Suhodra* v. *Maxwell* (32), per Phear, J.]

(3) I. L. R. 24 Cal. 355 (1897).
(4) I. L. R. 26 Cal. 615 (1899).
(31) 22 W. R. 22 (1874).
(32) 20 W. R. 139 (1873).

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The man who sells the land walks out.

[THE CHIEF JUSTICE.—There is no finding here of abandonment.]

Could a licensee claim as representative?

What is the meaning of "representative"? *Nalini Behari Roy* v. *Fulmani Dasi* (20), *Nissa Bibi* v. *Radha Kishore* (2), *Prosunno Kumar* v. *Bama Churn* (19).

There can be no ratification of a transfer by the landlord. Recognition must mean a new settlement.

Babu Sarat Chandra Ghosh was heard in reply.

The Reference in Appeal from Appellate Decree No. 2388 of 1908 was made on the 23rd March 1911 by CHITTY and N. R. CHATTERJEA, JJ., and it was in these terms:

CHITTY and N. R. CHATTERJEA, JJ.—This is an Appeal by the Plaintiff in a suit brought by him to recover possession jointly with Defendant No. 44 of certain land. His suit was dismissed by the Munsif, but the Subordinate Judge has given him a decree for one-fourth of his claim, on the ground that he had been recognized as tenant by some of the co-sharer landlords holding a share of 4 annas. As to the facts it is found that the *jote* in question belonged to Hari Das Mondal and Parasuram Nama Das, two brothers, in equal shares. Defendants Nos. 1 and 2 are the sons of Hari Das. On Parasuram's death his widow, Defendant No. 44, succeeded to his 8 annas share, and sold 7 annas 15 gandas to the Plaintiff on 25th Asarh 1308 (9th July 1901) Within two years before suit filed, the Plaintiff was dispossessed of his portion of the holding by the 12-anna co-sharer landlords, who settled these lands with Defendants Nos. 6, 8 and 12. It appears that Defendant No. 44, Plaintiff's vendor, and her co-sharers are in possession of the remainder of the holding, and it is not alleged that they had ceased to pay the rent of the entire holding before the ouster of the Plaintiff by the 12-anna co-sharer landlords. It was conceded by the learned Vakil for the Appellant that if the case of *Kuldip Singh* v. *Gillanders, Arbuthnot and Company* (4) is to be followed, then his client has no case. That case is a distinct authority for the proposition, that the mere fact of a Plaintiff having once had possession, would not entitle him, as against the landlord, to recover possession in a suit not under sec. 9 of the Specific Relief Act. As against the landlord, he must shew some title. In that case as the transfer to the Plaintiff of a portion of the *jote* was not binding on the landlords, he was unable to show a title, on which he could claim to be reinstated in possession. That case is on all fours with the present. It was distinguished in the cases of *Benodini Dassi* v. *Peary Mohun Haldar* (21) and *Asgar Ali* v. *Asabuddin Kazi* (15). In each of these cases the Court remarked that had the case of *Kuldip Singh* (4) been directly in point, they would have had to consider whether the matter ought not to be referred to a Full Bench. The same remark was made in the case of *Rai Kamaleswari Pershad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (39).

(2) 11 C. W. N. 312 (1906).
(19) 13 C. W. N. 652 (1909).
(20) 16 C. W. N. 421 : s. c 16 C. L. J. 383 (1912).
(4) I. L. R 26 Cal. 616 (1899).
(15) 9 C. W. N. 134 (1904).
(21) 8 C. W. N. 66 (1903).
(39) 2 C. L. J. 869 (1905).

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Kuldip Singh's case (4) was again distinguished, but without any note of dissent, in *Ashok Bhuiyan* v. *Karim Bepari* (40). In that case, the Court pointed out that *Kuldip Singh's* case (4) is no authority for the proposition, that a purchaser of a portion only of a *jote* gets no title at all. It was again distinguished in the case of *Gour Kaibarta* v. *Tarajan Bibi* (41), where the Plaintiff sued not the landlord, but other tenants. On the other hand, we find that *Kuldip Singh's* case (4) was followed in the case of *Manoda Sundari Dasi* v. *Madhu Sudan Das* (42), one of the Judges being a member of the Bench in both cases. We cannot find that *Kuldip Singh's* case (4) has ever been overruled. At the same time it is questionable whether the principle upon which it proceeds is entirely consistent with the principle on which the cases of *Kabil Sardar* v. *Chandra Nath Nag Chowdhury* (9), *Durga Prasad Sen* v. *Doula Gazee* (10), *Sheikh Gozaffar Hossain* v. *E. Dalglish* (11) and *Rai Kamaleswari Pershad Singh Bahadur* v. *Maharaj Harbullabh Narain Singh Bahadur* (39) are based. These cases appear to rest upon the principle, that where an occupancy raiyat transfers a portion of his holding but remains in possession of the remainder and pays rent for the entire holding, the tenancy still subsists and there is no abandonment of the entire holding, which alone can entitle the landlord to eject the transferee.

If *Kuldip Singh's* case (4) was correctly decided, it follows that so long as the transferee of a portion of a holding can remain in possession, he can shelter himself under the title of his transferor, the occupancy raiyat, and the landlord cannot evict him by process of law. If, however, the landlord can, by any means, prevent his getting into possession, or, when he has got into possession, can oust him by force, the transferee has no remedy at law by suit against the landlord. This is no doubt somewhat of an anomaly, and puts a premium upon violence, the landlord being tempted to take the law into his own hands. *Kuldip Singh's* case (4) is perhaps indirectly supported by the decision in the recent case of *Agarjan Bibi* v. *Panaulla* (24).

As serious doubts have been cast on the correctness of the decision in *Kuldip Singh's* case (4) and as the questions raised are of very great importance, we would refer, for decision by a Full Bench, the question, whether in the case of a transfer of a portion of an occupancy holding, such transfer not binding the landlord, unless made with his consent, the transferee can by suit recover possession from the landlord who has forcibly dispossessed him.

Babu Tara Kishore Choudhury (with him *Babus Jyotish Chunder Sarkar* and *Sasanka Jiban Roy*) for the Appellant.—Right of occupancy under the Bengal Tenancy Act is different from the right as defined by the Act of 1859, and it is property and as such transferable though the transfer may not be binding on the landlord, unless certain conditions are fulfilled.

[MOOKERJEE, J.—Do you concede that occupancy right was not transferable before the Act of 1885?]

(4) I. L. R. 26 Cal. 615 (1899).
(9) I. L. R. 20 Cal. 590 (1892).
(10) 1 C. W. N. 160 (1894).
(11) 1 C. W. N. 162 (1896).
(24) I. L. R. 37 Cal. 687: s. c. 14 C. W N. 779 (1910).
(39) 2 C. L. J. 369 (1905).
(40) 9 C. W. N. 843 (1905).
(41) 8 C. L. J. 161 (1908).
(42) Unreported. S. A. No. 528 (1901).

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For the purpose of my argument, I assume that it was not transferable and that was what the Full Bench held in *Narendra Narain Ray* v. *Ishan Chandra Sen* (31).

Refers to the Preamble to Act VII of 1885 which shows that the Act expressly amends previous Acts; cf. provisions of Act VIII (B. C.) of 1869 which reproduce Act X of 1859. Sec. 6 of the Act of 1869 defines mode of acquisition of occupancy right. The right was limited in duration to the period "so long as he pays rent for same" saving for the case of a holding inherited, when the holding and cultivation of a third party is treated as that of the raiyat. It not only defines the right, but also its extent or measure and duration. (See sec. 6 of Act X of 1859) Sec. 22 to some extent qualifies the limitation (see sec. 21 of Act X of 1859). He is not liable to ejectment except under a decree: Sec. 52 (sec. 78 of Act X of 1859)]

[MOOKERJEE, J.—Refers to sec. 7 which gave a certain scope to contracts. This has been taken away and the right made more valuable.]

Narendra Narain Ray v. *Ishan Chandra Sen* (31). The interpretation in this case depends upon the language of sec. 6 of the Act of 1869 upon which *Chandrabati* v. *Harrington* (43) is also based.

Coming back to Act VIII of 1885, refers to sec. 3, cl. (3), where "tenant" includes all classes of tenants [sec. 3, cls. (7), (8) and (9), Ch. II, secs. 4 and 5]. "Successor in interest" would include transferee. The rights of a raiyat are the same as a tenure-holder's; only the purpose is different. It cannot on the definitions be said that one is a right in property and the other a personal right. Then the raiyat may cultivate with the aid of a "partner." This is a great advance. He remains liable to the landlord, but his partners acquire rights against him. "Members of the family" assisting him in cultivation would become in the same way co-sharers.

[MOOKERJEE, J.—Those words were introduced to meet the difficulty arising from the definition in sec. 6 of the Act of 1869 which said that cultivation must be by the raiyat.]

The raiyat could not turn out his partner. That would be an interest in the land.

[THE CHIEF JUSTICE.—That does not show that the right is other than contractual, that is, it is an interest in the land.]

If as a fact a partner could not be removed from the land, it is only a play of words to say, he has no interest in the land.

Due weight must be given to the Preamble: *Chunder Kishore* v. *Raj Kishore* (44).

Sec. 44 (*a*) and sec. 66 show that a non-occupancy raiyat too has a right in the property. An occupancy raiyat's rights are higher.

It is arguable that had the Full Bench in *Narendra Narain Ray* v. *Ishan Chandra Sen* (31) these words before them, their decision would have been different. Reads sec. 19.

[THE CHIEF JUSTICE.—Does not that section show that what right of occupancy there was before, was continued under the Act?]

(31) 22 W. R. 22 (1874).
(43) I. L. R. 18 Cal. 349, 353 (1891).

(31) 22 W. R. 22 (1874).
(44) I. L. R. 15 Cal. 450 (1888).

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Continued and enriched in its incidents. My theory of sec. 19 is that new rights were intended to be conferred on occupancy raiyats and others.

[THE CHIEF JUSTICE.—Does it not come to this that wherever there was occupancy right, the tenants acquired the right given by the Act.

It may be so.

[THE CHIEF JUSTICE.—Or it may be, the section was provided to meet the situation that occupancy right being the creation of the Act fell with the repeal of the Act.]

Sec. 20 [cls. (1), (4) and (5)] confers higher rights than sec. 6 of Act VIII (B. C.) of 1869 : *Forbes* v. *Ram Lal* (45).

[MOOKERJEE, J.—*Mahomed Chaman* v. *Ram Pershad* (46) is opposed to that.]

The Full Bench in *Narendra Narain* v. *Ishan Chandra* (31) does not leave the matter in doubt.

Sec. 21 refers only to the acquisition of the right not to its measure or duration. That must be ascertained from other provisions, *e.g.*, sec. 26, which clearly shows, it is property. This cuts away the foundation of the decision in *Narendra Narain* v. *Ishan Chandra* (31). That it is property is assumed, not expressly enacted by the section. It became more than a personal right or a license.

[MOOKERJEE, J.—Was not this section possibly introduced in view of sec. 178, where a right of bequest by custom is recognised ?]

Sec. 26 is irrespective of customs. Sec. 178 must refer to non-occupancy holdings and non-transferable occupancy holdings.

Secs. 65, 73. "First charge" in the former section implies that there might be a second and other charges. A "charge" implies property upon which it is a charge.

[THE CHIEF JUSTICE—Refers to sec. 18A.]

It shows, as other sections show, that the dealing with the property by the tenant will not bind the landlord.

[MOOKERJEE, J.—Refers to sec. 6 (i) of the Transfer of Property Act.]

That refers to non transferable occupancy holdings implying that ordinarily they are transferable. Moreover, that Act has a more extensive local application than the Bengal Tenancy Act.

As to sec. 178, where there was a local usage of transfer previously existing, the law does not take it away. Where it was not, there was nothing to take away.

[THE CHIEF JUSTICE.—Even under the Transfer of Property Act, a transfer contrary to a covenant of forfeiture and re-entry is not prohibited. It has only that consequence attached to a right of property.]

Secs. 159, 160. "Protected interest" includes occupancy rights. It implies that it is an interest in land.

[THE CHIEF JUSTICE.—The right protected by cl. (*f*) to sec. 160 is not a right in property.]

Cls. (*e*), (*f*) and (*g*) are rights attached to rights in property.

Unless it is boldly asserted that all these sections refer to custom of which there is no mention, it is difficult to say that these sections do not assume that occupancy right is a right to property.

Sec. 163, cls. (*a*) and (*b*), sub-sec. (2) assumes that the raiyat can create incumbrances on his interest which must be property.

A notification under sec. 168 may virtually do away with the distinction

(31) 22 W. R. 22 (1874).
(45) 22 W. R. 51 (1874).
(46) 22 W. R. 52n (1872).

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between cls. (*a*) and (*b*), between tenures and occupancy holdings.

I submit, there is no limitation to the right to transfer occupancy rights except what is enacted in sec. 73 and the need for registration in the landlord's *sherista*.

Sec. 85 gives no authority to create a sub-lease. It is assumed.

[MOOKERJEE, J.—Why was the power of transfer expressly given in sec. 11 to tenure-holders, but not to raiyats?]

That was the argument in *Bhiram Ali's* case (3), which I am trying to answer. Many things are assumed in the Act.

[THE CHIEF JUSTICE.—So far as subletting is concerned, it existed before.]

Because it existed before, it does not follow that it did not need enacting. The argument is at best not conclusive. But I show from other provisions of the Act that, subject to certain restrictions, the right was treated as a right in property. That is the explanation of the absence of a general section authorising transfer, confining one's arguments to the provisions of the Act. There might have been reasons outside the Act against an express recognition of the right. The Legislature might have been unwilling to rouse the active hostility of the landlords by making an express provision. It proposed to describe the rights generally in terms of property leaving it to the Courts to work out its intention with greater precision as occasion arose. With regard to sec. 85, cls. (2) and (3), there is a conflict of decisions, but cl. (1) is clear: sec. 136 (5), sec. 137.

Sec. 22: "Interest becoming united." Both interests are treated as similar. And the modes are succession, transfer. The language is only consistent with the idea that occupancy right is property. There is no mention here as in sec. 23 of custom. If sec. 22 was intended to apply only by custom, that would have been mentioned.

Secs. 84, 88 imply partial transfer.

Secs. 72, 73. There is nothing in the heading of the chapter or in the sections that they refer only to cases outside the Act, *i.e.*, to cases governed by custom.

Custom is dealt with in sec. 183. It is not necessary to assume, as was done in *Bhiram Ali's* case (3), that only custom would give the right provided for in the various sections. Notice under sec. 73 must be in a particular form. Sec. 73 deals with occupancy right as dealt with in the Act and not rights outside the Act, *i.e.*, customary rights.

The sections of the Act are to be interpreted without reference to custom which is dealt with separately under sec. 183. The argument briefly is that occupancy right is made property by the Act. Being property under the general law of property, it would be transferable. The power of making testamentary disposition is assumed in sec. 26, and transfers otherwise are recognised in various other sections. The sections where no reference is made to custom should be interpreted as dealing with a state of things dealt with in the Act. But although it is property and as such transferable, the landlord is not bound to recognise it, unless notice has been served on him as required by the Act. Does the transfer of a part make any difference? Earliest and latest cases on the subject are *Kabil Sardar* v. *Chandra Nath Nag Chowdhury* (9), *Jogendra* v. *Tincowri* (47). The purchaser of a portion has a good title

(3) I. L. R. 24 Cal. 355 (1897).

(3) I. L. R. 24 Cal. 355 (1897).
(9) I. L. R. 20 Cal. 590 (1892).
(47) 10 C. L. J. 147 (1909).

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against the transferor. The person whose title is undoubted has put him in possession. Therefore, his possession is derived lawfully. Being in possession, the question is whether a trespasser can oust him; it makes no difference, if the trespasser happens to be the landlord. The landlord has acquired no title. Even if it be held that the purchaser has got no title from the vendor, the fact remains that he has been in possession for some years, and that being so, can the landlord who is no better than a trespasser recover?

There is some conflict of authority on this question. *Enayetoollah* v. *Kishen* (48) is clear authority in my favour: *Mohabeer* v. *Mohabeer* (49), *Wise* v. *Ameerunnessa* (50). The decision to the contrary in *Ertaza* v. *Banij* (51) is erroneously interpreted. Other High Courts are in my favour: *Pemraj* v. *Narayana* (52). *Krishnarav* v. *Vasudeb* (53) interprets *Wise* v. *Ameerunnessa* (50) as in my favour: *Narayani* v. *Dharmachar* (54), *Krishna* v. *Secretary of State* (55), *Sangoda* v. *Varadappau* (56), *Wali Ahmed* v. *Ajudhia* (57), *Ismail* v. *Mahomed* (58), *Sundar* v. *Parbati* (59). Anterior possession is itself evidence of good title. In *Sundar* v. *Parbati* (59) it was held that the widows being in possession were entitled to sue for partition apart from any other question of title. If the rightful owner comes, previous possession won't prevail, but against any one else it would. Referred to *Purmeshur* v. *Brojo Lal* (60), *Nisa Chand* v. *Kanchiram* (61). The origin of all title is possession: *Banka Behary* v. *Raj Chunder* (62), *Shyama Churn* v. *Surya Kanta* (63).

Babu Gobindo Chandra Dey Roy for the Respondents.—*Nisa Chand* v. *Kanchiram* (61) now in question has never been doubted.

[MOOKERJEE, J.—I thought you were going to say that it has never been followed except once.]

Whenever the case has been considered, the Judges have said that the case was distinguishable from the case under determination. So it has been distinguished, but not doubted. It is good law, and is quite in agreement with the rooted notions of lawyers and laymen alike as to occupancy rights.

Right of occupancy is of a peculiar and limited nature.

If possession is to be respected merely as possession, the Defendant should succeed. He has been in possession.

[MOOKERJEE, J.—The Plaintiff was put in possession by a person lawfully in possession. You came in and dispossessed him by force.]

Whenever it has been thought necessary to confer a new right, the Legislature has done it in express terms.

The section or sections which create or recognise the existing right should alone be looked to in order to determine what was the intention of the Legislature:

(48) 8 W. R. 386 (1867).
(49) I. L. R. 7 Cal. 591 (1881).
(50) L. R. 7 I. A. 73 (80, 81) (1879).
(51) I. L. R. 9 Cal. 130 (1882).
(52) I. L. R. 6 Bom. 215 (1882).
(53) I. L. R. 8 Bom. 371 (1884).
(54) I. L. R. 26 Mad. 514 (1902).
(55) I. L. R. 33 Mad. 173 (1909).
(56) I. L. R. 36 Mad. 148 (1911).
(57) I. L. R. 13 All. 537 (F. B.) (1891).
(58) I. L. R. 20 Cal. 834 at p. 842 (P. C.) (1893).
(59) I. L. R. 12 All. 51 (P. C.) (1889).
(60) I. L. R. 17 Cal. 256 at p. 260 (1889).
(61) 3 C. W. N. 568: s. c. I. L. R. 26 Cal. 579 (1899).
(62) 14 C. W. N. 141 (1909).
(63) 15 C. W. N. 168 at p. 169 (1910).

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Narendra Narain v. *Ishan Chandra* (31). Refers to secs. 20, 21 of Act VIII of 1885. Secs. 20, 21 may be said to correspond to sec. 6, Act X of 1869.

In sec. 20 we have for the first time a definition of "settled raiyat"—this definition was not in the old Act. The result is that every settled raiyat gets a right of occupancy. These sections elucidate certain matters not clear under sec. 6 of the old Act, and in some respects create new rights. On the question of transferability sec. 6 was silent and the present sections also are equally so. On a construction of secs. 20, 21 alone, apart from any other consideration, the conclusion must be arrived at that occupancy right is not transferable; but fortunately there are other indications in the Act in my favour. Refers to sec. 4.

[THE CHIEF JUSTICE—Referred to the distinction between a tenure-holder and a raiyat.]

[MOOKERJEE, J.—The words in sec. 11 are "like other immoveable properties." The inference is that the right of occupancy is immoveable property. The legislature does not say "as if it were an immoveable property." The same expression occurs in sec. 26 also.]

Discusses sec 26

[MOOKERJEE, J.—The reason why sec. 26 was put in is well-known. Sir Barnes Peacock expressed doubt as to whether an occupancy right is heritable or not, and the legislature thought it right to put in a section making the point clear.]

It has never been held on the wording of sec. 26 that the right is bequeathable. Refers to sec. 178.

In *Prosunno Kumar* v. *Bama Churn* (19), the question of testamentary disposition of this right was raised and partially considered, though no opinion was expressed.

[MOOKERJEE, J.—The question was left open.]

Refers to sec. 19. This section proposes to preserve the existing rights.

It is conceded that under the old Act the right of occupancy was not transferable, but it is contended that it is, under the new Act. A person, who had acquired a right of occupancy before the new Act, acquired it in a particular manner and with certain incidents, one of which was non-transferability. But according to the interpretation of the present Act put forward by the Appellant, such a person would be able to transfer such a right after the passing of the new Act. We can hardly conceive that this anomaly was intended by the Legislature.

My submission is that the present Act, although it makes some improvements on the position of the raiyat, makes no departure from the old Act on the question of the transfer of occupancy right: *Girish Chandra* v. *Kedar Chandra* (30). It has been held that sec. 22 refers to transferable holdings only; so the argument that this section recognises transfer of occupancy holdings fails.

Secs. 85, 136, cl. (5), were referred to by the other side; but as to sec. 85, the right of sub-letting does not necessarily imply that the tenant has got a right of property in the ordinary acceptance of the expression.

Sec. 136 also deals with sub-letting.

Refers to sec. 183 and illus. (1) and sec. 6, cl. (*i*) of the Transfer of Property Act.

(19) 13 C. W. N. 652 (1909).
(31) 22 W. R. 22 at p. 25 (1874).

(30) 4 C. W. N. ; s. c. I. L. R. 27 Cal. 473 (1899).

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[MOOKERJEE, J.—Is it intended to govern the previous clauses?]

[STEPHEN, J.—Yes.]

Then it should have been put in as a sub-section.

The mere fact that it has not been so put in should not deprive it of its importance. It is in the section.

[MOOKERJEE, J.—Yes, you can make the most of it.]

Refers to sec. 160 of the Bengal Tenancy Act. This section deals with "protected interest." The temporary right of holding for five years is a protected interest within the meaning of this section, but it cannot be said that it is a right of property.

Cites *Bhiram Ali Shaikh Shikdar* v. *Gopi Kanth Saha* (3), *Agarjan Bibi* v. *Panaulla* (24). These cases keep the law in the same position in which it was under the old law, as interpreted in some well-known cases, *e. g.*, *Suhodra* v. *Maxwell* (32), *Narendra Narain* v. *Ishan Chandra* (31).

So far as the essence of the right is concerned, I submit there is really no difference between what it was and what it is to-day.

I said that the case in *Nisa Chand* v. *Kanchiram* (61) has never been doubted, I shall show that it is so. Not even in the referring order has it been doubted. It seems to have been taken on trust that this case has been doubted. Even in *Rai Kamaleswari Pershad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (39), *Gour Kaibarta* v. *Tarajan Bibi* (41) their Lordships did not, after a consideration of this case, hold that the law laid down there was not correct. Their Lordships say that the case of *Nisa Chand* v. *Kanchiram* (61) appeared to have been doubted.

[THE CHIEF JUSTICE.—If it is a personal right, it would come under cl. (*d*) of sec. 6 of the Transfer of Property Act rather than under cl. (*i*).]

To hold that the whole cannot be transferred, although a part can be, is a logical absurdity.

[MOOKERJEE, J.—Where is the absurdity?]

The essence of the right must attach to the whole.

The next point is the effect of earlier possession.

The question is whether merely on the ground of possession one may succeed in a suit for ejectment without showing better title. The law laid down in *Enayetoollah* v. *Kishen* (48) by Dwarka Nath Mitter, J., is no longer the law: *Kuldip Singh* v. *Gillanders* (4). The Plaintiff here purchased a portion; some of the Defendants evicted him: *Kawa Manjee* v. *Khowaz Nussio* (64). A Plaintiff cannot recover merely on the ground of anterior possession. In order to succeed on such a ground, he must bring his suit under the possessory section. Where the Plaintiff does not avail himself of sec. 9, the question of title must be looked into and not merely possession.

[MOOKERJEE, J.—There is an earlier case where neither party could prove ownership. It is referred to in *Enayetoollah*

(3) I. L. R, 24 Cal. 355 (1897).
(24) 14 C. W. N. 779 : s. c. I. L. R. 37 Cal. 687 (1910).
(31) 22 W. R. 22 (1874).
(32) 20 W. R. 139 (1873).
(39) 2 C. L. J. 369 (1905).
(61) 3 C. W. N. 568 : s. c. I. L. R. 26 Cal. 579 (1899).

(4) I. L. R. 26 Cal. 615 (1899)
(41) 8 C. L. J. 161 (1908).
(48) 8 W. R. 386 (1867).
(61) 3 C. W. N. 568 : s. c. I. L. R. 26 Cal. 579 (1899).
(64) 5 C. L. R. 278 at p. 282 (1879).

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v. *Kishen* (48) by D. N. Mitter, J.: *Shama Churn* v. *Abdul Kabeer* (65).]

If sec. 9 of the Specific Relief Act is enough to cover these cases, what is the necessity for giving wider powers?

In *Benodini Dassi* v. *Peary Mohan Haldar* (21), *Kuldip Singh* v. *Gillanders* (4) is only distinguished, not doubted; so in *Asgar Ali* v. *Asabuddin Kazi* (15), *Ashok Bhuiyan* v. *Karim Bepari* (40).

The Reference in Appeal from Appellate Decree No. 2379 of 1908 was made on 25th June 1912 by JENKINS, C. J., and N. R. CHATTERJEA, J., before whom the case came on appeal under sec. 15 of the Letters Patent (L. P. A. No. 15 of 1910) from a decision of D. CHATTERJEE, J., dated the 25th January 1910. It was in the following terms:—

JENKINS, C. J., and N. R. CHATTERJEA, J.—The Plaintiffs sued to recover possession of an occupancy holding, alleging that they had purchased the same at a sale held in execution of a money decree against one Kristo Dass. The defence was that Kristo Dass had no title to the lands, that the holding being non-transferable no right passed to the Plaintiffs and that the suit was not maintainable, as one Narain, the nephew of Kristo Dass, who had a share in the holding, had not been made a party. The Court of first instance held that only a four annas share of the holding belonged to Kristo Dass, four annas to Narain, and the remaining 8 annas share belonged to the contesting Defendants Nos. 1 and 2, that the holding not being transferable nothing passed to the Plaintiffs at the sale, and that the suit was bad for non-joinder of Narain and dismissed the suit. On appeal, the lower Appellate Court held that the suit could not be dismissed for non-joinder of Narain, but that he would not be bound by the decree, and that Defendants Nos. 1 and 2 who were Kristo Dass' co-sharers in the holding could not raise the question of transferability of the holding and gave a decree to the Plaintiffs for joint possession in respect of a four annas share of the lands. That decree having been confirmed on second appeal by Mr. Justice Digambar Chatterjee, the present appeal has been preferred by the Defendants Nos. 1 and 2 under the Letters Patent against his judgment. It appears that Kristo Dass whose interest was purchased by the Plaintiff did not contest the Plaintiff's claim. The landlord of the holding brought a suit for arrears of rent against the Defendants Nos. 1 and 2 and Narain, and so far has not recognised the Plaintiffs as tenants and is no party to the suit.

The point for consideration in this appeal is whether the question of transferability of Kristo Dass' share in the holding can be raised by the Defendants Nos. 1 and 2, and this depends upon the question whether a right of occupancy not transferable by custom or local usage is a right, that is, merely personal to the *raiyat* and as such cannot be transferred at all, or is a right the transfer of which is valid against all persons other than the landlord, so that no one except the landlord can take exception to the validity of the purchaser's title. There is a considerable conflict of judicial opinion on the point.

Before the Bengal Tenancy Act was passed, it was settled by a Full Bench in the case of *Narendra Narain Ray* v. *Ishan*

(4) I. L. R. 26 Cal. 615 (1899).
(15) 9 C. W. N. 134, 135 (1904).
(21) 8 C. W. N. 55 (1903).
(40) [illegible] C. W. N. 843 (1905).
(48) 8 W. R. 386, 389 (1867).
(65) 3 C. W. N. 158 (1898).

Chandra Sen (31), that a right of occupancy was a right that was personal to the raiyat and could not be transferred. The question there arose between the landlord and the transferee. Subsequent to the passing of the Bengal Tenancy Act, in the case of *Bhiram Ali Shaikh Shikdar* v. *Gopi Kanth Saha* (3), the learned Judges, after a consideration of the provisions of the Bengal Tenancy Act, came to the same conclusion, and it was held in that case that the tenant whose occupancy holding had been sold in execution of a money decree could himself raise the question that the holding was not transferable in a suit by the purchaser for possession of the holding and that the tenant was not barred by the provisions of sec. 244, Civil Procedure Code. *Bhiram Ali's* case (3) was followed in a number of cases where such a question was raised by the tenant, with this qualification that if the tenant was aware of the execution proceedings and having had opportunity of objecting did not object, he was precluded by the provisions of sec. 244, Civil Procedure Code, from raising the question subsequently. The case of *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (66) may be cited as an instance of this class of cases.

In the case of *Agarjan Bibi* v. *Panaulla* (24), a suit for possession by the purchaser of a share of an occupancy holding was resisted not by the tenant who had transferred his share, but by his co-sharers, and it was held that it was open to tenants in occupation of a portion of the *jote*, *i.e.*, the co-sharers of the vendor, to question the validity of the transfer.

(3) I. L. R. 24 Cal. 355 (1897).
(24) I. L. R. 37 Cal. 687 : s. c. 14 C. W. N. 779 (1910).
(31) 22 W. R. 22 (1874).
(66) I. L. R. 26 Cal. 727 (1899).

A different view has been taken in other cases, *viz.*, that the question of transferability is one that might be raised by the landlord, but cannot legitimately be raised by trespassers, and that whatever might be the precise nature of the tenant's interest which is purchased, it has a market value and the transfer is capable of being recognized by the landlord, and that the purchaser is entitled to be protected in the enjoyment of his purchase against all the world except possibly his landlord. See *Basarat Mandal* v. *Sabullah* (23), or, in other words, as observed in the case of *Hari Das Bairagi* v. *Udoy Chandra Dass* (26), the transfer of an occupancy holding is not a void transaction, and is voidable only at the option of the landlord. And in several cases, for instance in *Ayenuddin Nasya* v. *Srish Chandra Banerjee* (8), it has been held that in a suit between two rival claimants (both of whom derive their title from the tenant), neither of whom is the original tenant nor the landlord, the question of transferability does not arise. These cases however can be explained by the doctrine of estoppel.

A sale of occupancy holding has been held to be valid, if settlement is made by the landlord with the auction-purchaser as soon as can reasonably be expected after the sale; see *Dwarka Nath Pal* v. *Turini Sankar Roy* (67), and an objection to the sale of a holding with the consent of some of the landlords was overruled in the case of *Shakaruddin Chowdhry* v. *Hemangini Dasi* (68), on the ground

(8) 11 C. W. N. 76 (1906).
(23) 2 C. W. N. cclxxix (1898).
(26) 12 C. W. N. 1086 : s. c. 8 C. L. J. 261 (1908).
(67) I. L. R. 34 Cal. 199 (1907).
(68) 16 C. W. N. 420 (1911).

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that the non-consenting landlords might give their consent after the sale is held, but that the decree-holders must take the risk and the purchaser must purchase at his peril.

In the case of a voluntary transfer it has been held that the transferor cannot question the validity of the transfer; see *Bhagirath Changa* v. *Hafizuddin* (6), but such cases proceed on the ground that the transferor is estopped from impugning the validity of his own transfer.

If the view, that the transfer of an occupancy holding is valid against all persons excepting the landlord, is correct, it is difficult to see how the raiyat himself whose right is sold at an execution sale can question the validity of the purchaser's title, or why the validity of the transfer should depend upon recognition by the landlord in cases where the landlord does not impugn the transfer. If on the other hand occupancy holdings are not transferable at all, there does not seem to be any reason why persons in the position of the Defendants in the present case or even trespassers in possession of the land should not be entitled to question the validity of the transfer, or why the purchaser should acquire a right of occupancy by consent of the landlord, although he might by virtue of fresh settlement become a non-occupancy raiyat.

The facts of the present case are similar to those of *Agunjan Bibi* v. *Panaulla* (24) referred to above, except that in that case the purchase was made by a *kobala*, which however does not make any difference in principle (the doctrine of estoppel not coming into operation either in that case or in the present), but having regard to the conflict of views noticed above and having regard to the great importance of the questions involved, we think the case should be referred to a Full Bench.

The questions referred to the Full Bench are :—

(*i*) Whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all.

(*ii*) If not, whether the holding apart from the right of occupancy can be transferred.

(*iii*) In either case whether the validity of the transfer can be questioned by any person other than the landlord of the holding.

As these questions arise in a second appeal, the whole case is referred to the Full Bench.

Babu Bepin Chandra Mullik for the Appellant —Occupancy right is a personal right in connection with the holding. A holding in which a raiyat has acquired occupancy right cannot be transferred apart from the occupancy rights. The transfer of an occupancy holding in the absence of any custom to that effect can be questioned by any one who is not estopped. *Narendra Narain* v. *Ishan Chandra* (31) and *Chandrabati* v. *Harrington* (43) establish conclusively that the occupancy right was, under the old law, a personal right which could not be transferred. The Bengal Tenancy Act has enacted no change in the law as it stood at the time of the passing of the Act.

[MOOKERJEE, J.—Has there been any case before the passing of the Bengal Tenancy Act between a transferee and the co-sharers of the transferor ?]

(6) 4 C. W. N 679 (1900).

(24) I. L. R. 37 Cal. 687 : S. C. 14 C. W. N. 779 (1910).

(31) 22 W. R. 22 (1874).

(43) I. L. R. 18 Cal. 349, 353 (1891).

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No. The words "successors-in-interest" in the definition of the term "raiyat" in sec. 5 refers to those raiyati holdings which are transferable by custom. Sec. 26 admits of a similar interpretation. "As other immoveable property" should be read "as if it was immoveable property." In view of the sec. 11 it has been held that even tenures which are not permanent are incapable of being transferred or bequeathed. See *Hiramoti* v. *Annoda* (69). In the case of a tenure, no abandonment is possible, whereas an occupancy holding can be abandoned and surrendered. Unless a right is a personal one, there cannot be any abandonment of that right. Reads sec. 87. The right of surrender in sec. 86 also implies that it is a personal right.

[THE CHIEF JUSTICE.—Does not cl. (6) of sec. 86 indicate that this right can be mortgaged? Is that possible with a personal right?]

[MOOKERJEE, J.—Your contention would equally apply to the case of a raiyat at fixed rent, but his right is transferable.]

My point is that the framing of the Bengal Tenancy Act specially in view of the sections on abandonment and surrender show that the occupancy right is in the nature of a personal right.

In this particular case the landlord cannot object, as it is a part transfer, and if I am not allowed to raise any objection, the result would be that the land will be enjoyed rent-free by the purchaser. Sec. 178 (3) and illus. (1) of sec. 183 clearly support me. Sec. 6 of the Transfer of Property Act also supports the same view.

The right of occupancy is not something severable from the holding. Referred to *Bhiram Ali* v. *Gopi Kanth* (3), *Durga Charan* v. *Kali Prasanna* (66), *Girish Chandra* v. *Kedar Chandra* (30).

Babu Jadunath Kanjilal (with him *Babu Karunamoy Ghose*) said—In this case, in execution of the money-decree obtained against the judgment-debtor raiyat, I purchased a 4-anna share of the holding. There is neither abandonment nor surrender of the holding by the raiyat. My vendor had a right to possession and that right to possession has been transferred to me. The remark of the Judicial Committee in the case recently reported [*Forbes* v. *Maharaj Bahadur* (70)] shows that the Bengal Tenancy Act applies when relationship of landlord and tenant subsists. I am entitled to joint possession with the other co-sharers of my vendor. It is a tenancy in common and not joint tenancy; and hence my vendor's co-sharers, so far as my vendor's share is concerned, are merely trespassers. My right to possession was *in personam* against the judgment debtor or the landlord, but it is *in rem* against his co-sharers. Referred to Mackenzie's Roman Law, p. 171 and Dr. Moyle's Roman Law, Vol. II, p. 334 and Arts. 136 and 137, Limitation Act, and *Davenport* v. *Queen* (71). The extreme contention of the other side is that such a transfer is absolutely void. Sec. 6 (*i*) of the Transfer of Property Act certainly does not support that contention. The clauses "except as otherwise provided by any other law for the time being in force" and the cl. (*d*), which would otherwise cover the opposite side's contention, show that the cl. (*i*) has no application in this case.

(3) I. L. R. 24 Cal. 355 (1897).
(69) 7 C. L. J. 553 (1908).

(30) 4 C. W. N. 569: s. c. I. L. R. 27 Cal 473 (1899).
(66) I. L. R. 26 Cal. 727 (1899).
(70) 18 C. W. N. 747 (1914).
(71) 3 A. C. 115, 128 (1877).

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If, under the old Acts, an occupancy right could be acquired "by law, by custom or otherwise," that is, by purchase, then, *a fortiori*, it can under the present Act which is clearly in advance of the old Acts in the matter of conferring rights on raiyats. The case of *Chandrabati* v. *Harrington* (43) is quite distinguishable upon its facts from the present case. Here, under the Civil Procedure Code, symbolical possession has been delivered to me and the judgment-debtor raiyat did not object thereto. He is now estopped from raising any objection to my purchase, and therefore his co-sharers are equally bound by the sale to me.

Under the Tenancy Acts of 1859 and 1869, the occupancy right was regarded as a right to cultivate. Refers to *Suhodra* v. *Maxwell* (32). Sec. 23 of the present Act which regulates the user of the holding by a raiyat, secs. 85 and 178 (*c*) which gives him the power to sub-let the holding, secs. 77 (1) and 76 which give him the power to improve the holding and erect dwelling houses thereon show that the occupancy right under the present Act is an ordinary right of property, and hence can be transferred under the general law.

The right is at least transferable under certain conditions, that is, with the landlord's consent whether given before or after the transfer. Even under the old Act it was held in the case reported in *Suhodra* v. *Maxwell* (32) that it was transferable with the landlord's consent. Sec. 73 and illus. (1) of sec. 183 support my present contention. Secs. 65, 158B (1) and 89 expressly give the landlord power to sell the holding for arrears of rent. The complete ownership is vested in the landlord and the tenant. They can conjointly transfer the same to any third person. There is no outstanding right in anybody else. It has been held in *Buzlul Karim* v. *Satish Chandra* (72) that even in case of a custom, the absence of the landlord's consent must be an element for consideration. The transfer is voidable. Referred to Woodfall's Landlord and Tenant (19th edition), p. 233.

[THE CHIEF JUSTICE.—You need not deal with the question whether a new tenancy is created on transfer.]

Babu Bepin Chandra Mullik in reply:—The case in *Forbes* v. *Maharaj Bahadur* (70) has reference to Chap. VIII of the Bengal Tenancy Act, and the remark does not apply here. "Otherwise" in sec. 19, B. T. A., has reference to tenancies transferable by custom. Secs. 65 and 158B lay down special procedure for recovery of arrears of rent. As I was not party to the decree and the sale, I am not bound by the same, and I can object to the title of the Plaintiff.

The JUDGMENT OF THE COURT was as follows:—

These several references have been heard consecutively, and as they involve many of the debatable points that relate to the transferability of occupancy holdings, apart from local usage, it will be convenient to state our conclusion in general terms. This conclusion rests largely on a recognition of the paramount importance of upholding decisions on which dealings with property have been extensively based. These decisions probably mark a departure from earlier

(32) 20 W. R. 139 (1873).
(43) I. L. R. 18 Cal. 349, 353 (1891).
(70) 18 C. W. N. 747 (1914).
(72) 15 C. W. N. 752 (1911).

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judicial pronouncements and the opinions of those who have studied this question in the past. The life of the law, however, it has been said, is not logic but experience, and the modern departure is probably due to a change in economic conditions, which has brought into prominence problems that did not previously call for solution.

The weight of modern authority establishes the following propositions regarding the transfer for value of occupancy holdings apart from custom or local usage :

(1) The transfer of the whole or a part is operative as against the raiyat,

(*a*) where it is made voluntarily,

(*b*) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily where it is in execution of a money decree, but not of a decree founded on a mortgage or charge voluntarily made.

(2) The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of sec. 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy.

Whether there has been a relinquishment or repudiation or not, depends on the substantial effect of what has been done in each case.

(3) The transfer of the whole or a part is operative as against all other persons, where it is operative against the raiyat.

Applying then these propositions to the questions propounded, we answer them as follows :—

(1) The question in the Appeal from Order No. 455 of 1907 is answered in the affirmative. We accordingly hold that the Appellant is a person whose immoveable property has been sold and is a representative of the judgment-debtor under sec. 244 of the Civil Procedure Code of 1882. This appeal must, therefore, be allowed and an order made as prayed. Each party, however, will bear his own costs throughout.

(2) The question in Appeal from Appellate Decree No. 2388 of 1908 is answered in the affirmative. The decree of the lower Appellate Court is set aside, and a decree will be passed in favour of the Plaintiff for possession, but each party will bear his own costs throughout.

(3) The questions in Appeal from Appellate Decree No. 2379 of 1908 are answered as follows :—(*i*) in the affirmative; (*ii*) in the negative; (*iii*) in accordance with the propositions above set out. The result will be that this appeal will be dismissed. There will be no order as to costs of the Letters Patent Appeal on this reference.

We would only add that the uncertainty as to the transferability of holdings has been one of the most fruitful sources of litigation, and it is urgently necessary that it should be set at rest by the legislature.

[CRIMINAL REVISIONAL JURISDICTION.]

CRIMINAL REV. No. 1693 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
5, December.

ARIFF MUNSHI & anr, Accused, Petitioners, *v.* EMPAROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), secs. 147, 447, I. P. C.—Rioting—Criminal trespass—Charge of rioting with common object of taking forcible possession of complainant's land and assaulting him—Absence of charge under sec. 447. I. P. C.—Conviction of criminal trespass, propriety of—Criminal Procedure Code (Act V of 1898), sec. 238.

When the Petitioners who were charged under sec. 147, I. P. C., with rioting with the common object of taking forcible possession of complainant's land and of assaulting him and others were convicted of criminal trespass under sec. 447, I. P. C., without any charge being framed against them or without being called upon to plead to a case of trespass:

Held—*That the conviction was illegal.*

If the common object had been to commit criminal trespass, the conviction under sec. 447, I. P. C., without a charge having been framed against the accused might have been legally valid, but the common object stated in the charge did not make out a case of trespass.

In a case of trespass, before a conviction is obtained, the prosecution must establish on the part of the trespasser an intention to commit an offence or to intimidate insult or annoy any person in possession of the property on which trespass has been committed.

QUEEN *v.* SALAMUT ALI (1) *referred to.*

This was a Rule against the order of Mr. Ataur Rahaman, Extra Assistant Commissioner of Sylhet, dated the 14th day of July 1913, convicting the Petitioners under sec. 447, I. P. C, and sentencing them each to pay a fine of Rs. 50 or in default three months' rigorous imprisonment, an application for revision of which order was rejected by A. E. Stinton, Esq., Sessions Judge of Sylhet, on the 18th August 1913.

The material portion of the judgment of the Magistrate is set out below:

"Bonai Chong (P. W. 2) and Accused Ariff Munshi have contiguous paddy fields at *Tukarbundh kitta*, separated only by a common ridge (*ail*), which has been there for the last 20 to 25 years. On the 6th April last Ariff Munshi (Accused) with his son Ibrahim (Accused) and others demolished a portion of this ridge and incorporated about 15 cubits × 1 cubit of Bonai Chong's paddy land in Accused Ariff Munshi's land. Bonai Chong and his men protested, but to no effect. It is alleged that about 20 to 25 persons belonging to Accused's party came up armed with *lathis* and assaulted Bonai Chong. Bhanu (P. W. 1), Gonai (P. W. 3) and Brojo (P. W. 4) came to the rescue of Bonai Chong and were assaulted in their turn by the Accused's party.

"Both the Accused plead not guilty to the charge laid against them. Accused Ibrahim's plea is that it was the Complainant's party that had trespassed on his father Ariff's land that day, that he had on the next day after the occurrence lodged a complaint before the Magistrate for the trespass and the assault on him. Accused Ariff Munshi's plea is that he knows nothing about the occurrence and that he was at his house at the time of the occurrence.

"That there was an occurrence that day over the common ridge between Bonai Chong and Ariff Munshi's paddy fields is

(1) 23 W. R. Cr. 59 (1875).

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Contents.

NOTES.

The late Mr. Ganesh Chandra Chandra.

We deeply regret to record the death of Mr. Ganesh Chandra Chandra, who was not only one of the leading, but one of the most senior amongst the solicitors practising in the Calcutta High Court. He was a self-made man and rose to the top of his profession by his own ability. He and the late Mr W. C. Bonnerji were intimate friends; from early in life both took to the legal profession and rose to positions of great eminence in their respective spheres Although Mr Chandra did not ordinarily take part in public life, in his own sphere he was known to be a man of rare independence, and he commanded the respect not only of all branches of the legal profession, but also of the Bench. Though well advanced in years, he took a keen interest in the well-being of the profession to which he belonged, and was one of the most active members of the Incorporated Law Society. We convey our sincere condolence to the members of his family.

President of the Judicial Tribunal of the Calcutta Improvement Trust.

We congratulate the Government of Bengal on having made an almost unexceptionable selection for the post of the President of the Judicial Tribunal in connection with the Calcutta Improvement Trust. Dr. Sarat Chandra Banerjee is both by his legal attainments and character eminently fitted to fill this position with credit. The only exception that could be taken to this appointment is as to his lack of experience in judicial work of an original nature, his legal training both in the past and present being more or less of a technical and secretarial nature. But he is a lawyer of excellent parts and quick intellect, and we have every confidence that he will soon get accustomed to his judicial duties. We welcome the appointment; chiefly because we believe that he will be an absolutely reliable person for this position of great responsibility and trust both from the public and the Government point of view.

Legality of Mr. Justice Sundarlal's appointment.

We publish in another column a letter from an eminent Vakil of the Allahabad High Court questioning the legality of the appointment of Mr Justice Sundarlal as a Judge of the Allahabad High Court. The objection seems to us to be extremely technical. There is no question that he acquired the necessary qualification of being a Vakil of ten years' standing many years ago. The fact that he has since been enrolled as an Advocate of the Court does not annul the qualification he once acquired.

City Civil Court.

The Hon'ble Mr. S. N Ray has been well-advised in taking time to consider the propriety of moving a resolution in the Bengal Legislative Council for the establishment of a City Court in Calcutta. Before such a resolution is moved, the Hon'ble Member should satisfy himself that the general public and the people, particularly whose property, rights and interests are likely to be affected by it, demand the establishment of such a Court in supersession of the jurisdiction of the Original Side of the High Court The Hon'ble Mr. Ray is not a resident of the town of Calcutta, and before moving any resolution for ousting the jurisdiction of the Original Side in respect of properties and transactions situate or arising within the statutory limits of the town of Calcutta, he must take steps for the ascertainment of the opinion of those who are likely to be affected for good or evil by this proposal. If the different sections of the community, whose interests may be affected, meet, deliberate and express an unequivocal opinion in favour of his proposal, the Hon'ble Member would be justified in moving the resolution in the Bengal Council but otherwise not. The Hon'ble Members who owe their seat to a sort of election (which is yet far from popular) often complain that the Provincial Council is no better than a debating society in so far as they

are unable to elicit adequate response from official members to popular demands. If, however, the non-official members betake themselves to moving resolutions on questions of their own initiative and for which there is no public demand and regarding which they are themselves divided in their own camp, they would lay themselves open to the charge that when their individual or professional interests are concerned, they too are apt to forget that the Provincial Legislature is not after all a debating society.

We have before this pointed out on more than one occasion that no material advantage would be gained by the establishment of a City Civil Court for the trial of suits of the value up to Rs. 10,000, unless the Judge or Judges presiding over such Courts are of the ability and experience of High Court Judges. The popularity of a tribunal and public confidence in it entirely depend on the personnel of the tribunal. If it is difficult to get men of ability and practice at the Bar to accept High Court Judgeships, it would be much more difficult to get such men to accept judgeships of the City Court. The prestige of the position of a High Court Judge and also the tradition of the Bar that when any of its members is called upon to serve on the Bench, he should not refuse a judgeship, make it comparatively easier for the State to secure desirable Judges for the High Court Benches. But surely a lower scale of pay, pension and prestige would not attract a good class of men from the Bar to the City Court Bench. Judges from the mofussil are also not likely to give public satisfaction as Judges of a City Court. The character and quality of business in Calcutta is so entirely different from what they are in the mofussil that mofussil Judges will feel quite out of their element here.

Any one, who has any experience of both the Original Side procedure and the mofussil procedure, cannot close his eyes to the fact that really contentious and complicated matters are much more expeditiously disposed of on the Original Side than in the mofussil Courts. The infinite troubles and procrastinations connected with execution proceedings in the mofussil are almost unknown on the Original Side of the High Court. That matters, which come up before the Original Side, are not only speedily but more effectively disposed of is also borne out by the fact of the very small number of appeals which are preferred against the decisions and orders passed by the Original Side Judges. Further, it is also a very significant fact that in suits between the value of Rs. 1,000 to Rs. 2,000, where the High Court has a concurrent jurisdiction with the Small Cause Court, nearly ten per cent. of such suits are transferred to the Original Side at the instance of the parties. The Defendants by getting such suits transferred incur the risk of being mulcted in costs on a higher scale than in the Small Cause Court, but they prefer to run such risk in the expectation of getting better justice from the High Court. It is also a matter of common experience that of all suits instituted in any Court, the percentage of cases, where there is any real and substantial contest of law or facts, would hardly exceed ten per cent. It is therefore a matter of very legitimate inference that the litigant public of Calcutta would much more prefer their suits to be tried on the Original Side of the High Court than in another glorified Small Cause Court which some people only from the point of view of professional interest are anxious to see set up in this city under the name and style of a City Civil Court.

From what we have said, it would be evident that nothing will be gained and much may be lost both in the quality of justice and in the expeditious disposal of suits by the litigant public of Calcutta by the establishment of a City Court presided over by Judges of indifferent qualifications. It might let loose a flood-gate of appeals to the High Court, which will be of no practical advantage to anybody except to members of the legal profession. Then weaker judges always lead to prolongation of hearing of original suits, which necessarily means increased cost of litigation. Strong self-opinionated judges on the other hand mean so much costs thrown away and costs of appeal in addition. Further, in really contentious cases leaders of the Bar will charge more fees for going before the City Court than they do on the Original Side. The only ground which may be urged in favour of such a Court is that in non-contentious suits the cost of litigation there would be less. But there is a good deal of misapprehension in the public mind as to the legitimate costs of litigation on the Original Side. For instance, it may be mentioned in this connection that the costs of an uncontested mortgage suit of the value of Rs. 10,000 up to any value need not and does not ordinarily exceed Rs. 250 up to the decree stage, while the *ad valorem* Court-fees in the Mofussil Court would alone cost Rs. 475 and pleaders' fees even on the fixed scale would amount to Rs. 350. Then in an undefended suit of any value the cost on the Original Side comes up to only Rs. 250.

In mortgage suits, subsequent to the decree, the costs of execution, sale and realization may come up to Rs. 1,000 or Rs. 1,250 more. Although this may be somewhat more than the costs incurred

in the Mofussil Courts, still it is well worth in the interests of both the mortgagor and the mortgagee. It is a well-known fact that a property sold at a Registrar's sale on the Original Side fetches nearly 50 per cent. more value than the same property, if sold at an execution sale at Alipur. The difference is due to the fact that the Registrar in the Original Side takes care to give people a clean title, while the *sheristadars* of the Mofussil Courts are neither competent, nor do they trouble themselves about the title, and on the top of that, owing to various other reasons, which we need not detail here, purchasers at Mofussil execution sales cannot rely on such sales being regular in every respect. Naturally they bid at such sales leaving a sufficient margin for covering the cost of subsequent proceedings that often arise for the setting aside of the sale. Such proceedings are almost unknown on the Original Side of the High Court.

The strongest objection to the proposal of any City Court will proceed from the citizens of Calcutta who enjoy the unique privilege of being exempt from *ad valorem* duty. If a City Court is set up, this privilege will be lost irrevocably and it is people who have to realize their moderate claims varying from Rs. 2,000 to Rs. 10,000 and who will be most seriously prejudiced by such change. The public Revenue will swell at their expense, but the more wealthy people will continue to enjoy the exemption. The proposal may be viewed with favour by the Government, but it will not surely receive public approval. Under the present taxing rules on the Original Side, the solicitors and counsels are not entitled to charge costs or fees on any higher scale than that fixed by the Rules of the Court. If, however, clients choose to incur costs on a more lavish scale, they are required to give a written authority to the solicitor for engaging extra counsel or for the payment of extra fees, but on no account would the Taxing Officer allow costs on any higher scale than that fixed by the schedule between party and party. The Court cannot be responsible for those who would still gamble in litigation or pay counsel on a lavish scale without any protest, more by way of a bet on their favourite counsel on the off chance of securing judicial favour—a thing which ought not to exist. So all that is said about the fabulous cost of litigation on the Original Side is a myth. The fact is that costs are often piled up owing to the ignorance or folly of clients, and if they are more vigilant and astute about their rights, they can bring the lawyers to book for the abuse of their privileges and opportunities.

CURRENT INDIAN CASES.

(Criminal.)

Criminal Procedure Code, sec. 94.

Re S. Kondareddi, I. L. R. 37 Mad. 112.

It is competent to a Magistrate under sec. 94, Cr. P. C., to issue a summons to an accused person to produce a document or other thing, the production of which might tend to incriminate him.

Correspondence.

MR. JUSTICE SUNDAR LAL.

To the Editor, "Calcutta Weekly Notes".

Sir,

While the United Provinces are to be congratulated on the acceptance of a seat on the Bench by a lawyer of the intellectual calibre and professional eminence of the Hon'ble Dr. Sundar Lal, one cannot but feel considerable doubt as to the validity of his appointment. It is however proper that one should state in public what those doubts are, so that the matter might be considered and set at rest, and to my mind the legal objection in the case of Mr. Justice Sundar Lal is much more substantial than the one which was raised regarding the validity of the appointment of Mr. Justice Burkitt in 1894 by Mr. Ross Alston in the case of *Queen-Empress* v. *Ganga Ram* (I. L. R 16 All.), which was overruled by the High Court on one ground and by the Privy Council on another. Now the Charter of the Allahabad High Court provides that four classes of persons are eligible for High Court Judgeships. They are Barristers, District Judges, Subordinate Judges and Vakils of a Sudder or High Court, all of a certain standing. Of course, there could be no doubt that the test of eligibility is that the individual selected should at the time of his appointment belong to one or other of these categories. Now it cannot be contended that Pandit Sundar Lal comes within any one of the first three categories. His claim to eligibility rests solely on his being a Vakil of ten years' standing. Now the Law List of 1893 published by authority tells us that Pandit Sundar Lal was admitted as a Vakil of the High Court in 1880. The Law List of 1900 published also by authority shows us that he was enrolled as an Advocate of the High Court early in 1896, and that his name had been removed from the List of Vakils. Since the first quarter of 1896, Pandit Sundar Lal belongs to another class of practitioners, and his name, from whatever cause it might be, has ceased to adorn the Roll of Vakils of the Allahabad High Court. That he has ceased to be a Vakil would also clearly appear from the fact that he had not filed any *vakalatnama*, in any case Civil or Criminal (he had a few Criminal cases since 1896), which every one who is a Vakil must do under the Rules of the High Court either in a Civil or Criminal proceeding. Now the Charter of the Allahabad High Court has no place for an Advocate who is not a Barrister, and under the circumstances one fails to see how Pandit Sundar Lal (who by the way is the fittest man in those provinces to be raised to the Bench and to whom such a translation would mean a considerable sacrifice of income) can be regarded as a validly appointed Judge.

The practice of making a few Vakils Advocates which obtains in the Allahabad High Court is to my mind a most unwise step, and it has been most injurious to

the profession as a whole. Be it remembered that the Advocates in the Allahabad High Court, unlike their brethren in Calcutta, Madras and Bombay, can act and sign for their clients, can see the latter directly and can appear without being instructed by an Attorney or Vakil. This places them at a very great advantage, as compared to their brethren in the rest of the British Empire and very favourably indeed, as compared to the Vakil members of the profession, who cannot do anything without a *vakalatnama* which, in the case of prisoners transferred from District to Central Jails after their conviction, it often takes days and weeks to obtain. On the Civil Side of the Court, the Code of Civil Procedure expressly exempts Advocates of Chartered High Courts from the obligation of filing *vakalatnamas*, but on the Criminal Side of the Court, the Advocates and Vakils have been placed on exactly the same footing, and the practice of requiring *vakalatnamas* from one class of practitioners and exempting the other class from this burden has no justification in law, and any rule to that effect is, it is humbly submitted, altogether *ultra vires*. Of course it need not be said, where a few men were selected from a large body for professional honors, the litigants would naturally flock to them, and it is therefore that we find that in the Allahabad High Court business has centred in those few hands, who, at the turning point of their career, had been selected for advancement to a higher category of practitioners. This has been very detrimental to both the members of the English Bar and the Vakils of the Court, all of whom, popular opinion regards, as having been left by the Judges in the cold shade of neglect. The situation was aggravated, when some clever juniors who had been admitted to the degree of Doctor of Laws of the Allahabad University were by virtue of that very fact coupled with three years' practice enrolled as Advocates. It was apparently overlooked that this was a serious injustice to the senior members of the Vakil Bar most of whom passed their examinations before the Allahabad University was in working order and some of whom had obtained high distinctions in the parent University of Calcutta. It was further overlooked that by a technical rule of the Allahabad University only LL. B.'s of that University were eligible for appearing for Doctorial Honors and that all the senior men including the present Vice-Chancellor (who is by the way an Honorary Doctor) cannot even be permitted to try their chance for such honors.

All these things show that those practitioners who were once Vakils and who are now Advocates form a distinct category by themselves and have nothing in common with those who are at present on the Roll of Vakils of the Court. The only thing that can be said the other way is that these Advocates are still members of the Vakils' Association, but they are there not by choice but by compulsion, because the Barristers would not have them, and the Vakils would not care to part with them so long as they buy their privilege by paying a higher rate of subscription.

Yours faithfully,

AN ALLAHABAD VAKIL.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION.—Before HOLMWOOD AND CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE No. 97 OF 1912. SRIMATI AMJADNESSA BIBI AND OTHERS, Plaintiffs, Appellants *v.* RAHIM BAKS SHIKDER AND OTHERS, Defendants, Respondents. 28th May 1914.

Suit, maintainability of—Suit for recovery of money—Agreement not to prosecute—Non-compoundable offence.

The suit was for recovery of Rs 680, the principal sum of Rs. 535 with interest, said to have been given by the Plaintiff to the Defendants Nos. 1 to 5 for withdrawing a certain criminal case, in which the Plaintiffs were prosecuted at the instance of Defendant No. 1 for offences punishable under secs. 323 and 147 of the Indian Penal Code, in respect of the murder of Defendant No.5's husband. The first batch of accused had been punished, and the Plaintiffs were the second batch of accused sent up for trial. Plaintiffs further alleged that the Defendants Nos. 1 to 5 agreed to return the money in case the higher authorities prosecuted them again for the same offence as they did.

The Defendants Nos. 1 to 5 appeared and admitted having taken the money for withdrawing from the prosecution, but denied that there was any agreement to return the money, in case the Plaintiffs were again prosecuted by the higher authorities, that they fulfilled their part of the agreement by withdrawing from the prosecution and that the suit was not maintainable, as the consideration for the agreement was unlawful and against public policy, the offence under sec. 147 being a non-compoundable one.

The lower Courts dismissed the suit, holding that the suit was not maintainable.

There was no pressure upon the Plaintiff to pay this money in consideration of not being prosecuted.

Held, that the rule derived from cases could be thus stated: "If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned."

Babu Rajendra Chandra Guha for the Appellants.

Babu Satis Chandra Ghose for the Respondents.

A. T. M. *Appeal dismissed.*

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an admitted fact. The only question that calls for my decision in this case is whether the occurrence had developed into a riot that day or whether it was a case of simple trespass which has been magnified into a riot by the complainant and his witnesses in the present case.'

* * * * * * * *

"The Defence have in my opinion completely failed to prove that the Complainant's party were the trespassers that day. I have gone carefully through the entire record of this case, and I have also gone through the Accused Ibrahim's cross case (No. 419 of 1913). I am convinced that there is conclusive evidence against both the Accused for a conviction under sec. 447, I. P. C., in this case. The evidence against the Accused for charge under sec. 147, I. P. C., is not very convincing to me.

"I accordingly find both the Accused guilty under sec. 447, I. P. C. As the criminal trespass was attended with hurt, both the Accused deserve a severe punishment in this case. I accordingly sentence both the Accused to pay a fine of Rs. 50 each, in default three months' rigorous imprisonment each. An order under sec. 106, C. P. C., against the Accused is not desirable in this case."

Babu Hemendra Kumar Das for the Petitioners.

Babu Srish Chandra Chowdhury for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Petitioners were charged with the commission of an offence under sec. 147, I. P. C., but were convicted under sec. 447 of the Code for trespass, without any charge under that section being framed against them or without being called upon to plead to a case of trespass. The case against them was that their land lay contiguous to the land of the Complainant, and in order to encroach on the Complainant's land they demolished a certain *ail* and constructed another on the land of the Complainant and thereby included within their own land the land belonging to the Complainant. The Complainant set up a case of rioting against them. But that case was not believed by the Magistrate who summed up his findings in the following terms:—"I am satisfied that both the Accused had broken the common *ail* that day and had incorporated some land belonging to Bonai (P. W. 2) in their own land. The evidence that Accused party had numbered five or more than five that day is not very convincing to me, and I am not in a position to hold that the Accused had formed the members of an unlawful assembly on the day of alleged occurrence." After arriving at this conclusion, the Magistrate convicted the petitioners under sec. 447, I. P. C., for criminal trespass and sentenced them to pay a fine of Rs. 50 each. Against their conviction and sentences, the Petitioners moved the Sessions Judge and then this Court and obtained this Rule on the Deputy Commissioner of Sylhet to show cause why the conviction of the Petitioners under sec. 447, I. P. C, should not be set aside on the ground that the Petitioners having been charged under sec. 147 only and there being no charge nor any complaint under sec. 447, I. P. C., the conviction of the Petitioners under sec. 447 was illegal. The learned Government Pleader appearing on behalf of the Crown maintains that under sec. 238, Cr. P. C., sub-sec. (2), a person charged with an offence may be convicted of a minor offence, though not charged with

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it, if the facts proved justify a conviction for a minor offence. In this case, had the common object constituting unlawful assembly been to commit criminal trespass, the conviction under sec. 447 without a charge having been framed against the Petitioners might have been legally valid. But the common object described in the charge is to take forcible possession of Bhanoo Namasudra's land and of assaulting him and others. This common object does not clearly make out a case of trespass. In a case of trespass, before a conviction is obtained, Prosecution must establish on the part of the trespasser an intention to commit an offence, or to intimidate, insult or annoy any person in possession of the property on which trespass has been committed. In the present case, none of these elements is present. As an authority bearing on this case we may cite the case of *Queen* v. *Salamut Ali* (1).

The convictions, therefore, are clearly bad and must be set aside. This Rule is made absolute. The fine, if paid, will be refunded.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 8, 9, 10 and 15, April.
Judgment, 19, May.

MAHA PRASAD SINGH, since deceased (now represented by Sashi Bhusan Singh and ors., Appellants,

v.

RAMANI MOHAN SINGH, since deceased, Respondent.

Sonthal Parganas, mortgage of land in, not completely settled—Suit in Civil Court at Bhagalpur on mortgage, if lies—Limits of Civil Court's jurisdiction—Exclusive jurisdiction of special officers appointed by Lieutenant-Governor—Stipulation in bond that suit might be instituted at Bhagalpur—"Court having jurisdiction in Sonthal Parganas," if includes Civil Courts at Bhagalpur—Sonthal Parganas Regulation III of 1872 (read with Act XXXVII of 1855 and Act X of 1857), secs. 5, 6—Interest—Usury rules enforceable by all Courts—Sonthal Parganas Justice Regulation (V of 1893), sec. 9—Civil Procedure Codes (Act VIII of 1859, Act XXIII of 1861, Act X of 1877, Act XIV of 1882) how far applicable in Sonthal Parganas—Civil Courts Acts (Act VI of 1871 and Act XII of 1887) how far apply in Sonthal Parganas—Scheduled Districts Act (XII of 1874) if applied to Sonthal Parganas—Jurisdiction, objection to, taken at a late stage when entertainable.

Where, exception being taken to the Court's jurisdiction to entertain a suit, an issue was raised, but the objection was overruled, and on appeal to the High Court the Defendant did not raise the question, but did so before the Judicial Committee :

Held, *that inasmuch as the question was one of jurisdiction and it did not depend on disputed facts, the Judicial Committee could not decline to entertain it, specially as it necessarily presented itself in argument.*

That on 20th June 1904, the date on which the present suit was instituted in the Subordinate Judge's Court at Bhagalpur to enforce a mortgage of properties two-thirds of which was in the Sonthal Parganas, no suit could lie in any Court established under the Civil Courts Act of 1871 or 1887, in regard to any land or interest in or arising out of any land or for the rents or profits of any land, but such suits must have been brought under sec. 5 of Sonthal Parganas Regulation of 1872, before the Settlement Officers or Courts of officers appointed by the Lieutenant-Governor of Bengal under sec.

(1) 23 W. R. Cr. 59 (1875).

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2 of the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation of 1893, Part 2, so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette *to have been completed and concluded.*

That as it appeared that portions only of the mortgaged land had been settled and notification made prior to the institution of the suit of the completion of the settlement in respect of such portions only, the suit came within sec. 5 of the Sonthal Parganas Regulation of 1872 and the Subordinate Judge of Bhagalpur had no jurisdiction to entertain it.

The provision in sec. 6 of that Regulation which places all contractual stipulation as to compound interest in a position of non-enforcibility and limits statutably the total interest which can be decreed on any loan or debt is not one of procedure, but of substance, and applies to all Courts having jurisdiction in the Sonthal Parganas and acting under and by virtue of such jurisdiction. "All Courts having jurisdiction in the Sonthal Parganas" in sec. 6 do not refer only to Courts locally situated in the Sonthal Parganas and dealing with matters purely local.

A stipulation in the mortgage-bond that the mortgagees might enforce it in the Court at Bhagalpur was inoperative, as the parties could not by consent give the Court jurisdiction, thereby nullifying the express prohibition of sec. 5 of the Regulation of 1872.

The Civil Procedure Codes of 1861, 1877 and 1882 applied to suits cognizable in the ordinary Civil Courts, and these, since the enactment of sec. 9 of Reg. V of 1893, were suits of which the value exceeded Rs. 1,000 and which were not excluded from their cognizance by, amongst others, the provisions of sec. 5 of the Regulation of 1872.

Quære.—*Whether the Civil Procedure Code was intended by the Notification of 19th August 1867 to apply to Courts held by officers appointed by the Lieutenant-Governor of Bengal in those suits in which they were not required to try and determine the case according to the several laws and regulations prevailing in Bengal.*

Semble.—*The true interpretation of cl. (1) of Act XXXVII of 1855 (before its operation was modified by subsequent enactments and notifications) was that even suits on which the matter in dispute exceeded Rs. 1,000 in value were to be tried by the special officers appointed by the Lieutenant-Governor, but in trying and determining them, they were to observe the general laws and regulations obtaining in Bengal.*

SORBOJIT ROY *v.* GANESH PROSAD MISSIR (1) *doubted.*

The facts of the case sufficiently appear from the Judgments of the High Court and of the Judicial Committee. The suit was to enforce a mortgage of properties situated in the Sonthal Parganas and was instituted in the Court of the Subordinate Judge of Bhagalpur. In their written statement the Defendants pleaded "that no party can in law fix by agreement the jurisdiction of the Court of law, in respect of any dispute, and such agreement cannot give jurisdiction in favour of a Court of law" and that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the suit under the Sonthal Parganas Regulations. Both the Courts below, the Subordinate Judge as well as the High Court, allowed the Plaintiffs' claim. Both held that sec. 6 of

(1) I. L. R. 10 Cal. 761 (1884).

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Reg. III of 1872 did not apply to the Court of the Subordinate Judge of Bhagalpur, which was governed by the ordinary law in force at Bhagalpur. Both parties appealed to His Majesty in Council. The Judgment of the High Court (Rampini and Sharfuddin, JJ.) was as follows :—

"This is an appeal against a decision of the First Subordinate Judge of Bhagalpur, dated the 12th February 1906.

"The suit is one brought upon a mortgage of certain property. One-third of this property is situated in the Bhagalpur district and two-thirds in the Sonthal Parganas. The Subordinate Judge exercised jurisdiction in the case, under sec. 19 of the Code of Civil Procedure. The suit was brought to recover 3½ lakhs of rupees upon a mortgage bond (Exhibit I) executed on the 21st December 1896. This bond was the last of a long series of bonds. The first of the series was executed on the 3rd October 1883 for Rs. 73,000 by some of the Defendants in this case, and by the predecessor of the others in favour of one Surja Narayan Singh, the predecessor of the present Plaintiff. The interest stipulated for was 12 per cent. per annum. At intervals other bonds were executed. The amounts of these bonds were always increasing, but the rate of interest decreasing. Finally, on the 21st December 1896, the bond now sued upon was executed for 3½ lakhs of rupees at 7½ per cent. per annum. The Subordinate Judge gave the Plaintiffs a decree upon this bond, and the Defendants now appeal to this Court.

Mr. Eardley Norton, the learned Counsel who appears on behalf of the Defendants-Appellants, very candidly admits that he cannot venture to impugn the findings of facts arrived at by the Subordinate Judge. He accepts those findings and contents himself with impugning the judgment of the Subordinate Judge on two points. In the first place, he says that under sec. 6 of Regulation III of 1872 (the Sonthal Parganas Settlement Regulation) the Subordinate Judge was not justified in giving compound interest, or in giving a decree for interest, exceeding the amount of the principal amount of the debt ; and in the next place, he points out that there has been non-joinder of parties in this case, seeing that two persons named Matuki Mandar and Jadu Mandar who are necessary parties to the suit, have not been made parties Defendants.

We will now deal with the first of these contentions. Mr. Eardley Norton argues that, in sec. 6 of Regulation III of 1872 it is laid down that all Courts having jurisdiction in the Sonthal Parganas shall observe the following rules, and therein certain restrictions are provided against usury, which the Subordinate Judge in this suit has not given effect to. The Subordinate Judge himself says that, in his opinion, the provisions of sec. 6 of Regulation III of 1872 do not apply to Courts exercising jurisdiction within the Sonthal Parganas under sec. 19, Civil Procedure Code. He thinks that these words relate only to the Courts of the Sonthal Parganas exercising jurisdiction within their territorial limits ; and it would appear to us that the Subordinate Judge's view upon this matter is correct. We are relieved of the necessity of discussing this question at any great length, because it was decided by this Court in Regular Appeal No. 467 of 1902 in a judgment, dated the 16th December 1903, to which one of the members of this Bench was party. In that judgment occurs the following passage: "The Appel-

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lants' fifth plea is founded on the terms of sec. 6 of the Settlement Regulation III of 1872, according to which 'no Court having jurisdiction in the Sonthal Parganas can decree compound interest arising from any intermediate adjustment of account or a larger amount of interest than the original debt.' But the words 'Court having jurisdiction in the Sonthal Parganas' occurring in the section must, in our opinion, refer to a Court in the Sonthal Parganas and constituted under the Regulation. They cannot include a Court, such as that of the Subordinate Judge of Bhagalpur, when dealing with a suit, the cause of action in which has arisen within his jurisdiction and not in the Sonthal Parganas, and which has only jurisdiction in the Sonthal Parganas in the sense that it has power to order the sale of some of the mortgaged property which is situated in that district.

"Two cases have been cited by the learned pleader for the Appellants, namely *Dungaram Marwari* v. *Rajkishore Deo* (2) and *Shama Charan Misser* v. *Chuni Lal Marwari* (3). They do no appear to be in point, or to throw any light upon the question now under discussion. There is certainly nothing in them which in any way conflicts with the view expressed above.

"Mr. Eardley Norton for the Appellants has cited another case, namely, that of *Maseyk* v. *Steel & Co.* (4). But it does not appear to us that this case in any way supports his contention. We accordingly see no reason to dissent from the view taken by this Court in the judgment above cited. Moreover, our attention has been called to the fact that in the mortgage bond on which the Plaintiff now sues the Defendants expressly declared that the loan had been taken at Bhagalpur and that the Plaintiff was entitled to institute a suit in Bhagalpur for the realization of the amount due. It appears that all the loans taken by the Defendant from the Plaintiff were taken at Bhagalpur; and there was further a stipulation that interest should be paid at Bhagalpur. We therefore think that the suit was properly instituted at Bhagalpur and that for the reasons above given, the Court at Bhagalpur was not restricted in awarding interest by the provisions of sec. 6 of Regulation III of 1872.

"We now turn to the second plea raised by Mr. Norton, namely, that the two persons, Matuki Mandar and Jadu Mandar, are necessary parties. The Subordinate Judge has held that they are not necessary parties, and we entirely agree with him. They are, no doubt, the great grandsons of one Rup Chand Mandar, who lent a sum of Rs. 10,000 to some of the Defendants on the 30th January 1884. The bond executed for this loan is printed at page 216 of the paper book; we have examined it. It appears to us to be a simple money bond and not a mortgage bond at all. That being so, it does not appear to us that the great-grandsons of Rup Chand Mandar are necessary parties to the suit or need have been made parties under sec. 85 of the Transfer of Property Act, even if they are the heirs of Rup Chand Mandar. It appears, however, that Rup Chand Mandar died in February 1897, and that he was succeeded in interest, so far as the loan of the 30th January 1884 is concerned, by his daughter-in-law, Champabati, and the Defendants executed in her favour a parwana (Exhibit E) in March 1897, putting her in possession of

(2) I. L. R. 18 Cal. 133 (1890).
(3) I. L. R. 26 Cal. 238 (1898).
(4) I. L. R. 14 Cal. 661 (1887).

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the property for the purpose of realizing the loan taken by them from her father-in-law, Rup Chand Mandar. We have examined this parwana. It does not appear to us to be a mortgage-bond, nor does it seem to be an instrument which requires registration under the Registration Act. Mr. Eardley Norton argues 'that it is not admissible in evidence. But the Subordinate Judge has not used it as evidence of any transaction, or as relating to any property affected by it, but as an admission by the Defendants of Champabati's having been put in possession of the property, and that therefore she has rightly been made a party Defendant in the suit and that therefore it was not necessary to implead Matuki Mandar and Jadu Mandar. Furthermore, we see from the petition at page 448 of the paper-book put in by Matuki Mandar and Jadu Mandar themselves, that they disclaim all connection with the property now in the possession of Champabati. They say, they have no right to it and are not in possession of it and that Champabati is in possession and that the property will vest in them after her death. This seems an additional reason why they should not be regarded as necessary parties. A third reason is that the Plaintiffs applied, in the course of the suit, to have the 2nd part of issue No. 2 either struck out, or that these two persons should be made parties. The Defendants, however, objected and Matuki Mandar and Jadu Mandar were accordingly not made parties. In these circumstances, it does not seem to us that it lies in the mouth of the representatives of the Defendants now to contend that these persons should have been made parties and that the suit should be dismissed, because they have not been impleaded.

"Finally, we may refer to the provisions of the 2nd part of the clause (1) of sec. 31, Civil Procedure Code, in which it is laid down that 'the Court may in every suit deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it.'

"For these reasons, the Appeal fails and is dismissed with costs."

Mr G. R. Lowndes for the Mortgagors-Appellants submitted that sec. 6. of Reg. III of 1872 relating to usury applied.

[In the course of argument their Lordships asked whether the Code of Civil Procedure had any application to the Sonthal Parganas and whether the Bhagalpur Court had any jurisdiction to entertain the suit relating to land in Sonthal Parganas.]

Mr. Lowndes submitted that the Code of Civil Procedure had no application and that the suit to enforce the mortgage which was a suit relating to land in Sonthal Parganas could not be maintained in Bhagalpur.

[*Sir R. Finlay, K. C.*, Counsel for the Respondents, objected that the point was not argued in the Courts below and was therefore not open to the Appellants.]

Mr. Lowndes replied that the point was not a new one; it was clearly raised in the written statement, although the Courts below had not dealt with it.

[Their Lordships ruled that it was a question of jurisdiction which arose on the admitted facts of the case and allowed the Appellants to argue it]

Mr. Lowndes submitted that two-thirds of the mortgaged properties were situated in the Sonthal Parganas and in districts in which the settlement had not been completed. The Bhagalpur Court was, therefore, incompetent to entertain the suit under sec. 5, Reg. III of 1872. By a

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notification, dated 19th August 1867, made under sec. 385 of the Code of Civil Procedure, 1859, that Code was applied to the Sonthal Parganas. It was applied to civil suits in which the matter in dispute exceeded Rs. 1,000, but Reg. III of 1872, sec. 5, expressly provided, "no suit shall lie in any Court established under the said Act, VI of 1871, in regard to any land, etc, except as hereinafter provided." The words of the section were wide and imperative and excluded the jurisdiction of the ordinary Civil Court in all suits regarding land irrespective of its value. The notification of 1867 was abrogated after the passing of the Civil Procedure Code, 1877, which repealed Civil Procedure Codes of 1859 and 1861. There was no power in the Act of 1877 to extend its application to the Sonthal Parganas. In any case, the Civil Procedure Code of 1877 was applicable to suits of the value of more than Rs. 1,000, excepting suits relating to land. Civil Procedure Code, 1882, clearly shews what sections of the Act apply to the Sonthal Parganas. Reference was made to the Bengal Code, Vol. V., p. 268, where a list of enactments applicable to Sonthal Parganas is given. Sec. 19 of the Civil Procedure Code, 1882, would not apply, unless the whole Code applied. Reliance was placed on *Ram Ratan* v. *Lalta Prasad* (5), which was almost on all fours with the present case and related to scheduled districts.

Partial application of the Code by sec. 10 of Reg. V of 1893 is not sufficient, as that only makes it applicable to certain suits filed in Sonthal Parganas to which alone the Regulation applies. The same argument applies to sec. 2 of Reg. III of 1872, as the suits there referred to are clearly suits filed in the Sonthal Parganas.

(5) I. L. R. 17 All. 483 (1895).

Vide sec. 2 of Sonthal Parganas Act, 1855. No doubt the Civil Procedure Code of 1859 was applied to Sonthal Parganas by notification, dated 19th August 1867, which might possibly be good under sec. 3 (3) of Reg. III of 1872. But the two subsequent Codes of 1877 and 1882 were made specifically not applicable to the scheduled districts which includes the Sonthal Parganas. The reasoning of Wilson, J, in *Sorbojit Roy* v. *Gonesh Prasad* (1) is against that contention, but it is submitted that it is unsound. By sec. 3 (2) of Reg. 3 of 1872, no Act other than those specified in the schedule attached thereto are to apply to the Sonthal Parganas, and the Code of Civil Procedure is not among them. The notification, dated the 19th August 1867, must be held to have been repealed by subsequent enactments. Further, the Codes of 1877 and 1882 contain in themselves no power to extend their application similar to the provision made in the Code of 1859, sec. 385. The argument is strengthened by

(1) the fact that the Code of Civil Procedure is not mentioned in the Schedule to Reg. III of 1872 ;

(2) the fact that by Reg. III of 1899 certain specific sections of the Code of Civil Procedure are applied to Sonthal Parganas which would be absurd, if the whole Code already applied ;

(3) the fact that the Code is applied by Reg. V of 1893, sec. 10, to certain suits only in the Sonthal Parganas. Again, even if the Code applied to the Sonthal Parganas, the jurisdiction in respect of all suits regarding land is taken away and confined to particular Courts in the Sonthal Parganas by sec. 5 of Reg. III of 1872. The words of the section are

(1) I. L. R. 10 Cal. 761 (1884).

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wide enough to include suits on mortgages. It is argued on the other side that the scope of the Regulation of 1872 limits the section to such suits only as would come ordinarily before a Settlement Officer. But the Preamble to the Act shows that it was not merely an Act to provide for settlement only. Sec. 6 is also a general section. The settlement sections of the Regulation seem to refer only to "claims" and not suits. Under sec. 5, suits regarding land were to be tried either by Settlement Officers or by officers appointed under the Sonthal Parganas Act of 1855. The whole Civil jurisdiction over the Sonthal Parganas was vested in them. By notification, dated 7th May 1872, the trial of all suits relating to land was entrusted to these officers. The only question is whether the provision with regard to such suits under sec. 5 of Reg. III of 1872 had become inoperative owing to a notification of the completion of the settlement. The first settlement was completed in 1879, but it seems that no notification of completion was published in the Gazette. Evidently the Government did not want to do away with the whole machinery and to re-enact the old Act for the purposes of the second settlement which began about 1886. So sec. 5 remained operative. There were several amending Acts between 1872 and 1908, and if sec. 5 had become inoperative, it would have been repealed. The reference in sec. 9 of Reg. of 1893 to suits over Rs. 1,000 which are excluded from the cognizance of the ordinary Civil Courts must refer to suits regarding land under sec. 5 of Reg. III of 1872, and shows that they were still supposed, at all events, to be excluded. Sec. 5 contains both a prohibition against any other Courts trying suits relating to land and also a positive enactment that they must be tried by certain Courts only. Further, even assuming that sec. 19 of the Code of Civil Procedure applies or that the parties have by their agreement or terms of the deed of mortgage chosen that Court as their forum [*Hamlyn* v. *Taliskar Distillery Co.* (6)], still the law to be applied must be the law of the Sonthal Parganas. That law does not allow usury beyond the limits of sec. 6. It was a law for the protection of the people there and their land. *Qua* land they could not contract themselves out of it. All suits respecting land are governed by *rei situe*. To hold otherwise would be to allow an evasion of the Act. Considerations applicable to mere money suits against residents in the Sonthal Parganas have no application to a suit on mortgage. The Bhagalpur Court under sec. 19 would clearly be a Court having jurisdiction in the Sonthal Parganas. It is asked to make a decree for sale, and under sec. 223, C. P. C., it would have jurisdiction actually to sell: *Maseyk* v. *Steel & Co.* (4), *Shurrup Chunder* v. *Ameerunnessa* (7), *Kartick Nath* v. *Telukdhari* (8), *Gopi Mohun* v. *Doyibaki Nundun* (9). *Tincouri* v. *Shib Chandra* (10), *Jagarnath* v. *Dip Rani* (11).

To hold, as the High Court did, that sec. 6 only refers to Courts in the Sonthal Parganas would be to strike out the words "having jurisdiction" from the section. It is suggested that these words were intended to apply to the Courts at Bhagalpur and Birbhum, which, after the Act of 1855, acted as District Courts

(4) I. L. R. 14 Cal. 661 (1887).
(6) [1894] A. C. 202.
(7) I. L. R. 8 Cal. 703 (1882).
(8) I. L. R. 15 Cal. 667 (1888).
(9) I. L. R. 19 Cal. 13 (1891).
(10) I. L. R. 21 Cal. 639 (1894).
(11) I. L. R. 22 Cal. 871 (1895).

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of Sonthal Parganas. But (1) they were still strictly Sonthal Parganas Courts constituted under sec. 2 of Act of 1855, though for convenience sitting in places outside the Sonthal Parganas under sec. 3 of that Act.

(2) On the date when Reg. III of 1872 was published, it was notified that these particular Courts should cease to have jurisdiction in the Sonthal Parganas. It could not therefore have been intended to refer to them in sec. 5 of the same Regulation.

(3) If sec. 5 was intended to apply to Courts outside Sonthal Parganas, as argued on the other side, it clearly applied to Bhagalpur Court and excluded suits regarding land in the Sonthal Parganas from that Court's jurisdiction.

Sir Robert Finlay, *K. C.* (*Messrs. L. DeGruyther*, *K. C.*, and *Dunne* with him) submitted that sec. 5, Reg. III, 1872, related to questions of title to land and not to a suit to enforce a mortgage. The object of the Regulation was to give the Settlement Officer a free hand in dealing with questions which arise in the course of settlement, namely, questions as to who should be recorded as the owner of land, and as to the record-of-rights. Sec. 12 clearly indicated that the object was to make an enquiry into landed rights. Prior to 1855, the Sonthal Parganas were subject to the ordinary laws of India. Act XXXVII of 1855 imposed a limitation on suits under Rs. 1,000 and set up special Courts. Secs. 1 to 3 of Reg. III of 1872 leave in tact the application of the general law in all suits over Rs. 1,000. It was never intended that the Settlement Officers were to deal with suits relating to mortgages; such suits over Rs. 1,000 were to be tried by the Civil Courts in the ordinary way under the general law of the Code of Civil Procedure. Sec. 10 of Reg. V of 1893 shews that the whole C. P. C., 1882, was applicable to the Sonthal Parganas. Reference was made to Sonthal Parganas Settlement Manual (1898), p. 96; Bengal Code, Vol. V., pp. 222, 268, 269. The present suit could have been instituted in the ordinary Civil Court of the Sonthal Parganas as well as in Bhagalpur. Reliance was placed on *Sorbojit Roy* v. *Gonesh Prosad Misser* (1) (*supra*).

Mr. L. DeGruyther, *K. C.*, followed:—The Code of Civil Procedure does apply to the Sonthal Parganas (sec. 10, Reg. V of 1893), and thereby the Sonthal Parganas are placed on a par with other districts in British India. It provides for the trial of the suits according to the Civil Procedure Code; the trial of a suit must include the place where the suit is brought. Sec. 5 of Reg. 3 of 1872 refers to Civil Courts in the Sonthal Parganas and not to Courts beyond them. It was limited to the term of settlement, and it was proved that the settlement of some of the districts, where the mortgaged lands were situated, had been completed. The terms of the bond also shewed that the parties agreed that the suit to enforce the bond could be brought in Bhagalpur or in Sonthal Parganas. If it were a suit for money alone, it was certainly maintainable, and the place of residence of the Defendant would have made no difference. There was no reason why the suit should not lie, because the Plaintiff had an additional security in Bhagalpur and the Sonthal Parganas.

Mr. Lowndes in reply: Sec. 10 of Reg. V of 1893 applied the Code of Civil Procedure to suits in certain Courts in Sonthal Parganas. The whole Code was not applicable to all the Courts there.

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Reg. III of 872 repealed all previous notifications, and the administration of civil justice was entrusted to officers appointed by the Regulation. The notification, dated 6th August 1873, had the force of law. There has never been a notification that the settlement of the districts had been completed. Again, the agreement of the parties could not give jurisdiction to the Court which it was prohibited from exercising. Reference was made to *Hamlyn's* case (6).

As to the compound interest, sec. 6 of Reg. III of 1872 applied, and the Bhagalpur Court was incompetent to allow greater interest than what the Courts of the Sonthal Parganas could have allowed. The section embodied a basic law, and the parties could not contract themselves out of it. In so far as the Bhagalpur Court had jurisdiction to decree a sale of the mortgaged properties in the Sonthal Parganas, it was governed by sec. 6. The account of moneys due ought to be taken from the date of the first mortgage. If sec. 19 of the Code of Civil Procedure applied, it was only a matter of convenience and that could not extend the powers of the Court beyond those given by sec. 6.

Sir Robert Finlay, K. C.: Sec. 6 applied to the Courts in the Sonthal Parganas only. The authority given by sec. 19 of the Code of Civil Procedure included an authority to make an order for the sale of the properties situated in another district: *Maseyk* v. *Steel & Co.* (4). *Ram Chandra Marwari* v. *Rani Keshobati Kumari* (12) was a case where the property was in the Sonthal Parganas. The Civil Procedure Code, sec. 223, and other sections provided for executing a decree. Because a Court could send out a decree for execution to a Court in the Sonthal Parganas, it could not be said that that Court had jurisdiction in the Sonthal Parganas. The Bhagalpur Court was competent to make a decree for money without being affected by sec. 6, and the decree could not be varied inasmuch as a Court executing a decree cannot do so.

Mr. L. DeGruyther: Reg. III of 1872 was not an Act of the Imperial Legislature; it was enacted by the Lieutenant-Governor of Bengal for the Sonthal Parganas only, and could not override the general law of British India. It would be *ultra vires*, if it did so (Cowell's "Courts in India"), p. 113.

Mr. Lowndes in reply: The Respondents were in fact asking the Bhagalpur Court to sell the property in the Sonthal Parganas which meant that the Court was to exercise jurisdiction therein. Reg. III of 1872 was not an executive Act, its validity was as good as that of any other law.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—In this case their Lordships have to deal with three consolidated Appeals from decrees of the High Court of Judicature at Fort William in Bengal, arising out of a mortgage suit filed in the Court of the Subordinate Judge at Bhagalpur in Bengal. The first and principal appeal is from the decree of the Subordinate Judge enforcing the mortgage, which was affirmed on appeal by the High Court. Subsequently to making that decree, the Subordinate Judge made two orders varying the same, both of which were on appeal set aside by the High Court. From these two orders of

(4) I. L. R. 14 Cal. 661 (1887).
(6) [1894] A. C. 202.
(12) L. R. 36 I. A. 85 (1909).

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the High Court, appeals have been brought by the Respondents to the main appeal, and they constitute the second and third of the consolidated appeals.

The mortgage bond, to enforce which the action was originally brought, was a bond for Rs. 3,50,000, dated the 21st December 1896, in favour of Babu Suraj Narayan Singh, the father of the principal Respondent, and secured on lands situated in the Sonthal Parganas and elsewhere. The mortgagors were members of a joint Hindu family. Inasmuch as no question arises in this appeal as to the parties to the present action being the proper parties, it will be convenient to call the Appellants in the principal appeal the mortgagors and the Respondents the mortgagees.

The bond sued on was the last of a series of bonds for increasing amounts. The total of the principal amounts advanced was, according to the statements in the plaint, Rs. 2,85,903-1-9. But the total claim of the mortgagees at the date of suit was Rs. 5,36,038-11-10, the balance being made up of interest which was charged according to the provisions of the different bonds, the rate under the bond in suit being $7\frac{1}{2}$ per cent. per annum with annual rests. By far the greater portion of the mortgaged properties was situated in the district of the Sonthal Parganas, and the mortgagors resided in that district. The remainder of the mortgaged property was situated within the local jurisdiction of the Bhagalpur Court.

The bond in suit was executed at Bhagalpur and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court.

The suit was commenced on June 20th, 1904. The plaint shows that it was an ordinary suit to enforce a mortgage. Written statements of defence were put in by various Defendants, and various issues were raised and decided by the Subordinate Judge at the trial. Most of these relate to matters no longer in dispute. The only issues that remain for their Lordships' decision in this appeal turn on the fact that the mortgagors reside, and the chief part of the property is situate, in the Sonthal Parganas, so that it is not necessary further to refer to the other issues.

The judgment of the Subordinate Judge, which is dated February 12th, 1906, was in favour of the mortgagees on all issues. On the appeal to the High Court, the argument seems to have been confined to the sixth issue, which was in the following terms:—

"Are the Plaintiffs precluded from claiming compound interest, or interest exceeding the amount of the principal advanced under Reg. III of 1872?"

The High Court found in favour of the mortgagees on this issue, and from that decision the present appeal is brought. But in the hearing before the Subordinate Judge, an issue was raised as to the jurisdiction of the Court of Bhagalpur to entertain the suit, and this point has again been raised in the argument before their Lordships. Seeing that it is a question of jurisdiction, and depends on no disputed facts, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument.

The position of the Sonthal Parganas is very peculiar. They are under separate and special legislation, which differs widely from the legislation applicable to the rest of Bengal. The Lieutenant-Governor of Bengal has the power to vary that legislation from time to time by notifica-

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tions published in the "Calcutta Gazette," under and according to provisions appearing in the regulations relating to the district as will presently be more particularly referred to. At the hearing of the appeal it was found that the documents in the record did not adequately inform their Lordships of the relevant notifications which had thus appeared in the "Calcutta Gazette," and, accordingly it was arranged that the parties should supplement the record by putting in copies of such notifications as they thought material. These were furnished to their Lordships in December last, and they affect to an important degree the matters in issue, and more particularly those that turn upon the settlement of the lands to which the mortgage bond relates.

In order to make clear the legal questions that arise in this appeal, it is necessary to explain the nature and sequence of the legislation relating to the Sonthal Parganas.

The special legislation for the Sonthal Parganas commences by an Act of the Governor-General of India in Council, No. XXXVII of 1855, which was passed on December 22nd, 1855. Its full title is :—

"An Act to remove from operation of the General Laws and Regulations certain districts inhabited by the Sonthals and others and to place the same under the superintendence of an officer to be specially appointed for that purpose."

The Preamble of the Act recites that the General Regulations and Acts of Government then in force in the Presidency of Bengal were not adapted to the uncivilized race of people called Sonthals, and it was therefore deemed expedient to remove from the operation of such laws certain districts. It then proceeded to enact [illegible]. (1) as follows :—

"The districts described in the Schedule to this Act are hereby removed from the operation of the General Regulations of the Bengal Code and of the Laws passed by the Governor-General of India in Council except so far as is hereinafter provided and no law which shall hereafter be passed by the Governor-General of India in Council shall be deemed to extend to any part of the said districts unless the same shall be specially named therein."

This is subject to a proviso which is not material to this case.

The Act then proceeds to carry out its main object by the following enactment :—

"The said district shall be placed under the superintendence and jurisdiction of an officer or officers to be appointed in that behalf by the Lieutenant-Governor of Bengal. . . . . The administration of civil and criminal justice . . . . are hereby vested in the officer or officers so appointed."

This language is perfectly general in its character, and under it the whole administration of civil justice became vested in the officer or officers so appointed. But there follows a proviso to which frequent reference was made in the argument. It reads as follows :—

"Provided that all civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the General Laws and Regulations in the same manner as if this Act had not been passed."

The interpretation of this provision is a matter of great difficulty. Two rival interpretations naturally suggest themselves. The one is that the officers exercising the jurisdiction shall do so in accordance with the general laws and regulations, so that the rights of the parties are unaffected by the provision, although they are to be pronounced upon by a different judicial tribunal. The other is that not only the laws that govern rights, but also the procedure to enforce those rights is to remain unchanged. Now it must be observed that this is a proviso and not

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an exception, and accordingly, taken in connection with the general language of the previous portion of the clause, the former of these two interpretations is the one that commends itself to their Lordships, so that it must be construed as providing that the special officer or officers shall try such suits, but that in trying and determining them they shall observe the General Laws and Regulations obtaining in Bengal, which but for the Act would have applied equally in the Sonthal Parganas. It would seem, however, that the other view has been taken in India [see the judgment in *Sorbojit Ray* v. *Gonesh Prosad Misser* (1)]. Subsequent legislation has, however, rendered it unnecessary, so far as the decision in this case is concerned, to decide what would be the state of things, if this regulation were still in force unmodified by any other statutory enactments.

The territorial definition of the Sonthal Parganas was originally to be found in the schedule to this Act; but, by Act X of 1857, a new schedule was substituted therefor. The judgment of the High Court finds that two-thirds of the mortgaged properties are situated within the district described in that schedule, and it would seem that this estimate may be assumed to be approximately correct for the purposes of this Appeal.

The next Act in chronological order to which it is necessary to refer is the Code of Civil Procedure of 1859. The Sonthal Parganas are not specially named in that Act, and therefore it did not *primâ facie* apply to them; but, nevertheless, we must have regard to the language of section 385 of that Act, which reads as follows:—

"This Act shall not take effect in any part of the territories not subject to the General Regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subordinate and notified in the Gazette."

Although the words "Sonthal Parganas" do not appear in this section, the district falls under the description there appearing. Accordingly, we find that by notification on August 19th, 1867, the Code of Civil Procedure of 1859, as amended by the Code of Civil Procedure, 1861, was applied to the Sonthal Parganas subject to certain provisions, restrictions and exceptions which are not relevant to the matters of this suit.

It is not necessary to decide what was the precise effect of this notification. It can hardly have been intended that it should apply to the Courts held by the officers appointed by the Lieutenant-Governor of Bengal in those suits in which they were not required to try and determine the case according to the general laws and regulations prevailing in Bengal. But with regard to civil suits in which the matter in dispute exceeded the value of Rs. 1,000, it would seem to have settled the doubt as to whether they were cognizable by ordinary Civil Courts duly established with jurisdiction within the Sonthal Parganas, because it will be found that the fact that such jurisdiction exists in such Courts is recognized in subsequent legislation.

In the year 1872 a new Regulation was passed for the Sonthal Parganas. It is entitled the Sonthal Parganas Settlement Regulation, and by cl. (2) it is directed to be read with Act XXXVII of 1855 and Act X of 1857 before referred to. Cl. (3) reads as follows:—

"Subject to the provisions of this Regulation, the Regulations and Acts mentioned in the schedule

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annexed to this Regulation, or such portions of them as are unrepealed, shall be deemed to be in force in the Sonthal Parganas. No other Regulations or Acts shall be deemed to be in force in the Sonthal Parganas, except so far as regards the trial and determination of the civil suits mentioned in sec. 2, Act XXXVII of 1855, in which the matter in dispute exceeds the value of Rs. 1,000, when such suits are tried in the Courts established under Act VI of 1871."

It further provides that the Lieutenant-Governor of Bengal may by notification in the "Calcutta Gazette" add to or take away from the list in the schedule.

To arrive at the true meaning and effect of these provisions, it is necessary to bear in mind that at the date of this Regulation the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, applied to the Sonthal Parganas by virtue of the notification of August 19th, 1867. But the schedule to the Regulation does not contain the Civil Procedure Codes of 1859 and 1861, nor have they ever been added to the above list by any notification of the Lieutenant-Governor of Bengal as above described. It follows that these Civil Procedure Codes were thereafter applicable in the Sonthal Parganas only so far as concerns the trial and determination of civil suits in which the matter in dispute exceeded the value of Rs. 1,000, when such suits were tried in the Courts established under Act VI of 1871. So far as such suits were concerned, there is nothing in this clause of the Sonthal Parganas Settlement Regulation to alter the effect of the notification of August 19th, 1867, which applied to them the Civil Procedure Code of 1859 as amended in 1861.

Act VI of 1871 is known as the Bengal Civil Courts Act, 1871. It is not in the scheduled list. But it was passed at a date when the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, was in force in the Sonthal Parganas, and it would seem as though the wide provisions of the clauses in those Codes giving jurisdiction to Civil Courts must be taken to have given to the Government power to appoint Judges under it within the Sonthal Parganas, inasmuch as sec. 4 of the Sonthal Parganas Regulation, 1872, provides as follows :—

"The Lieutenant-Governor of Bengal may, by notification in the 'Calcutta Gazette,' invest any competent officer in the Sonthal Parganas with the powers of any Civil Court established under Act VI of 1871, and may exclude the whole or any part of the said Parganas from the jurisdiction of any of the Courts established under the said Act now having jurisdiction therein."

But while it is evident that the Government by this section left it to the Lieutenant-Governor of Bengal to decide in future whether Courts established under the Bengal Civil Courts Act, 1871, should retain jurisdiction within the Sonthal Parganas, it had already made up its mind that such should not be the case with suits relating to lands, pending the completion of the settlement which they proposed forthwith to make of all the lands situated in the Sonthal Parganas. This is made clear by sec. 5, which reads as follows :—

"Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the 'Calcutta Gazette' to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village-headship or other office connected with the land, except as hereinafter provided; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under sec. 2 of the said Act XXXVII of 1855, or by the Settlement Officers hereinafter

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mentioned, according as the said Lieutenant-Governor shall from time to time direct."

Then follows a proviso by which the officer empowered to try a suit may transfer it to a Court established under the said Act, and thereby give to the Court jurisdiction to try it. No question, however, under this proviso, arises in the present case.

The critical question in this suit is as to whether cl. (5) excludes from the jurisdiction of Courts established under the Bengal Civil Courts Act, 1871, suits relating to land, where the value of the matter in dispute is more than Rs. 1,000. Their Lordships are of opinion that to this question only one answer can be given. The language of the section is so wide and so peremptory that it gives to the officers therein mentioned sole and exclusive jurisdiction in all suits in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land. To make the meaning clearer and to render the language more emphatic, it is expressed both in the positive and in the negative form. On the one hand, it provides that "no suit shall lie in any Court established under the said Act, VI of 1871, in regard to any land, etc.," and on the other hand it provides that such "suits shall be heard and determined by the officers, etc." It is impossible not to give to such language the full effect of creating an exclusive jurisdiction. It follows, therefore, that no action relating to land in the Sonthal Parganas can be brought otherwise than before such officers, so long as sec. 5 is in force with respect to the district in which that land is situated. There is no difficulty in comprehending the motives for such legislation. The section shows that a settlement of the lands was in contemplation, and evidently the aim of the provision was to prevent any clash of jurisdiction between different Courts in matters relating to land until such time as the Government proclaimed the settlement to be completed—a very intelligible policy when it is considered that on the results of such suits between individuals might depend the entries which must be made in the settlement records.

The object of the regulation being thus to throw the whole of the jurisdiction in suits relating to land into special Courts established in and for the Sonthal Parganas, and provision being made for extending that exclusive jurisdiction to all suits, one has to consider the meaning and effect of sec. 6, which is the section upon which the rights of the parties in the present suit depend. That section, so far as is material, reads as follows :—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely :—

"(*a*) . . . . no compound interest arising from any intermediate adjustment of interest shall be decreed;

"(*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

The Respondents sought to establish that the phrase "all Courts having jurisdiction in the Sonthal Parganas" meant Courts locally situated in the Sonthal Parganas, and dealing with matters purely local. Their Lordships cannot accept this interpretation. The words are definite and precise, and must be applied in their natural signification. It was urged that, taken literally, they would apply to everything done by a Court having jurisdiction in the Sonthal Parganas, whether the matter related to those districts or not, inasmuch as the language used makes the

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application of the enactment depend on the Court and not on the matter in dispute. But this is to ignore the fact that the Regulation is only applicable to the Sonthal Parganas, and that, therefore, it would not apply to Courts having jurisdiction wider than these local limits when such Courts were dealing with matters relating solely to other parts of India. The enactment, therefore, applies to Courts having jurisdiction in the Sonthal Parganas, and acting under and by virtue of such jurisdiction.

The importance of the section is very great. It is a protective section clearly dictated by the fundamental consideration to which reference has already been made, and which led to the Sonthal Parganas being put under separate and special legislation, namely, that—

"The General Regulations and Acts of Government now in force in the Presidency of Bengal are not adapted to the uncivilized race of people called Sonthals, and it is, therefore, expedient to remove from the operations of such laws"

the district known as the Sonthal Parganas.

The provision, therefore, is not one of procedure, but of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforcibility, and limits statutably the total interest which can be decreed on any loan or debt. The application of these provisions to the facts of the present case will be considered later.

The next Act in chronological sequence to which reference was made in the argument is Act XIV of 1874, known as the Scheduled Districts Act, 1874. This is an Act for the purpose of removing doubts as to what Acts or Regulations are in force in parts of British India, which have never been brought within or have from time to time been removed from the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature. These parts of British India are termed in the Act "Scheduled Districts." They are all set out in the First Schedule to the Act, and amongst them are to be found the Sonthal Parganas. The scheme of the Act is peculiar. It is expressly made to apply to all parts of British India other than the scheduled districts. But it is provided that it shall come into force in any scheduled district upon the issue of a notification under sec. 3 of the Act with regard to such district. In such case, the Local Government may, with the previous sanction of the Governor-General in Council by notification in the "Gazette of India" and also in the local Gazette, declare (among other things) what enactments are actually in force in any of the scheduled districts, and every such notification shall be binding on all courts of law. During the argument, Counsels for the parties were not in agreement as to whether any notification under this Act had been issued applying to the Sonthal Parganas; but, from the subsequent information supplied to their Lordships, it would appear that no such notification has been issued, and therefore that the provisions of the Scheduled Districts Act, 1874, have never been applied to them. It is, therefore, unnecessary to discuss further the provisions of this enactment.

The next Act which requires to be noticed is the Civil Procedure Code, 1877. It repeals Act VIII of 1859 and Act XXIII of 1861, which constituted the then existing Code of Civil Procedure. Sec. 1 reads as follows :—

"This Act may be cited as 'The Code of Civil Procedure' and it shall come into force on the first day of October 1887.

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"This section and sec. 3 extend to the whole of British India. The other sections extend to the whole of British India except the scheduled districts as defined in Act No. XIV of 1874."

The relevant part of sec. 3 reads as follows :—

"The enactments specified in the First Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of the same schedule.

"But when in any Act, Regulation or notification passed or issued prior to the day on which this Code comes into force, reference is made to Act VIII of 1859, Act XXIII of 1871, or 'The Code of Civil Procedure' or to any other Act hereby repealed, such reference shall so far as may be practicable be read as applying to this Code or the corresponding part thereof."

The effect of these sections is to make the notification of 1867 relative to the application of the then existing Codes of Civil Procedure to the Sonthal Parganas read as though it applied to the Civil Procedure Act, 1877. But it will be remembered that such application had been restricted by the Sonthal Parganas Regulation of 1872 to suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871. The combined effect of these provisions must be to make the Civil Procedure Act of 1877 apply in the Sonthal Parganas only to suits so brought.

The next Act is the Civil Procedure Code of 1882. In every thing that is material to the present appeal, this is identical with the Civil Procedure Code, 1877. It took the place of that Act in the Sonthal Parganas to the extent that such Act was in force therein, that is to say, for suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871.

We now come to Reg. V of 1893, the short title of which is the Sonthal Parganas Justice Regulation, 1893. It made important changes in the administration of civil justice in the Sonthal Parganas. By sec. 5 it added to the two classes of special Courts theretofore existing in the Sonthal Parganas, named the Courts of Settlement Officers and the Courts of officers appointed by the Lieutenant-Governor of Bengal under sec. 2 of the Regulation of 1855, a third class, namely Courts established under Act XII of 1887, known as the Bengal, United Provinces and Assam Civil Courts Act, 1887, which is an Act which has taken the place of Act VI of 1871 (which has been repealed), and all references to the last-mentioned Act must now be read as referring to it.

These definite provisions entirely remove the difficulties as to the jurisdiction within the Sonthal Parganas of Courts appointed under the Bengal, United Provinces and Assam Civil Courts Act, 1887, or its predecessor—the Bengal Civil Courts Act, 1871. It remains to see what suits are put within the cognizance of these Courts. By sec. 9 the jurisdiction of a Judge of one of these Courts extends to—

"Suits of which the value exceeds Rs. 1,000 and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force."

Their Lordships are clearly of opinion that these words of exclusion refer to sec. 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of Settlement Officers or officers appointed by the Lieutenant-Governor of Bengal under sec. 2 of the Regulation of 1855. This exclusive jurisdiction is, therefore, maintained, and suits in regard to land, which is not in districts that have been notified as being completely settled,

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are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purpose of this appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts.

The result of this examination of the Acts and Regulations applicable to the Sonthal Parganas is that at the date when this suit was commenced, no suit could lie in any Court established under Act VI of 1871, or under the Act which has taken its place, namely, the Bengal, United Provinces and Assam Civil Courts Act, 1887, in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, but such suits must have been brought before Settlement Officers, or Courts of officers appointed by the Lieutenant Governor of Bengal under sec. 2 of the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation of 1893, Part 2, so long as the land had not been settled and the settlement declared by a notification in the "Calcutta Gazette" to have been completed and concluded. And, further, that whatever be the Court that has jurisdiction to decide cases within the Sonthal Parganas, and is exercising that jurisdiction, it must observe the two rules relating to usury above referred to.

It is necessary therefore to ascertain what was the exact position (so far as settlement is concerned) of the land included in the mortgage bond at the date of the commencement of the action in which the present appeal is brought, namely, June 20th, 1904. The information supplied to their Lordships by the parties, as to the notifications appearing in the "Calcutta Gazette" show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed at dates prior to the institution of the suit, other portions were not so settled. It is clear, therefore, that the suit came within the provisions of sec. 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by Settlement Officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the "Calcutta Gazette" to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal must be allowed.

Reliance was placed by Counsel for the Respondent on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. That Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so, the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of sec. 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction.

Their Lordships are also of opinion that, apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of sec. 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree

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any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, and the action dismissed with costs in both Courts. The Respondents must pay the costs of this Appeal. The two subsidiary appeals fall with the dismissal of the action, and the costs connected with them will form part of the costs of the whole proceedings, which the Respondents must bear.

Solicitors: *Messrs. T. L. Wilson & Co.*, for the Appellants.

Solicitors: *Messrs. Morgan, Price & Co*, for the Respondents.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2146 OF 1911.

COXE, J.
D. CHATTERJEE, J.
1914,
19, January.

GAJADHAR AHIR and ors., Defendants, Appellants,
v.
MUNSHI BHIKARI LAL, Plaintiff, Respondent.

Suit for recovery of possession of land by proprietor of undivided half share—Nature of decree that Plaintiff may be entitled to—Proprietor of undivided half share if can eject any one on the land from the whole of it.

The Plaintiff brought a suit for recovery of possession of a plot of land to the extent of an eight annas share, the Plaintiff being the proprietor to the extent of eight annas and Defendants Nos. 5 and 6 proprietors to the extent of the other eight annas. Defendants Nos. 1 to 3 were tenants on the land recognised by Defendants Nos. 5 and 6. The Plaintiff asked for joint possession with Defendants Nos. 1 to 3, if joint possession with Defendants No. 5 and 6 could not be granted:

Held—*That all that the Plaintiff could ask for was joint possession of an eight annas share. He could not in this suit ask the Court to decide who was entitled to possession of the other eight annas share of the land with which he had no concern.*

That a person entitled to an undivided half share of the land cannot sue to eject anybody from the whole of it and the Defendants Nos. 1 to 3 who had been recognised as tenants by the co-sharer landlords could not be ejected by the Plaintiff from the whole of the land.

That the Plaintiff was entitled to a decree against all the Defendants for recovery of joint possession of an eight annas share of the disputed property and he was entitled to enforce the right by a suit for partition, if he was not satisfied with the delivery of possession of an undivided half share.

This was an Appeal preferred on the 10th August 1911 against a decree of Babu Sihari Lahiri, Subordinate Judge of Zilla Saran, dated the 14th July 1911, reversing a decree of Maulvi Khaja Taki Jan, Munsif at Gopalganj, dated the 31st March 1911.

The material facts appearing from the judgment of the Munsif are as follows:—

"The Plaintiff is mortgagee in possession of 8 as. share of Mauza Pakowala and the Defendants Nos. 5 and 6 are the mortgagees in possession of the other 8 as. share. In this mauza, there is a plot of land, bearing No. 907 which is in dispute. The Plaintiff alleges that this land appertains to and is *Sihan* land of the zemindary kutchery which is plot No. 908;

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that he was in direct possession of the properties; that the Defendants Nos. 5 and 6 with whom the Plaintiff has some dispute have set up the Defendants Nos. 1 to 4 to take wrongful possession of the said land and use it as their *bathan* by fixing cattle-troughs and pegs and that it is not *bathan* land of the Defendants Nos. 1 to 4 and they have no right to remain in possession of the land and use it as such.

"Hence this suit for a declaration that the said plot is attached to the plot No. 908, the site of zemindary kutchery, that it is not *bathan* land of the Defendants Nos. 1 to 4 and that they have no right to use the same as such; for perpetual injunction to restrain Defendants from using the land as *bathan*; for *khas* possession to the extent of 8 as. jointly with Defendants Nos. 5 and 6 with Defendants Nos. 1 to 4; for removal of all the cattle-troughs and pegs fixed on the land. The Defendants Nos. 1 to 3 contest the suit and Defendants Nos. 5 and 6 support them.

* * * * * * *

"From the evidence in the record and from allegations made in the plaint and written statements of Defendants, it is clear that the possession of Defendants Nos. 1 to 3 in respect of the disputed land is less due to any merits of theirs than to the discord between the co-sharers. In such a case the Plaintiff is not entitled to anything more than his strict rights as co-sharer."

Against this order the Plaintiff appealed to the Sub-Judge who reversed the judgment.

The Defendants appealed to this Court.

Babu Debendra Narayan Bhattacharjee for the Appellants.

Babu Rajendra Prasad for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This was a suit for recovery of possession of a plot of land to the extent of an 8 annas share. The Plaintiff appears to be the proprietor of the land to the extent of 8 annas and Defendants Nos. 5 and 6 to be proprietors to the extent of the other 8 annas. Defendants Nos. 1 to 3 claim to be tenants on the land, and they are supported by Defendants Nos. 5 and 6. The Munsif gave the Plaintiff a decree for *khas* possession to the extent of an 8 annas share jointly with Defendants Nos. 1 to 3, but not so as to entitle the Plaintiff to remove certain cattle-troughs and pegs fixed by Defendants Nos. 1 to 3 thereon. The Plaintiff was not satisfied with this success, and appealed to the Subordinate Judge, who held that the title of Defendants Nos. 1 to 3 had not been proved and that the Plaintiff should recover possession of a moiety share in the disputed land jointly with Defendants Nos. 5 and 6 after removal of the *Nads* and pegs. Defendants Nos. 1 to 3 have appealed to this Court. On their behalf it is first urged that as the Plaintiff asked in the alternative for joint possession with Defendants Nos. 1 to 3 or with Defendants Nos. 5 and 6 and obtained a decree for joint possession with Defendants Nos. 1 to 3, he could not subsequently appeal for joint possession with Defendants Nos. 5 and 6. In the first place, it is clear that the Plaintiff only asked for joint possession with Defendants No. 1 to 3, if joint possession with Defendants Nos. 5 and 6 could not be granted. But it appears to us that that matter does not really arise in this case. All that the Plaintiff could ask for was joint possession of an 8 annas share. He could not in this suit ask the Court to

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decide who was entitled to possession of the other 8 annas share of the land, with which he had no concern.

Secondly, it is argued that as Defendants Nos. 1 to 3 had been recognized as tenants by the co-sharer landlords Nos. 5 and 6, they could not be ejected from the whole of the land, nor could the cattle-troughs and pegs be removed. We have not been shown any authority for holding that a person entitled to an undivided half share of the land can sue to eject anybody from the whole of it.

This contention therefore must succeed. Accordingly, the decree of the lower Appellate Court will be modified. The Plaintiff will be entitled to a decree against all the Defendants for recovery of joint possession of an 8 annas share of the disputed property. He will be entitled to enforce this right by a suit for partition, if he is not satisfied with the delivery of possession of an undivided half share. Until the land is partitioned, the cattle-troughs and pegs will not be removed.

The Appeal will be decreed in these terms.

Appeal decreed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 93 OF 1912.

FLETCHER, J. RICHARDSON, J. 1914, Heard, 16, April. Judgment, 16, April.	MOHIRUDDIN MONDAL, Defendant No. 1, Appellant, *v.* SRIMATI INDRA KUMARI DASI, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), sec. 11—Res judicata.

Where in a suit on a subsequent mortgage bond, a prior mortgagee was made a party and the Plaintiff prayed for an account as to the amount due to the prior mortgagee, but the Court on the failure of the prior mortgagee to appear passed an ex parte *decree, but no order was passed as to Plaintiff's prayer for account as against the prior mortgagee:*

Held—*That the Court in passing this decree never intended to say that the absence of the prior mortgagee from the trial caused the mortgage security of the Plaintiff to override the prior security which was held by the prior mortgagee.*

AJUDHYA *v.* INAYET (1) *followed.*

This was an Appeal from a decree of Babu Asutosh Banerjee, Subordinate Judge at Burdwan, dated the 10th November 1911, confirming a decision of Babu Sachindra Kumar Sen, Additional Munsif at Kalna, dated the 27th June 1910.

This appeal arises out of a suit instituted by the Plaintiff for recovery of possession of lands purchased by her, in execution of her mortgage decree in suit No. 477 of 1902. In that mortgage suit Defendant No. 1 in the present suit was impleaded as Defendant No. 3 in the mortgage suit. He was made a party as purchaser of the mortgaged property in execution of a decree based on a prior mortgage of his own. In the suit based on the prior mortgage bond by the present Defendant No. 1, the present Plaintiff was not made a party. It was stated in the plaint in the subsequent mortgage suit by the Plaintiff that the prior mortgage was satisfied partly by cash payment and partly by the realization of profits during the time that the mortgaged properties were in his possession. It was stated in prayer "ka" of the plaint that if after taking proper account the Court

(1) I. L. R. 35 All. 111 (1912).

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found that any sum was due to the Defendant No. 3, then on the Plaintiff's paying the same to the Defendant No. 3 the Court would be pleased to pass a decree under the provisions of the Transfer of Property Act in favour of Plaintiff against the Defendants Nos. 1 and 2 (the mortgagors).

In this suit the Defendant No. 1 filed a written statement, but when the case came on for decision, he failed to appear, and the suit was decreed *ex parte.* No order was, however, made on the aforesaid prayer of the Plaintiff. The mortgaged properties were sold and purchased by Plaintiff, and she then instituted the present suit for recovery of possession. The Defendant No. 1 pleaded that unless his prior mortgage was paid off, the Plaintiff was not entitled to succeed. The Courts below held that the *ex parte* decree in the previous mortgage suit No. 477 of 1902 operated as *res judicata* and the Defendant No. 1 was not entitled to raise the issue in the present suit.

Hence this appeal.

Babu Bepin Behary Ghosh (with *Babu Bankim Chandra Mukherjee*) for the Appellant cited *Ajudhya* v. *Inayet* (1).

Babu Hiralal Sanyal for the Respondent relied on *Gopal* v. *Benarshi* (2) and *Mungal* v. *Girija* (3).

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an Appeal from a decision of the learned Subordinate Judge of Burdwan, dated the 10th November 1911, affirming the decision of the Munsif. The suit was brought by the Plaintiff to recover possession of certain pieces of land on the ground that the Plaintiff had become the owner thereof as the purchaser in certain execution proceedings that had taken place in the suit which was brought by her to enforce her own mortgage security. The Plaintiff was the second mortgagee. The present Appellant who was the Defendant No. 1 in the suit was a prior mortgagee and, as such prior mortgagee, he had brought a suit and had the property brought to sale and, in that sale by the Court, he himself had purchased the property. The first Defendant, however, failed to make the present Plaintiff a party to his suit and, therefore, the present Plaintiff was not bound by the decree for sale that was passed in the suit brought on the mortgage of the first Defendant. Subsequently, the present Plaintiff brought suit No. 477 of 1902 to enforce her own mortgage. In the plaint in that suit, the present Plaintiff alleged that the Defendant No. 1, who was the Defendant No. 3 in that suit, was or claimed to be a prior encumbrancer and that the Defendant No. 1 having been in possession of the mortgaged properties, the rents and profits thereof had satisfied his claim ; and accordingly the reliefs that the present Plaintiff asked for in that suit were (1) that if on proper accounts being taken by the Court, any sum would be found due by the Defendant No. 3, that is, the Defendant No. 1 in the present case, then on the Plaintiff's paying the same to the said Defendant No. 3, the Court would be pleased to pass a decree under the provisions of the Transfer of Property Act in favour of the Plaintiff and against the Defendants Nos. 1 and 2 for the sums claimed with interest, and (2) that if the Defendants Nos. 1 and 2 (no mention was made of the present Appellant, the Defendant No. 3 in that suit) did not pay off the decretal amount within the time

(1) I. L. R. 35 All. 111 (1912).
(2) I. L. R. 31 Cal. 423 (1904).
(3) I. L. R. 8 Cal. 51 (P. C.) (1881).

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allowed by the Court, then the Court would be pleased to pass a decree declaring that they have no right to redeem the properties. As a matter of fact, no relief was asked for against the present Appellant except that an account should be taken of what was due to him, if anything, on the footing of his prior mortgage security. The present Appellant put in a written statement denying that there was anything due upon his mortgage, but made no appearance in the suit. The suit thereafter came on for trial before the learned Judge and the Court passed a decree *ex parte*. The decree runs in these terms:—"Ordered that the suit be decreed *ex parte* with costs and interest at bond rate up to two months hence from date, the time allowed to pay off the decree and that, in default, the mortgaged properties be sold. Now, as already stated, no relief was asked for in that suit of the Plaintiff against the Defendant No. 3, that is, the present Appellant, except that an account should be taken of what was due to him on the footing of his prior mortgage security and, although the present Appellant did not appear in that suit, he was entitled to assume that the Court would only pass a decree in accordance with the reliefs sought for. In my opinion, the Court in passing this decree never intended to say that the absence of the present Appellant from the trial caused the mortgage security of the Plaintiff to override the prior security which was held by the Appellant. That point seems to me to have been quite conclusively determined by the decision which has been handed up to us in *Ajudhya Pandey* v. *Inayet Ulla* (1). That case seems to me to be conclusive against the argument that has been addressed to us by the learned Vakil for the Respondent. Then the present Plaintiff pursuant to this decree brought the properties to sale and herself became the purchaser, and next she brought this suit for ejectment against the first mortgagee. The short answer is that the Plaintiff has not got the interest of the first mortgagee. The case that the learned Vakil for the Respondent cited to us [*Gopal* v. *Benarshi* (2)] is not an authority at all for the proposition that he stated. That was a case where a party knowing of his rights and being present before the Court did not put forward his claim under a prior mortgage. That is a very different case from a case where the Plaintiff setting up a case that one of the Defendants had a claim under a prior encumbrance says that the said Defendant by merely not appearing at the trial has lost the benefit of his prior encumbrance. I think, the contrary has been decided by the Allahabad High Court and that seems to me to be perfectly good law and good sense. The learned Judge never intended in the former suit that the Plaintiff's mortgage should be enforced except against the property that was comprised therein. That was the property subject to the first mortgage. Nobody has ever heard that the doctrine of merger applies so as to give the second mortgagee the benefit of the first mortgage simply by reason of the first mortgagee, in a suit to enforce his encumbrance, not having joined the second mortgagee whose existence perhaps he did not know of, as a party to the suit. The question in the present case is whether this is a case of *res judicata*. It is difficult to see what is the case of *res judicata* that has been decided. Nothing was decided

(1) I. L. R. 35 All. 111 (1912).

(2) I. L. R. 31 Cal. 428 (1901).

in the former suit with reference to the present Appellant's prior encumbrance. That was left altogether untouched, and it was not within the scope of the suit for the Court to enforce a second encumbrance so as to override the prior encumbrance which happened to be held by the present Appellant who was not only the prior encumbrancer, but then also the owner of the equity of redemption. The mere fact that the prior owner of the equity of redemption was also the first mortgagee is obviously not sufficient to raise a case of *res judicata*. In my opinion, this case does not fall within sec. 11, C. P. C. The present appeal ought to be allowed and the case sent back to the Court of first instance for trial on the merits. Costs of this appeal and of the two lower Courts will abide the result of the trial before the first Court.

RICHARDSON, J.—I agree. There was no adjudication in the previous suit on the question that is now said to be *res judicata*. The Defendant No. 1 raised the question by his pleadings, as he was bound to do, but there was no decision upon it.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1200 OF 1913.

	BROHMANAND NATH DEB SIRCAR, Petitioner,
MOOKERJEE, J.	Decree-holder,
BEECHCROFT, J.	*v.*
1914,	HEM CHANDRA
30, January.	MITRA and others, Opposite Party, Defendants.

Bengal Tenancy Act (VIII of 1885), sec. 148A—Landlord and tenant, meaning of—Nature of suit under the section—Usufructuary mortgagee of a landlord—Sec. 158B—Co-sharer landlords, who are Usufructuary mortgagee of a portion from a co-sharer of a co-sharer landlord—Decree for rent obtained by such mortgagee how to be executed—Civil Procedure Code (Act V of 1908), Or. 34, r. 14, if applies to such a decree—Revisional jurisdiction of the High Court, circumstances warranting the exercise of.

The Petitioner was a usufructuary mortgagee from a co-sharer landlord who was interested in the property to the extent of one-fourth, the Opposite Parties being entitled to the remaining three-fourths share. The Petitioner as usufructuary mortgagee brought a suit for rent against the tenant under sec. 148A of the Bengal Tenancy Act and joined the proprietors of the three-fourths share as also the mortgagor as parties Defendants. The co sharers did not enter appearance and the Plaintiff obtained a decree for rent and applied for execution under sub-sec. (1) of sec. 158B of the Bengal Tenancy Act, whereupon the co-sharers appeared and objected that the execution could not proceed under sec. 158-B. The objection was overruled by the Court of first instance, but the lower Appellate Court directed the first Court to hold the sale not under sub sec. (2) of sec. 158B of the Bengal Tenancy Act, but in accordance with the Code of Civil Procedure:

Held—*That the term "landlord" means a person immediately under whom a tenant holds, and the term "tenant" is defined to mean a person who holds land under another person and is or, but for a special contract, would be liable to pay rent for that land to that person, and a usufructuary mortgagee is consequently a person immediately under whom a tenant holds and is in the position of a landlord and is entitled to sue for rent in his character as such.*

That the co-sharer landlords are the entire

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body of persons who are entitled to collect rent, and a usufructuary mortgagee from one of the proprietors is in the position of a co-sharer landlord within the meaning of sec. 158B, sub-sec. (1), cl. (e) *of the Bengal Tenancy Act.*

That the Plaintiff having sued for the recovery of what to his information was the whole arrear due, the suit was in essence a suit for rent due to all the co-sharers within the meaning of sec. 148A of the Bengal Tenancy Act, and the suit as framed was within the scope of that section, and the decree should be executed under sec. 158B, sub sec. (1), cl. (e) *of the Bengal Tenancy Act.*

That r. 14 of Or. 34 of the Civil Procedure Code had no application to the execution proceedings in the present case.

That the result of the decision of the District Judge was that the Court of first instance had to proceed to sell the tenure in accordance with the provisions of the Code of Civil Procedure which it had no jurisdiction to do and to refuse to sell the tenure in accordance with sec. 158B of the Bengal Tenancy Act which it had jurisdiction to do and the circumstance that this result followed from an erroneous interpretation of the scope and requirements of secs. 148A and 158B of the Bengal Tenancy Act was clearly no bar to the exercise of the revisional jurisdiction of the High Court.

This was a Rule against a decision of H. P. Duval, Esq., District Judge, 24-Parganas, dated the 12th of July 1913, reversing that of Babu Thakurdas Banerjee, Munsif, Diamond Harbour, dated the 3rd of April 1913.

The facts of the case will appear from the judgment.

Babu Prokas Chandra Mazumdar for the Petitioner.

Babu Atul Krishna Roy for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

We are invited in this Rule to set aside an order by which the Court of appeal below has directed execution of a decree for rent to proceed, not under sec. 158B of the Bengal Tenancy Act as had been ordered by the Court of first instance, but under the provisions of the Code of Civil Procedure. The circumstances under which the order in question has been made may be briefly narrated. The Petitioner is a usufructuary mortgagee from a co-sharer landlord, who is interested in the property to the extent of one-fourth. The Opposite Parties are entitled to the remaining three-fourths share. The Petitioner as usufructuary mortgagee brought a suit for rent against the tenant and joined the proprietors of the three-fourths share as also the mortgagor as parties Defendants. He stated in the plaint that the entire rent payable to all the landlords was Rs. 42 annually, and that the rent payable in his share was Rs. 10-8. He further alleged that the co-sharers refused his invitation to join as co-Plaintiffs in the suit, and had declined to inform him whether any arrears of rent were due to them, and if so, how much. He consequently instituted the suit under sec. 148A of the Bengal Tenancy Act, and prayed that the co-sharers might be transferred to the category of co-Plaintiffs, if they so desired, and that in any event if they stated that rent was due to them, the Plaintiff would amend his claim and pay additional court-fees. The co-sharers did not enter appearance, and the Plaintiff

obtained a decree for rent. He next applied for execution in accordance with sub-sec. (1) of sec. 158B of the Bengal Tenancy Act. Thereupon under sub-sec. (2), notice of the application for execution was given to the co-sharers. They appeared and contended that the suit had not been properly framed under sec. 148A, and that the execution could not proceed under sec. 158B. The objection was overruled by the Court of first instance. Upon appeal the District Judge has reversed that decision and has directed the Court of first instance to hold the sale not under sub-sec. (2) of sec. 158B of the Bengal Tenancy Act, but in accordance with the Code of Civil Procedure on the footing that the decree obtained by the Petitioner was a decree for money and was not capable of execution as a decree for rent under the provisions of the Bengal Tenancy Act.

The propriety of this order is now challenged before us, and we are invited to interfere in the exercise of our revisional jurisdiction, inasmuch as no second appeal lies in the present case. There is no question that the case falls within sec. 47 of the Code of Civil Procedure, because the matter arises between the parties to the suit, and the question raised obviously relates to the execution of the decree. But a second appeal is barred under sec. 153 of the Bengal Tenancy Act, because the amount claimed in the suit was less than Rs. 100 [*Shama Charan* v. *Debendra Nath* (1)]. Consequently if the order of the Court below is erroneous, the only course left open to the Petitioner to obtain relief is by way of an application under either sec. 115 of the Code of Civil Procedure or sec. 15 of the Indian High Courts Act.

(1) 4 C. W. N. 269 (1900).

The order of the Court below has been sought to be supported on behalf of the Opposite Party on three grounds. It has been argued in the first place, that the Bengal Tenancy Act does not apply, because the decree was made in a suit by a person other than the landlord. It is difficult to appreciate the force of this argument, but the contention appears to be that a usufructuary mortgagee is not in the position of a landlord; in other words, if the relationship of landlord and tenant exists between A and B, the usufructuary mortgagee of A is not in the position of a landlord in relation to B. In our opinion, this contention is wholly fallacious. The usufructuary mortgagee is entitled to receive the rent, as is clear from the definition of the expression "usufructuary mortgage," given in cl. (*d*) of sec. 58 of the Transfer of Property Act. Reference has been made to cls. (3) and (4) of sec. 3 of the Bengal Tenancy Act, but they are clearly of no assistance to the Opposite Party. The term "landlord" means a person immediately under whom a tenant holds, and the term "tenant" is defined to mean a person who holds land under another person, and is or, but for a special contract, would be liable to pay rent for that land to that person. The usufructuary mortgagee is consequently a person immediately under whom a tenant holds. But it has been argued that this view cannot be supported, because a usufructuary mortgagee is a transferee of a portion only of the interest vested in the mortgagor. This clearly does not affect the question. An intermediate lessee is entitled to collect rent from the tenant—rent which but for the lease would have been payable to his landlord. On the other hand, sec. 78 of the Land Registration Act clearly contemplates that a usu-

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fructuary mortgagee in possession is entitled to sue for rent in his character as landlord. The first contention, therefore, fails.

It has been argued in the second place, that a usufructuary mortgagee is not in the position of a co sharer landlord within the meaning of sec. 158B, sub-sec. (1), cl. (c) of the Bengal Tenancy Act, because he is the mortgagee from one of the proprietors, whereas the co sharers are the proprietors themselves. This argument is obviously fallacious. The co-sharer landlords are the entire body of persons who are entitled to collect rent. It is not essential that the interest of each should be of the same degree ; for instance, it is conceivable that a *putnidar* of one-half share in the zemindary and a *dar putnidar* of the other half share may be jointly entitled to collect rent from tenants in actual occupation, and when they are so entitled, they clearly constitute a body of co-sharer landlords. It has been contended further that sec. 158B has no application, because the suit as framed was not within the scope of sec. 148A. We have already described the nature of the suit, and it is clear from the decision in the case of *Nanda Lal* v. *Kala Chand* (2) that the Plaintiffs substantially complied with the requirements of sec. 148A. It has been argued, however, that the suit was not brought for the entire rent due to all the co-sharers. We have been invited to construe the expression "rent due" as equivalent to "rent payable under the contract of tenancy." The argument in substance is that to entitle a person to claim the benefit of sec. 148A he must include in the suit a claim, not for the rent actually in arrears, but the rent payable under the contract without the deduction of any amount that might have been actually paid to the landlord. This clearly is an entirely untenable contention. We may further add that it has not been suggested at any stage of present proceeding, nor was the suggestion made in the course of the original suit that at the time of the commencement of the litigation, there was an arrear of rent due to the co sharer landlords. The Plaintiff sued for the recovery of what to his information was the whole arrear due, and that was in essence a suit for rent due to all the co-sharers, within the meaning of sec. 148A of the Bengal Tenancy Act. The second contention consequently fails.

It has been argued in the third place that the execution proceedings are barred under r. 14 of Or. 34 of the Civil Procedure Code. This contention is based obviously on a misapprehension. R. 14 provides that where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Or. 2, r. 2. This rule is inapplicable on three grounds. In the first place, the mortgagee has not obtained a decree for the payment of money in satisfaction of a claim arising under the usufructuary mortgage. In the second place, he does not here seek to bring the mortgaged property to sale; the mortgagee seeks to bring to sale a tenancy subordinate to the interest of the mortgagor. In the third place, the decree has not been made for money in satisfaction of a claim arising under the mortgage. Consequently the suit is not barred under Or. 34, r. 14.

(2) 15 C. W. N. 820 (1910).

BROHMANAND NATH DEB SIRCAR *v.* HEM CHANDRA MITRA.

It is thus plain that the order of the District Judge cannot be supported on any of the grounds suggested. The only question for consideration is as to the competency of this Court to interfere with that order. On behalf of the Opposite Party, it has been suggested that the District Judge has acted in the exercise of his jurisdiction, as under the law an appeal did lie to him. He has, it is said, committed only an error of law, which, in the language of their Lordships of the Judicial Committee in the case of *Malkarjan* v. *Narhari* (3) he had jurisdiction to commit. This is a plausible view of the case, but upon a closer examination of the true nature of the order of the District Judge, the real position appears to be this. The order of the District Judge replaces the order of the Court of first instance. That is, in substance, the effect of the exercise of appellate jurisdiction by the Court below; if it finally disposes of the case, it makes the order which should have been passed by the Court of first instance. The result of the decision of the District Judge, consequently, is that the Court of first instance has to proceed to sell the tenure in accordance with the provisions of the Code of Civil Procedure, which it has no jurisdiction to do, and to refuse to sell the tenure in accordance with sec. 158B of the Bengal Tenancy Act, which it has jurisdiction to do. The circumstance that this result follows from an erroneous interpretation of the scope and requirements of secs. 148A and 158B of the Bengal Tenancy Act is clearly no bar to the exercise of our revisional powers: (*Jugodanand* v. *Amritalal* (4), *Sheo Prosad* v. *Ramchunder* (5).

The outstanding fact remains that if the original Court proceed to carry out the direction of the lower Appellate Court, as it is bound to do, it will exercise a jurisdiction, which it does not possess and will decline a jurisdiction which it does possess, and such proceeding would obviously be liable to be set aside—an aspect of the matter which was not suggested to the Court in *Mathura* v. *Umesh* (6). We are of opinion that this is plainly a case where it is competent to this Court to set aside the order of the Court below.

The result is that this Rule is made absolute, the order of the District Judge set aside and that of the Court of first instance restored. This order will carry costs in all the Courts. We assess the hearing fee in this Court at five gold mohurs.

Rule made absolute.

[CRIMINAL REFERENCE.]

REF. NO. 1 OF 1914.

SHARFUDDIN, J.
COXE, J.
1914,
21, April.

RANI ABHOYESWARI DEVI, Complainant,
v.
KISHORI MOHAN BANERJEE and ors., Accused.

Criminal Procedure Code (Act V of 1898), sec. 200—Complaint by a purdanashin *lady signed and presented by agent holding general power to present complaints—Absence of special power—Duty of Magistrate to satisfy himself if complaint really by person by whom it purports to be—Magistrate bound to examine complainant before issuing process—Complaint not presented in person, proper course for Magistrate on receipt of—Words "at once," effect of, in sec. 200—Sec. 198, compliance with the requirements of—Sec. 503, scope of—Examination of complainant on commission—Indian Penal Code (Act XLV of 1860), sec. 500—Defamation.*

A complaint was filed before the Chief Presidency Magistrate under sec. 500,

(3) I. L. R. 25 Bom. 337 (1900).
(4) I. L. R. 22 Cal. 767, (783) (1895).
(5) I. L. R. 41 Cal. 323 (341), (1913).
(6) 1 C. W. N. 626 (1897).

RANI ABHOYESWARI DEVI *v.* KISHORI MOHAN BANERJEE.

I. P. C., purporting to be made by a purdanashin *lady and signed by a person in whose favour there was a general power-of-attorney authorising the presentation of criminal complaints, but no power-of-attorney authorising the presentation of the specific complaint. The Chief Presidency Magistrate issued process against the accused and transferred the case to another Magistrate :*

Held (on a reference under sec. 432, Cr. P. C.)—*That the Chief Presidency Magistrate was wrong in issuing process against the accused. It is perfectly well settled that a process cannot be issued against an accused person either by the Magistrate first taking cognizance of an offence or by the Magistrate to whom the case is transferred under the proviso to sec. 200, Cr. P. C., unless and until the Magistrate issuing process has first examined the complainant. And this is more necessary in the case of a* purdanashin *lady than in other cases to enable the Magistrate to satisfy himself that the complaint is really her own action.*

That the Magistrate should be very loth to take cognizance of any complaint which is not presented in person. The words "at once" in sec. 200 of the Code clearly indicate that ordinarily a complaint must be presented in person, and a complaint should not be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint.

That whether the requirements of sec. 198, Cr. P. C., were satisfied in the present case depended upon whether or not the complaint was the complaint of the lady.

The High Court quashed the proceedings, giving liberty to the lady to file a fresh complaint and directed her examination, if fresh complaint was made by a commission issued to a Magistrate.

Held—*That the terms of sec. 503, Cr. P. C., are very wide. They refer not only to an enquiry and a trial, but to any other proceeding. The section authorises the examination of any witness and the complainant is a witness.*

This was a Reference made on the 25th March 1914 by the Fourth Presidency Magistrate (Mr. R. D. Chatterjee) (through the Chief Presidency Magistrate of Calcutta).

The facts will appear from the letter of reference of the Magistrate which is set out below :—

"'Under sec. 432, Cr. P. C., I beg to refer the following point of law to you for submission to the Hon'ble Judges of the High Court for decision. A case of Defamation (sec. 500, I. P. C.) was instituted in the Court of the Chief Presidency Magistrate of Calcutta on the 6th November 1913, on behalf of Rani Abhoyeswari Devi, Rani of Bijni, through her constituted attorney Bhuban Mohan Chatterjee, Asst. Superintendent, Bijni Raj, against Kishori Mohan Banerjee and others. The petition was signed by Bhuban Mohan Chatterjee on behalf of Rani Abhoyeswari Devi of Bijni and not signed by the Rani. No power-of-attorney has yet been filed in this matter. Mr. Keays took cognizance of the case and issued process. The case was in the file of Mr. Keays, whence it was transferred to the Central Court, Lall Bazar, by the order of the Hon'ble High Court. The case was transferred to my file by the Chief Presidency Magistrate, Mr. Swinhoe, on the 16th March 1914, when, as the accused were not present, the case was adjourned to 24th March 1914. On the case being called up to-day 24th March 1914, the Defence

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Counsel wanted *de novo* trial, and contended that as the Rani who is alleged to have been defamed did not lodge the complaint herself, but did so through one Bhuban Mohan Chatterjee, who was represented in the petition as her constituted agent, the complaint could not be said to have been made by the party aggrieved, and as such under sec. 198, Cr. P. C., the case cannot go on. As this point is not free from difficulty, I submit the record of the case to you for laying before the Hon'ble Judges of the High Court for the decision on the following point:—Whether the Rani can institute the case of defamation through her agent Bhuban Mohan Chatterjee and whether by doing so the requirements of sec. 198, Cr. P. C., have been met with.'

"The whole record of the case including the petition of complaint is submitted for their Lordship's decision. The case has been adjourned *sine die* pending their Lordships' order on the point."

Mr. J. N. Roy and Babu Monmatha Nath Mukerjee for the Complainant.

Mr. H. N. Sen and Babu Tarakeswar Pal Chaudhury for the Accused.

The JUDGMENT OF THE COURT was as follows:—

COXE, J.—This proceeding arises out of a complaint purporting to be made on the part of Rani Abhoyeswari Devi against the Petitioners accusing them of committing defamation. The complaint is not signed by the Rani, but by one Bhuban Mohan Chatterjee on behalf of the Rani. We are informed that there is no power-of-attorney on the record and that there is no power-of-attorney authorising the presentation of this specific complaint, although there is a general power-of-attorney authorising the presentation of criminal complaints. The document was presented to the Chief Presidency Magistrate, who issued process against the accused; and thereafter the case was transferred. The Magistrate, to whom it has ultimately come, has referred for our decision the following point:—"Whether the Rani can institute the case of defamation through her agent Bhuban Mohan Chatterjee and whether by doing so the requirements of sec. 198, Cr. P. C., have been met with."

If the Rani makes a complaint to a Magistrate, the Magistrate is entitled to take coginizance of it. But before he takes cognizance, he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate, if really it is her own complaint.

But I hold that the magistrate should be very loth to take cognizance of any complaint which is not presented in person. The words "at once" in sec. 200 of the Code clearly indicate that ordinarily a complaint must be presented in person. And I do not think that a complaint should ever be accepted which is not signed by the Complainant and is not preferred by a person duly authorised to prefer that specific complaint.

It is perfectly clear to me that the Magistrate in the Court below had no right to issue process against the accused persons in this case. It has been argued that when a case is transferred under sec. 192, Cr. P. C., before the Complainant has been examined, process can issue without the examination of the Complainant. That argument really has no application to the present case, because as a matter of fact process had been issued before the case was transferred. But in any case it is perfectly well settled that a process cannot be issued against an accused person, either

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by the Magistrate first taking cognizance of an offence, or by the Magistrate to whom the case is transferred, under the proviso to sec. 200, Cr. P. C., unless and until the Magistrate issuing process has first examined the Complainant, and this is perhaps more necessary in the case of a *purdanashin* lady than in other cases to enable the Magistrate to satisfy himself that the complaint is really her own action. In the present case, if the complaint is ill-founded, it would be difficult, if not impossible, to fix the Rani with any responsibility for the proceeding.

I see no reason, however, why the Complainant should not be examined under sec. 503, Cr. P. C. The terms of that section are very wide. They refer not only to an enquiry and a trial, but to any other proceeding. The section authorises the examination of any witness, and a Complainant is certainly, in my opinion, a witness. There is, indeed less objection to the first examination of a Complainant than to the examination of a witness under this section, inasmuch as in the examination of a Complainant, before a process is issued, the accused is not entitled to be present or to cross-examine.

It seems to me, therefore, that the proper order to pass in this case is to say that if the complaint on the record is the complaint of the Rani, a point in which we have no materials for a decision, the requirements of sec. 198 have been satisfied. But the Magistrate was wrong in issuing process against the accused persons. In these circumstances, the best course to adopt is to quash the whole proceedings, giving liberty to the Rani to make such further complaint as she may be advised. If such complaint is made, the examination of the Complainant under sec. 200, Chap. XVI, of the Code may be made by a commission which should be directed to a Magistrate.

SHARFUDDIN, J.—I agree.

[CRIMINAL REFERENCE.]

REF. 12 OF 1914.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
6, February.

THE EMPEROR
v.
MUKUND SAHU, Accused, Petitioner.

Bengal Excise Act [V. (B. C.) of 1909], sec. 19, cl (4)—Government Notification—Possession of cocaine.

A notification issued by Government under sec. 19, cl. (4) of the Excise Act has the force of law, and under the notification, dated the 20th November 1911, it is an offence for any person other than those specified to have any cocaine at all, except with a medical man's prescription and then only 5 grains. In all cases, the burden of proof to show under what authority he obtained cocaine lies on the accused.

This was a Reference under sec. 438, Cr. P. C., dated the 6th January 1914, by R. Sheepshanks, Esq., Sessions Judge of Muzaffarpur, recommending that additional evidence might be directed to be taken under sec. 428, Cr. P. C., in the case in which the Petitioner was convicted by Babu Girindra Chandra Banerji, Deputy Magistrate of Muzaffarpur, by his order, dated the 16th September 1913, under sec. 46, Act V of 1909, of possessing cocaine, an exciseable article, in contravention of the Act and of the Board's Notification No. 5978B, dated the 27th November 1909, read with sec. 19 of the Act and sentenced to undergo rigorous imprisonment for 6 weeks.

The facts will appear from the Sessions Judge's letter of reference set out below:

"On the morning of the 18th July 1913, on receipt of certain information, Excise

THE EMPEROR *v.* MUKUND SAHU.

Sub-Inspector Mohabir Prosad with his jamadar and peon searched the shop of accused in his presence and in that of search witnesses, and in a narrow room a large wooden box was found. The box was brought out of the room and in it were found (1) a small box and (2) a cylindrical tin box. In the small box were found one one-dram glass phial full of a white powder and two blue labels bearing on them the printed word *Cocaine*. In the cylindrical tin box were found 31 small paper packets of a similar white powder, containing about 2 grains each. The phial and packets were forwarded to the Chemical Examiner, whose report runs—'Cocaine Hydrochlorate has been detected in the contents of the glass phial and of the 31 paper packets.'

"The accused pleaded not guilty stating that the phial and packets were not found in his shop. He put in a petition praying that a reference might be made to the Chemical Examiner in order that the quantity of cocaine found in the phial and packets might be ascertained, but this was rejected.

"The trying Magistrate on the 16th September 1913 found the accused guilty under sec. 46, Act V of 1909, of possessing cocaine in contravention of the Act and sentenced him to 6 weeks' rigorous imprisonment, the quantity of cocaine found being confiscated and sent to the Collector.

"Applicant has been convicted under sec. 46 of the Excise Act of 1909 of possessing more than 20 grains of cocaine without a license, pass or permit. The Magistrate states in his judgment that Chemical Examiner's report shows that the powders in the one-dram phial and also in packets are cocaine. This is incorrect. The report is as follows:—'Cocaine Hydrochlorate has been detected in the contents. . . . .' Nothing is said as to the quantity. The offence charged has not, therefore, been established, and the missing link in the evidence should now be supplied. It has been argued in support of the motion, that the facts found do not constitute such exclusive possession on the part of the Applicant as is necessary for conviction, and that the present recommendation should be that the conviction and sentence may be set aside. I cannot accept this view. The articles in question were found in a box in a closed room in Applicant's house. *Queen-Empress* v. *Sangam Lal* (1), which has been cited in support of the motion, is in reality against Applicant. The ground on which it is urged that Applicant's possession should be held not to be established is that some labourers were working on the thatch of his house, and may possibly have had access to the box. Whether they had such access or whether the possession of Applicant is established is a question of fact on which the Magistrate has found against Applicant.

"In these circumstances, I have the honour to recommend that additional evidence be directed to be taken under sec. 428, Cr. P. C., in order that the amount of cocaine found in possession of the accused may be ascertained."

Babus Soroshi Charan Mitra and *Heramba Chandra Guha* for the Accused.

Mr. Sultan Ahmed for the Crown.

The JUDGMENT OF THE COURT was as follows:—

We have only to point out to the learned District Judge that his attention does not appear to have been called to the Government Notification of November 20th, 1911, which will be found in Part I

(1) I. L. R. 15 All. 129 (1893).

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Contents.

NOTES.

City Civil Court.

We have shown in our last issue that the cost of litigation on the Original Side of the High Court, if the client wishes to keep himself within bounds, is not abnormally high. Further, heavy cases on the Original Side are much more quickly disposed of than in the Mofussil Courts. The Judges of the High Court do not take up these cases by instalments as in the Mofussil, but hear them through. Besides, they keep both counsel and witnesses well in hand and as a matter of fact counsel on the Original Side through their training and traditions do not as a rule beat about the bush in the examination of witnesses or in stating their facts or the law. The London *Times* in its recent article truly diagnosed that the real weakness of untrained judges lay in the fact that through their want of practical familiarity with the rules of evidence and of procedure, they record everything first and try to comprehend the case or law afterwards. Before such judges, members of the Bar cannot be blamed for having everything recorded, lest the judge should lose sight of fundamental points. But before a judge who has practised at the Bar for a good many years, counsel, whatever may be his standing, knows from the beginning how far he will be allowed to go and would seldom transgress the line.

Thus cases which are disposed of on the Original Side in two or three days might take weeks in the Mofussil to decide. So even if the hearings in contentious cases be costly, the quick disposal and greater finality of the judgments, which are seldom appealed against, often compensate for the heavier costs. Since there can be no question that the quality of justice dispensed on the Original Side is of much superior order, if the real grievance is about costs, the remedy can be secured by approaching the Hon'ble the Chief Justice and the learned Judges rather than the Local Government for the disruption of the High Court. If the public are really aggrieved about heavy costs, let them make a representation to the High Court, setting out facts and figures and make practical suggestions for fixing a definite scale of costs for suits up to Rs. 5,000 or even of higher value on an ascending scale. If they are backed up by members of the legal profession, that would strengthen the hands of the Judges.

We do not think that the Local Government will at all be disposed to interfere with the jurisdiction of the High Court in any shape or form without consultation with or rather except at the instance of the Hon'ble the Chief Justice and the learned Judges. His Excellency Lord Carmichael in his very first speech on the assumption of his office as Governor of this Presidency assured the public that he would in no way interfere with the High Court of Calcutta which they have held so much and so long in high regard. Is it reasonable to expect that His Excellency at the instance of an individual member of his Legislative Council will go back upon his words and give the go by to his solemn declaration of policy? The break up of the Original Side on the top of the proposed partition of the High Court will mean the break of this historic tribunal and its weakening as a whole and in all its parts.

While we are confident that the Local Government will decline to interfere with the jurisdiction of the High Court in any of its Divisions, we seriously doubt the wisdom or propriety of the members of the legal profession who instead of approaching the High Court itself, which is an autonomous body, so far as judicial administration is concerned, would approach the Local Government for reliefs either in respect of costs or restrictions which

they may regard as unreasonable. It is a well-known fact that the greatest harmony prevails between the Local Government and the High Court, because each is autonomous in its own sphere and we are sure that any attempt to throw any bone of contention between the two will be quietly put aside by the honoured and universally respected heads of each and their Honourable colleagues. We see therefore no sense in moving a resolution in the Local Legislative Council on a subject which in its present form is not even presentable before a debating society.

Costs in Mortgage Suits on the Original Side.

In *Sarat Chandra Chaudhuri* v. *Nahapiet* (37 Cal. at p. 913), it was ordered that the first mortgagee was entitled to costs on the Original Side of the High Court on scale No. 2 as against the mortgagor who did not appear, although costs are as a rule on scale No. 1. Here the mortgagee had joined the puisne mortgagee, and the fight was between the two mortgagees, and the mortgagor did not at all appear. It was hard on him to be mulcted in costs as in a defended suit and it is presumably because of this that the Judges sitting on the Original Side have since been taking a more reasonable view in such cases and have been allowing costs on scale No. 1 against such mortgagors. This is, however, not yet generally known to the profession. We may, therefore, state it for their information that in a suit by a mortgagee against the non-contesting mortgagor and in which the puisne mortgagee is made a defendant and appears to prove his case, the uniform practice now on the Original Side is to allow the mortgagee costs as for an undefended suit on scale No. 1 only.

Judgment by consent in Copyright and Patent cases if to be in Court or Chambers—Costs.

The question whether the Plaintiff in a copyright case can compel a Defendant to come before the Court and have a judgment entered against him in open Court and at his expense, when the latter admits infringement and is willing to pay penalty and costs conditionally upon the matter being mentioned in Chambers for being disposed of, came up in the recent case of *Smith & Jones Ld.* v. *Service, Reeve, & Co.* before Mr. Justice Sargant in the King's Bench Division on the 16th of June last. In this case, the Plaintiffs sued Defendant amongst other things for infringement of their copyright in design, for injunction restraining future infringement, delivery of articles made in infringement of design, statutory penalty, damages, account of profits and costs. The Defendants entered appearance, pleaded that they had acted innocently, and offered to consent to the injunction asked for, to pay costs up to and including judgment, to pay a fixed amount into Court as penalty with their defence admitting liability.

But subsequent to this in the course of correspondence while the Plaintiffs' solicitor insisted that the judgment must be taken in open Court, the Defendant's solicitor urged that the application should be made by summons in Chambers, as that was less expensive and that if the application was made by motion in Court, he would not be responsible for more costs than for a Chamber application. The Plaintiffs' solicitor, however, made the application by motion in Court and Plaintiffs' counsel urged that matter of this kind should be dealt with in open Court so that it may serve as a warning to others against committing infringement. Counsel for Defendant cited from Annual Practice a passage at p. 536 that if the Defendant consents to the order being made in Chambers and if the Plaintiff moves in Court, he will be allowed costs only of summons in Chambers. Mr. Justice Sargant held, however, that judgments in cases of infringement of copyright and patent should be entered in open Court, and following Mr. Justice Eady's judgment (18 R. Pat. Ca. 276 and 26 R. Pat. Ca. 157) awarded costs of the motion against Defendants.

Dr. Sarat Chandra Banerjee.

With regard to Dr. Sarat Chandra Banerjee who has been appointed President of the Judicial Tribunal of the Calcutta Improvement Trust, we are informed that it is not a fact that he has no experience of the original Courts. As a matter of fact he joined the Alipur Bar as a pleader and practised there for several years in Courts of first instance, and during that time he enjoyed a fairly good practice. It is for improving his prospects in life that he subsequently became enrolled as a Vakil and joined the High Court.

CURRENT INDIAN CASES.

(CRIMINAL.)

Criminal Procedure Code, secs. 423, 439.

K. BALI REDDI, I. L. R. 37 Mad. 119.

The accused were charged under secs. 148, 302, I. P. C. The Sessions Judge found the accused not guilty of those offences, but guilty under secs. 147, 304, I. P. C. The accused appealed against their conviction and the High Court as a Court of Revision called upon the accused to show cause why they should not be convicted of murder.

Held—That sec. 423 expressly empowered an Appellate Court to alter the finding. The prohibition in sub-sec. (4) of sec. 439 which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction" refers to a case where the trial has ended in a complete acquittal, not to a case where the trial

has ended in a conviction, but the Court has wrongly applied the law and held that the conviction should be under some section of the Code other than the section properly applicable.

Re S. VIGIARAGHAVALU NAIDU, I. L. R. 37 Mad. 156.
Suicide by accused bailed out—Liability of surety.

When an accused commits suicide, the sureties are not liable for the default of his appearance.

Review.

THE PROVINCIAL SMALL CAUSE COURTS ACT. *By Kedar Nath Chaudhuri of the Provincial Civil Service, Judicial Branch, Bengal. First Edition. Published by the Author. 1914.*

The above is an annotated edition of the Provincial Small Cause Courts Act (IX of 1887), as amended up to date, containing the rulings of the different High Courts noted under the appropriate sections. The author has endeavoured to present the law on the subject in a clear and comprehensive form, a task in which his own experience as a Judge in the administration of this branch of the law has undoubtedly been of great assistance to him. The references to connected legislative enactments with notes and comments where necessary as also the rules made by the Calcutta High Court under the Act as well as the Amending Act VI of 1914 with the statement of objects and reasons, which have been incorporated in this work, will very considerably enhance its usefulness. We have no doubt that legal practitioners in Mofussil Small Cause Courts will find the book useful.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. APPEAL FROM APPELLATE DECREE No. 2663 OF 1913. GURUPADA MUKERJEE, Plaintiff, Appellant *v.* GANGADHAR BANERJEE, Defendant, Respondent. 18th June 1914.

Suit for declaration that auction purchase made by Defendant is benami *on behalf of the Plaintiff, whether maintainable—Sec. 66, C. P. C.*

The facts out of which this appeal arose are shortly as follows. In execution of a rent-decree the lands belonging to the Plaintiff's wife and sister-in-law were sold on 16th June 1910, and the Defendant auction-purchased them. The Plaintiff's case is that he was in intimate terms with the Defendant and that he gave him money to purchase the disputed property on his behalf, but that the Defendant purchased it in his own name fraudulently and that he took the sale certificate and got possession and that he gave all expenses for getting the sale certificate and obtaining possession of that property and that subsequently disputes having arisen between them, the Defendant dispossessed him. The Plaintiff therefore brought the suit for recovery of possession on establishment of his auction-purchased *lakhiraj* title thereto. The Defendant alleged that he purchased the property with his own money and that he paid all expenses for getting the sale certificate and for obtaining possession of the disputed property and that the suit is not maintainable under sec. 66 of the Civil Procedure Code. The first Court held that the purchase was made with the Plaintiff's money and so gave him a decree. On appeal to the District Judge, he also agreed with the finding that it was with the Plaintiff's money that the property was purchased; but he found that there was nothing fraudulent in the conduct of the Defendant and that the Plaintiff purchased the property in the *benami* of the Defendant and that the Defendant had not fraudulently or without the Plaintiff's consent got his name inserted in the certificate, and so he held that the suit was not maintainable under sec. 66 of C. P. C.

The Plaintiff preferred a second appeal, and it was contended that such a suit is maintainable in law and that equity being in favour of the Plaintiff he ought to get a decree.

Held:—That the suit is not maintainable in law under sec. 66, C. P. C.

Babu Sarat Chandra Mukerjee for the Appellant.

Babu Atul Krishna Ray for the Respondent.

A. T. M. Appeal dismissed.

CIVIL APPELLATE JURISDICTION. Before FLETCHER, AND RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 3182 OF 1912. SM. RAJANIBALA DASI, Appellant *v.* BHAJAHARI KOLEY AND ANOTHER, Respondents. Heard 22nd May, Judgment 28th May, 1914.

Admissibility in evidence—Road-cess return—Cess Act [IX of 1880 (B. C.)], sec. 95—Authorised agent—Certificated guardian.

The suit was brought by the Plaintiff as heir of her deceased husband Sarat Chandra Ghosh to recover against the Defendant No. 1 an eight annas share of the rent for certain holdings. The Defendant No. 2 was the uncle of the late husband of the Plaintiff and owned the other eight annas share in the holding. He was a formal Defendant and no relief was asked against him.

The only point argued in the second appeal was whether the lower Appellate Court rightly rejected certain road-cess returns which had been

given in evidence by the Plaintiff in the Court of first instance.

The road-cess returns in question were filed by the Defendant No. 2 during the minority of the late husband of the Plaintiff as his certificated guardian.

It was argued that as the returns in question were not signed by Sarat Chandra owing to his minority and as the Defendant No. 2 as his certificated guardian was not his authorised agent, the returns would not be evidence against him within sec. 95 of the Cess Act, 1880, nor, for the same reason, would that section make them inadmissible in favour of Sarat.

Held, that the returns could not be used as evidence in favour of the Plaintiff.

The words as to the return bearing the signature and address of the person or his authorised agent in sec. 95 of the Cess Act, are directory.

Babu Nagendra Nath Ghosh for the Appellant.

Babu Bepin Behari Ghose for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL REVISIONAL JURISDICTION—Before FLETCHER and RICHARDSON, JJ. CIVIL RULE No. 449 OF 1914. LAKHI NARAN GANGULY, Judgment-debtor, Petitioner *v.* FELUMANI DASI AND ORS., Decree-holders, Opposite Party. 29th June 1914.

Execution of money-decree—Limitation—No form for certifying payments under Or. XXI, r. 2, C. P. C.—No time fixed for decree-holders to certify payments.

This application for revision arose out of an application for execution of a decree which, according to the judgment-debtor, was barred by limitation. The decree under execution was passed on 5th April 1909. The application for execution was made on 19th December 1913. The decree-holder's case was that there had been three payments made by the judgment-debtor, all endorsed on the back of the decree by the judgment-debtor himself. The date of the earliest payment was 6th March 1911, that of the second was 18th March 1912, and that of the third was 21st February 1913. The judgment-debtor contended that those endorsements were not genuine. He further contended that the payments not having been certified in Court, they could not be recognised by the executing Court. The lower Court held that the endorsements were genuine, and that as there was no time fixed for decree-holders to certify payments, the second contention also of the judgment-debtor failed. The present rule was obtained by the judgment-debtor.

Babu Bepin Behari Ghosh (Jr.) for the opposite party showed cause and submitted that there was no time fixed for the decree-holders to certify payments. No form is prescribed for such certifying. No doubt, Or. XXI, r. 2, C. P. C., has omitted the words "as payment or adjustment of the decree" after the words "recognised" from sec. 258 of the old Civil Procedure Code, but that would not help the judgment-debtor in any way. Refers to the judgment of Farran, C. J., in 21 Bom. 122. The decree-holders have certified the payments in question.

[FLETCHER, J.—Have they done so?]

Yes, in their application for execution.

Babu Kshitis Chandra Chakrabarti for the Petitioner submitted that the case in 21 Bom. 122 did not apply to the present case, because it was decided under the old Civil Procedure Code. The new Civil Procedure Code had introduced a considerable change by omitting the words "as payment or adjustment of the decree" after the word "recognised." Refers to Or. XXI, r. 2, sub-rule (3), C. P. C. Payment or adjustment of a decree, which is not duly certified, cannot be recognised by the Court for any purpose whatever.

[FLETCHER, J.—What is the meaning of certification?]

To certify a payment is to record the payment in the Register of Civil Suits. In the present case, it having not been so recorded, the payments were not certified.

[FLETCHER, J.—The decree-holders have certified payments in their application for execution.]

I submit that the Court ought to certify payments.

[RICHARDSON, J.—It has been so done in the judgment of the lower Court.]

The decree-holders ought to file a separate petition for having the payments certified. They cannot do it now after the decree has been barred by limitation.

[FLETCHER, J.—Not necessarily.]

The case of *Katubulla Sarkar* v. *Durga Charan Rudra*, reported in 16 C. W. N. at p. 396, clearly lays down that the adjustment or payment of a decree which is not certified cannot be recognised by the Court for any purpose whatever, *e. g.*, for extending the period of limitation.

[FLETCHER, J.—No. It does not lay down how to certify payments.]

I submit that the payment not having been recorded in the Register of civil suits, the payments cannot be recognised by the executing Court for the purpose of limitation.

Held—Payment of decree can be certified by the decree-holder at any time after payment. The period of limitation is fixed for the judgment-debtor only. There is no form by which the payments can be certified. The decree-holders can certify payments by stating the same in their application for execution.

Rule discharged.

THE EMPEROR *v.* MUKUND SAHU.

of the *Calcutta Gazette* of November 22nd, 1911, at pages 1586 and 1587. In a case decided by us last year on reference made by the Fifth Presidency Magistrate as to whether the possession of 20 grains of cocaine can be allowed with impunity, the judgment was as follows :—" There can be no doubt as to the answer. We were not referred to the Government Notification of November 20th, and we were not aware of its existence. Under the powers conferred by sec. 19, cl. (4), the Notification has the force of law, and it is an offence for any person other than those specified to have any cocaine at all except with a medical man's prescription and then only 5 grains. In all cases, the burden of proof to show under what authority he obtained cocaine lies on the accused." The learned Judge will, therefore, see that this reference has been made under a misapprehension ; and as we do not feel inclined to interfere in any way with the sentence, the papers must be returned.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 23, April.
Judgment, 7, May.

RAI DWARKA NATH SARKAR BAHADUR and anr., Appellants,
v.
HAJI MAHOMED AKBAR and others, Respondents.

Partnership accounts—Duty of each partner to discover all documents—Arbitration, reference of dispute with customer to, by one partner—Others, if bound—Question if one of law—Agreement to refer not originally binding, becoming binding by acquiescence or acceptance of benefit—Question if should be allowed to be taken for the first time on appeal—Partner charged with entering into agreement to refer negligently and improperly—Measure of damages—Onus of proof.

For the purpose of working out a partnership decree, each party to the action is bound to produce and discover all documents in his possession relating to the partnership, and an application by the Plaintiff for discovery of documents in the possession of a Defendant in such an action ought not to have been refused :

Held—*That the decision of the High Court in so far as it was of opinion that the accounts taken by the Commissioner (and affirmed by the trying Court) were not properly taken or supported by evidence and must be investigated afresh was correct.*

A sum of money, paid by a customer as the result of a reference to arbitration in which the legal personal representatives of a deceased partner were no parties, having been brought into the partnership accounts, the latter who did not dispute the item in the first Court for the first time on appeal contended that not being parties to the reference they were not bound by it :

Held—*That the question whether the legal personal representatives of the deceased partner were bound by the agreement to refer and by the award was not a simple question of law to be decided without reference to the facts of the case or any evidence which might have been available if it had been raised at the proper time, and the contention should have been rejected as having been put forward at too late a stage.*

An agreement to refer not originally binding might become binding later on by the acquiescence of the party or his acceptance of benefits thereunder.

Held further—*That if the legal personal representatives of the deceased partner were not bound by the award, they would not*

RAI DWARKA NATH SARKAR BAHADUR *v.* HAJI MAHOMED AKBAR.

be entitled to relief on the footing that it was binding, but had been negligibly and improperly entered into.

That if relief could be given on this footing, the difference between the amount originally claimed against the customer and the amount paid by him under the award would not necessarily be the measure of damages; nor could the onus of proving that it was any less sum be thrown on the person accused of negligent and improper conduct.

HAJI MAHAMAD AKBAR *v.* DWARKA NATH SARKAR (1) *reversed in part.*

This was an Appeal from a judgment and decree of the Calcutta High Court passed by Mookerjee and Teunon, JJ., on 21st March 1910, allowing an appeal preferred against the decree passed on 24th September 1907 by Mr. Promotho Nath Chatterjee, Subordinate Judge of Nadia.

The facts which are material for the present appeal sufficiently appear from their Lordships' judgment and the judgment of the High Court which is reported in 14 C. W. N., 1106. The High Court *inter alia* held that an award was not binding upon the Plaintiff on the ground that the surviving partners had no authority to refer the matter to arbitration specially after the commencement of a suit for dissolution of partnership.

The material portion of the judgment of the High Court was as follows:—

"It appears, however, that a large sum of money was due from the Secretary of State on account of work done. The surviving partners submitted their bill to which exception was apparently taken; the result was that Sircar alone entered into an agreement with the Secretary of State to refer the matter to arbitration. This was done on the 27th November 1905, that is, more than 6 months after the institution of the present suit by the representatives of Rohim Bux against Sircar and the other surviving partners; the arbitrator made his award on the 28th April 1906, by which it was held that Rs. 77,788 was due on the bill which had been presented for Rs. 1,27,124. This implied a loss of nearly Rs. 50,000 to the firm. The Commissioner and the Subordinate Judge have both treated the award as binding upon the Plaintiffs and conclusive against them. The Plaintiffs challenge this position on the ground that the surviving partners had no authority to refer the matter to arbitration, specially after a suit had been commenced for the dissolution of the partnership. In our opinion, this contention is well-founded and must prevail.

"It is well-settled that it is incompetent to one of the members of a partnership, to bind the firm by a submission to arbitration. . . . .

"We must hold, therefore, that the reference to arbitration by the Sircar Defendant is not binding upon the Plaintiffs, and this conclusion is strengthened by two circumstances; in the first place, as already pointed out, the reference was made after the commencement of the present suit and with full notice of the claim of the Plaintiffs; in the second place, the partnership contract between the parties expressly provided that no partner should, without the consent of the other partners, release or compound any debt owing to or claimed by the firm, and if any partner does so, he should, if required by the other partners, make good to the firm the full amount of such debt or claim. Besides, if there was any urgency, and speedy settlement of the claim against the Secretary of State was

(1) 14 C. W. N. 1106 (1910).

RAI DWARKA NATH SARKAR BAHADUR *v.* HAJI MAHOMED AKBAR.

needed, the Defendants might have got a Receiver appointed, who might have wound up the business under the directions of the Court. Under such circumstances, the conduct of the Sircar Respondent was wholly unjustifiable. The result therefore is that the award is not binding upon the Plaintiffs. It is open, however, to the surviving partners to show, if they can, that what was paid by the Secretary of State on the basis of the award, was all that was legitimately recoverable from him; in other words, that the claim which had been originally put forward and embodied in the bill submitted, was grossly exaggerated. If this is proved, the Defendants would not be liable for damage on account of the reference to arbitration ; but if they fail to establish this position, they must be held liable for the loss which has been caused by the reference to arbitration. The burden is consequently cast upon them of explaining fully the details of the claim against the Secretary of State ; that is, the grounds on which the claim was advanced at the original figure, and how a reduction could justly be made. This may involve a protracted investigation, but for this the Defendants are entirely to blame, and as they put forward the claim against the Secretary of State, they may legitimately be presumed to have in their possession materials upon which their claim was based."

The Defendants appealed to His Majesty in Council.

The appeal was heard *ex parte*.

Mr. J. M. Parikh for the Appellants submitted that the High Court ought not to have allowed the Plaintiff to question the submission to arbitration for the first time at the hearing of the appeal. It was a mixed question of law and fact, and could not be properly decided without evidence. The award was binding. Further, the findings of the Commissioner were rightly affirmed by the Subordinate Judge and ought not to have been set aside by the High Court.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—This was a partnership action instituted by the legal personal representatives of a deceased partner against the surviving partners. By the decree, dated 31st May 1906, as varied by the order of the High Court, dated 26th March 1907, it was directed that a Commissioner be appointed for the purpose of taking the accounts therein referred to, being the usual partnership accounts. The Commissioner made his report on the 14th August 1907 and various objections to it were filed. On the 24th September 1907, the Subordinate Judge overruled these objections and confirmed and gave relief on the footing of this report. The order of the Subordinate Judge was appealed. On such appeal two points were decided by the High Court. In the first place, such Court decided that the report of the Commissioner was unsatisfactory and that the accounts as taken by him were not properly taken or supported by proper evidence and must be investigated afresh. In this respect, after careful consideration, their Lordships see no reason to differ from the High Court. Without going into detail, it will suffice to say that the accounts were taken without production or discovery of the partnership books and documents. For the purpose of working out a partnership decree, each party to the action is bound to produce and discover all documents in his possession relating to the partnership, and an appli-

cation by the Plaintiff in the action for discovery of the documents in the possession of the present Appellants appears to have been refused.

The second point decided by the High Court stands on a different footing. It appears that the partnership firm had in 1903 entered into a contract with the Secretary of State for India to construct a bridge. The bridge was completed in due course, but a dispute arose between the firm and the Secretary of State as to the amount payable to the firm under the contract. The surviving partners, or one of them, agreed with the Secretary of State that this dispute should be referred to the arbitrament of a Mr. Sanders. The legal personal representatives of the deceased partner were not parties to the reference. The arbitration resulted in the award of a certain sum as payable to the firm, and this sum has been paid and brought into the partnership accounts. On the appeal the legal personal representatives of the deceased partner put forward for the first time a contention that they were not bound by the agreement of reference or the award. The High Court upheld this contention. In their Lordships' opinion the High Court ought to have rejected the contention as having been put forward at too late a stage in the proceedings. The question whether the legal personal representatives were bound by the agreement and award was not a simple question of law, to be decided without reference to the facts of the case, or any evidence which might have been available. The original contract with the Secretary of State is not in evidence, and it is possible that it contained a submission binding on the legal personal representative of the deceased partner. Even if it did not, and the agreement to refer was not originally binding on such legal personal representatives, it may have become binding on them by their acquiescence therein, or their acceptance of benefits thereunder. The point not having been raised prior to the hearing of the appeal there has been no opportunity of ascertaining the relevant facts. Further, assuming that the agreement to refer was not binding on the legal personal representatives, it could hardly follow that they were entitled to relief on the footing that it was binding, but had been negligibly and improperly entered into. And lastly, if relief could be given on this footing, why should the measure of damages be the difference between the amount originally claimed against the Secretary of State and the amount payable under the award, and why should the onus of proving that it was any less sum be thrown on the persons accused of negligent and improper conduct? In their Lordships' opinion the decision of the High Court in these respects was erroneous.

Under the circumstances their Lordships will humbly advise His Majesty to discharge the order appealed from, and remit the case to the High Court with directions that the Commissioner's Report and the order of the Subordinate Judge confi ming the same be discharged, and the case sent back to the Subordinate Judge in order that the accounts may be taken on the basis of the order of 31st May 1906, as varied by the order of the 26th March 1907, and on the footing that every party is bound to account to the best of his ability and to give full discovery of all documents in his possession relating to the matters in dispute, the costs of the appeal to the High Court being made costs in the action, and the Appellants being entitled to their costs of this appeal.

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Solicitor: *Edward Dalgado* for the Appellant.

B. D. *Appeal allowed in part.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
Mr. AMEER ALI.
1914,
Heard, 1, May.
Judgment, 26, May.

BHAIAJI THAKUR, since deceased (now represented by Jalandhar Thakur and anr., Appellants,
v.
JHARULA DAS, Respondent.

Limitation Act (XV of 1877), Sch. II, Art. 124—Shebait's right to take a share of surplus income from offerings—Hindu widow succeeding to shebaitship—Sale of right to take surplus offerings by creditor of widow in execution and purchase by himself—Suit by widow to set aside decree and sale as fraudulent—Dismissal of suit as barred under sec. 244, Civil Procedure Code (Act XIV of 1882) if legal—Suit by reversioner for declaration of his right to surplus income—Limitation—Appropriation of income if amounts to dispossession of office, or is act of ordinary trespass only—Res judicata.

One of several co-shebaits of a temple who was entitled to receive a 3½ as. share of the daily surplus income from the offerings to the temple having died, his widow succeeded to the shebaitship. A creditor of the widow, G, obtained a decree against her and caused the 3½ as. share of the surplus daily offerings to be put up for sale, and himself purchased it, and from 1892 onwards went on appropriating the same. The widow's suit to set aside the sale on the ground that both the decree and the sale were fraudulent was dismissed in the view that her remedy was by application under sec. 244 of Act XIV of 1882 and not by a suit. The widow died in 1900, and the Plaintiff, her husband's reversionary heir, brought this suit in 1910 for a declaration that he was entitled to receive the said 3½ as. share of the surplus income. The office of the shebait was a hereditary one which could not be held by any one who was not a Brahmin Panda, and the purchaser was not a Brahmin Panda but a man of inferior caste who was not competent to hold the shebait's office or to provide for the performance of the duties of that office:

Held—*That the appropriation from time to time by the purchaser of the income derivable from the 3½ as. share did not deprive G or the Plaintiff of the possession of the office of the shebait, although that income was receivable by them in right of the shebaitship, and Art. 124 of the Limitation Act had no application to the case.*

By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, the purchaser acquired no title and no right to a share of that income. On each occasion upon which he appropriated the share of the surplus income, he committed a fresh actionable wrong in respect of which a suit could be brought against the shebait.

The right to the office of the shebait did not arise from or depend upon the receipt of a share of the surplus daily income from the offerings, although the right to receive it was attached to and dependent on the possession of the right to the shebaitship.

Held, *also, that the Defendant's further plea that the suit was barred by* res judicata *was untenable.*

Sec. 244 of Act XIV of 1882 did not apply to a suit to set aside a decree and sale thereunder on the ground that they had been obtained by fraud.

This was an Appeal from a judgment of the Calcutta High Court, dated the 12th March 1912.

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There was an ancient temple of *Mahadeoji* called *Singheswar* Temple in Mauza Gouripur, District Bhagalpur. It was a place of public worship for the Hindus, and there was some landed property endowed for the management of the temple. Some Brahmin Pandas, who were *shebaits* of the temple, performed the sacred worship or *puja* of the deity, and they received offerings in the shape of money, fruit, sweets, etc., which the devotees made to the deity. After defraying the expenses of the management of the temple and the charities connected with it, the Pandas or priests divided the balance of the income among themselves in proportion to their rights for services rendered by them The right to participate in the said offerings was in return for the services rendered from day to day, and was alleged to be inalienable.

The Pandas entitled to do the *puja* of the said deity and to manage the said temple belonged to nine families, and one Pratipal Thakur was the head of one of them. He was entitled to a 3½ annas share of the daily nett income from the said offerings. He died leaving a widow, Musammat Grihimoni, who succeeded to a life-estate in all the property left by him. It consisted of the (1) right to receive the said 3½ annas share of daily nett offerings for services of *shebaitship*, (2) 11 bighas of *lakhiraj* land in Mauza Kumarkhad and (3) 21 bighas of *lakhiraj* land in Mauza Khoksi.

By a bond, dated the 29th Asarh, 1281 (corresponding to the 12th July, 1874), the said Musammat Grihimoni mortgaged the said 21 bighas of land in Mauza Khoksi to Jharula Das (Respondent) in consideration of money borrowed by her. It was alleged to be purely her personal debt. Further, by a registered deed, dated the 11th Falgun 1282 (corresponding to the 3rd March, 1875), she sold to the father of the said Jharula Das the 11 bighas *lakhiraj* land in Mauza Kumarkhad. Jharula Das was a *Beldar* by caste, that is, to say, he was not a member of the twice-born castes.

Jharula Das (Respondent) sued Musammat Grihimoni for recovery of the money on the said mortgage, and obtained an *ex-parte* decree against her on the 21st September, 1880. In execution of the said decree, the "income of the Math of Sri Singheswar-nathji Mahadeo . . . . to the extent of 3 annas 6 pies, *which belongs to the judgment-debtor*," was sold on the 20th November, 1891, and was purchased by Jharula Das, who obtained formal possession thereof on the 30th March, 1892."

Thereupon Musammat Grihimoni instituted a fresh suit (No. 12 of 1895) in the Court of the Subordinate Judge of Bhagalpur against Jharula Das (Respondent). She alleged that her right to the 3½ annas share of the surplus profits of the offerings was inalienable, and she therefore claimed to set aside the said sale. It was pleaded against her in defence that her suit was not maintainable under the provisions of sec. 244 of the Code of Civil Procedure, 1882. This objection was upheld by the Appellate Court, and her suit was dismissed on that ground alone on the 30th March 1898. The question whether the said right was saleable or not was left undecided.

Musammat Grihimoni died in Jaith, 1307 (corresponding to May, 1900), and on her death the whole estate of her husband, Pratipal Thakur, reverted to the present Plaintiff, Bhaiaji Thakur, he being the next reversionary heir under the Hindu Law.

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On the 28th January, 1910, he instituted the present suit in the Court of the Subordinate Judge of Bhagalpur. In his plaint he stated the facts set forth above and claimed (1) possession of the said 11 bighas of *lakhiraj* land in Mauza Kumarkhad and (2) the right to receive the 3½ annas share of the surplus profits of the said offerings as a *shebait.*

The Defendant Jharula Das (Respondent) contested the suit and filed a written statement pleading *inter alia* that the suit was barred by limitation, and by the rule of *res judicata*.

After recording and examining evidence, both oral and documentary, the Subordinate Judge delivered judgment on the 3rd April 1911. He found that the Plaintiff was the nearest reversioner of the said Pratipal Thakur, deceased, and as such was entitled to recover from the Defendant the said 11 bighas *lakhiraj* lands in Mauza Kumarkhad and to receive the 3½ annas share of the surplus profits of the said offerings. He held that the suit was not barred by limitation, inasmuch as it was brought within 12 years of the death of the said Musammat Grihimoni. He also held that the decision in Suit No. 12 of 1895 did not bar the present suit. He observed as follows :—

"In the present case, the material points for determination are whether the properties under claim were mortgaged by Musammat Grihimoni for legal necessity and whether the reversioner is bound by the sales. These questions could not be gone into in the previous suit of the Musammat, and so the decision in the previous suit could not operate as *res judicata* in this case."

He also found that the alienations in question were not made by Musammat Grihimoni for any legal necessity under the Hindu Law, and that they were not binding upon the Plaintiff. He therefore made a decree allowing the Plaintiffs' claim with mesne profits and costs.

Against the said decree the Defendant appealed to the High Court of Judicature at Fort William in Bengal, which delivered judgment on the 12th March, 1912. The learned Judges of the said High Court affirmed the decree of the Subordinate Judge in so far as it related to the said 11 bighas of land in Mauza Kumarkhad. But they held that the Plaintiffs' claim to receive the 3½ annas share of the surplus profits of the offerings was barred by limitation and by the decision in suit No. 12 of 1895, mentioned above. In the course of their judgment they (Coxe & Imam, JJ.) observed as follows :—

"The main question in the appeal is whether the suit, so far as it relates to the temple income, is barred by (*i*) limitation and (*ii*) the rule of *res judicata*. It appears to us that both these questions turn on the point whether Grihimoni fully represented the estate, and this point appears to us to be concluded by authority. It cannot be contended for a moment that there was any collusion or dishonesty about the former suits. In one of them the Plaintiff himself was a party; and that the decision of a suit, fairly conducted, against a widow binds the reversioners is now well settled [see the cases quoted in *Lilabati* v. *Bishun Chobey* (1)]. And when the widow occupies the position of a *shebait*, as in this case, it appears that her sex makes no difference. This was held in *Pydigantam* v. *Rama Doss* (2), which was followed in *Lilabati* v. *Bishun Chobey* (1).

"There is also authority that decrees

(1) 6 C. L. J. 621, 631 (1907).
(2) I. L. R. 28 Mad. 197 (1904).

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against *shebaits* in honest suits bind their successors. The reason of this is explained in *Prosonno Kumari* v. *Golap Chand* (3), *Gora Chand* v. *Makhan Lal* (4) and *Lilabati* v. *Bishun Chobey* (1), quoted above. The reason is that *shebaits* with their predecessors and successors form one continuous representation of the idol and consequently subsequent *shebaits* are regarded as the same persons in law as their predecessors. If this is so, it seems clear that the Plaintiff is bound by the decree passed against his predecessor Grihimoni. It is argued that the validity of the Defendant's purchase was not decided in that case, which was dismissed on the ground that it was barred by sec. 244 of the then Code. But if the Plaintiff is regarded as the same person in law as Grihimoni, this argument must fail. Grihimoni, if she liked, could have attacked the sale under sec. 244 of the Code, and, in that event, would very probably have won her case. But she advisedly preferred to abandon that line of attack and to rely on a regular suit, in which course she was aided and assisted by the Plaintiff. Naturally it was held that the suit was barred. But when she had taken this unsuccessful course with her eyes open, she certainly could not thereafter have pleaded that her right to recover the property had not been decided, and that she was entitled to bring another suit for the purpose of recovering it. And if the Plaintiff is regarded by the eye of the law as the (co. me as Grihimoni, it is evident that he the sa.. ot do so either, more especially the said 2 hen he aided Grihimoni to bring Khoksi to Jharu l suit. It appears to us side ation of mone . 621, 631 (1907). was alleged to be p A. 145 (1875). Further, by a rep 404 (1907).

that the right of the *shebaits* generally to recover the property was finally extinguished by the decision in the former suit.

"It is clear also that the adverse possession runs from the delivery of possession to the Defendant, and that the suit is long barred. The case clearly comes under Art. 124 of the Schedule to the Limitation Act [see *Gnanasambanda Pandara Sannadi* v. *Velu Pandaram* (5)]. In that case the contention that a subsequent *shebait* obtained a fresh start in the calculation of adverse possession was distinctly overruled. The case of *Fydigantam* v. *Rama Doss* (2), quoted above, which followed *Lilabati* v. *Bishun Chobey* (1), seems to us quite indistinguishable from this case, and is a clear authority that the suit is barred by Art. 124. We have been referred also to *Veerathadra Van Baradu Row* v. *Vellandi Venkatadra* (6), in which it was held, following the Full Bench decision in *Radhabai* v. *Anantarav* (7), that in a suit for the income of a hereditary office a preceding holder fully represents his successors in matters of *res judicata* and limitation.

"We need not go into the question how the rights of the Plaintiff are affected by the fact that his own suit was withdrawn. It appears to us that when it is clearly proved that the Defendant has been in possession of the property in suit since 1892, and that a suit by the then trustee of the property for recovery was finally dismissed in 1898, the present suit, so far as it affects the 3½ annas of the *she-*

(1) 6 C. L. J. 621 (1907).
(2) I. L. R. 28 Mad. 197 (1904).
(5) L. R. 27 I. A. 69: s. c. 4 C. W. N. 329 (1899).
(6) 10 M. L. J. 114.
(7) I. L. R. 9 Bom. 198 (1885).

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baiti, is barred both by limitation and by the principle of *res judicata*."

Mr. A. M. Dunne and *Mr. Bhugwandin Dubé* for the Appellants submitted that the decision of the Subordinate Judge was right. There was no evidence that Musammat Grihimoni borrowed the money for the service of the idol, and both the Courts had found that there was no legal necessity for it. What was sold in execution was the widow's life-interest in the offerings and nothing more. On her death the husband's reversioner was entitled to *shebaitship* and the surplus offerings. *Gnanasambanda Pandara Sannadi* v. *Velu Pandaram* (5) had no application to the facts of this case. There could be no *res judicata* against the Plaintiff, nor was the Plaintiff's claim barred by limitation. If time began to run against the Plaintiff, it was from the death of the widow, and not from the date of the purchase in 1892. Both Courts had held that Art. 124 of the Limitation Act, 1877, applied. In any case, the Respondent was a *Beldar*, a *sudra* by caste, and he could not possibly be a *shebait* and appropriate the offerings to the diety which could be taken by the *shebait* only in lieu of services rendered.

Mr. G. R. Lowndes for the Respondent submitted that the suit was barred by limitation. Under Art. 124 the period of limitation began to run from 1892, when the Respondent took possession of the office of *shebaitship*. The receipt of the surplus offerings was dispossession from the office. Art. 140 is different from Art. 124, as under the former time runs when the estate falls into possession. It was not the case of a Hindu widow, but of one *shebait* succeeding another *shebait*. The female *shebait* fully represented the diety, and her successor in office was bound by her act: *Katama Natchiar* v. *Rajah of Shivagunga* (8).

(5) L. R. 27 I. A. 69: s. c. 4 C. W. N. 329 (1899).

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—The Appellants here are the heirs and legal representatives of one Bhaiaji Thakur, now dead, who was the Plaintiff in the suit in which this appeal has arisen. Bhaiaji Thakur was a *shebait* of an ancient temple of Mahadeoji, called the Singheswar Temple, which is situate in Mauza Gouripur, otherwise Singheswarpur, in the district of Bhagalpur. Bhaiaji Thakur became a *shebait* of the temple on the death in 1900 of one Musammat Grihimoni who was the widow of one Pratipal Thakur. Pratipal Thakur had been a *shebait* of the temple, and until his death had been, as such *shebait*, entitled to receive a 3½ annas share of the daily surplus income from the offerings to, after defraying the expenses of, the temple; on his death his widow Musammat Grihimoni succeeded to his *shebaitship* and accordingly became entitled to receive the same share of the daily surplus income from the offerings. The right to such 3½ annas share came to Bhaiaji Thakur on the death of Musammat Grihimoni as the next reversionary heir under the Hindu Law to the *shebaitship*. The *shebaits* of the temple are Brahmin Pandas who, as *shebaits*, have to perform, or to provide for the performance of, the sacred worship or *puja* of the diety at the temple. Jharula Das, who is the Defendant to the suit and the Respondent to this appeal, is by caste a Beldar, and, as a Beldar, is not competent to perform, or to provide for the performance of, the sacred *puja* to the

(8) 9 M. I. A. 539 (1863).

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deity at the temple, and consequently was incapable of acquiring or holding the office of a *shebait.*

In 1880, Jharula Das obtained a decree for money on a mortgage which had been granted by Musammat Grihimoni. In execution of that decree, Jharula Das in 1891 caused the 3½ annas share of Musammat Grihimoni to be put up for sale, and at the sale on the 20th November 1891 purchased the share. Jharula Das on the 8th February 1892 obtained a certificate of sale in which the property which he had purchased was described as the "Income of the Math of Sri Singheswarthanji Mahadeo, which math is situated in Mauza Singheswarthan, pargana Nisankhipur Khurha, to the extent of 3 annas 6 pies, which belongs to the judgment-debtor, within the jurisdiction of the Madhepura Sub-Registry Office Bhagalpur Collectorate."

In November 1892, Musammat Grihimoni and Bhaiaji Thakur brought a suit against Jharula Das to have the sale to him of the 20th November 1891 set aside. That suit was by the permission of the Court withdrawn by Musammat Grihimoni and Bhaiaji Thakur with liberty to bring a fresh suit on the same cause of action. In 1895 Musammat Grihimoni brought a fresh suit against Jharula Das to have the sale set aside on the ground that the decree and the order for sale had been fraudulently obtained by Jharula Das. The suit of 1895 was dismissed on appeal on the ground that her proper remedy was by an application under sec. 244 of the Code of Civil Procedure, 1882, to dispute the validity of the sale, and consequently that the suit did not lie. Their Lordships fail to understand how sec. 244 of the Code of Civil Procedure, 1882, could have applied to a suit which in effect was brought to set aside the decree of 1880, and the order for sale on the ground that Jharula Das had obtained them by fraud.

Musammat Grihimoni died in 1900. On the 25th January 1910 Bhaiaji Thakur brought the present suit in the Court of the Subordinate Judge of Bhagalpur and claimed possession of certain lands and mesne profits and a declaration that he was entitled to receive the 3½ annas share of the net income from the offerings to the temple with other reliefs. In his written statement the Defendant Jharula Das alleged, so far as is now material, that Bhaiaji Thakur was bound by the decree which dismissed Musammat Grihimoni's suit of 1895, and that the decision in that suit operated on the principle of *res judicata* to defeat the claim in respect of the 3½ annas share. At the trial a defence that the suit was barred by limitation was raised. As to the defence of *res judicata*, the Subordinate Judge rightly held that the decision in Musammat Grihimoni's suit of 1895 did not operate as a bar to this suit. On the question of limitation the Subordinate Judge found that Jharula Das had not purchased the right of *shebaitship*, but the Subordinate Judge held that the appropriation by Jharula Das of the 3½ annas share of the surplus income from the offerings to the temple practically amounted to a dispossession and treating Bhaiaji Thakur's suit, so far as it related to the 3½ annas share, as a suit for the establishment of his right to *shebaitship* and for recovery of the profits of that office, and having found that Musammat Grihimoni had died in 1900, he applied Art. 124 of the Second Schedule of the Indian Limitation Act, 1908, and decided that the suit had been brought within time. On the 3rd April

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1911, the Subordinate Judge gave to the Appellants here, who had been brought on the record as the representatives of Bhaiaji Thakur, who had died, a decree for possession of the land claimed, for possession of the 3½ annas share of the net income from the offerings to the temple, and for mesne profits subsequent to the institution of the suit. From that decree of the Subordinate Judge, Jharula Das appealed to the High Court of Judicature at Fort William in Bengal. The High Court in the appeal upheld the decision of the Subordinate Judge so far as it related to the land claimed and to mesne profits in respect of the wrongful possession by Jharula Das of that land, and to that extent by their decree affirmed the decree of the Subordinate Judge. With that part of the decree of the High Court, this appeal is not concerned. Those learned Judges of the High Court considering that Art. 124 of the Second Schedule of the Indian Limitation Act, 1908, applied to the claim in respect of the 3½ annas share of the surplus daily income from the offierings to the temple, and being of opinion that the 12 years' period of limitation provided by that Article began to run in 1892, when Jharula Das first began to appropriate to his own use the income of the 3½ annas share, decided that the claim in respect of the 3½ annas share was barred by limitation. They also held that the claim to the share was barred by the principle of *res judicata*, arriving at that decision apparently on the view that the dismissal of Musammat Grihimoni's suit of 1895 extinguished the claim of the *shebaits* to the 3½ annas share. Accordingly, the High Court by its decree of the 12th March 1912 set aside the decree of the Subordinate Judge, so far as it related to the claim to the 3½ annas share and the profits of that share. From that decree of the High Court, the present Appellants have appealed to His Majesty in Council. The Defendant Jharula Das has not appealed.

On the hearing of this appeal, the contention that the dismissal of Musammat Grihimoni's suit of 1895 extinguished the right of the *shebaits* to the 3½ annas share and that the claim in respect of that share was *res judicata* was very properly abandoned; it was untenable. But it was strongly contended on behalf of the Respondent that the claim in respect of that share came within Art. 124 of the Second Schedule of the Indian Limitation Act, 1908, and was barred by limitation. It is not necessary for their Lordships to consider whether, if that Article applied, the 12 years' period of limitation began to run in 1892 or on the death of Musammat Grihimoni in 1900, as they are of opinion that Article 124 of the Second Schedule of the Indian Limitation Act, 1908, does not apply in this case. Bhaiaji Thakur's suit was not a suit for possession of an hereditary office. Jharula Das had not taken possession of an hereditary office. The office of *shebait* of the temple was an hereditary office which could not be held by any one who was not a Brahmin Panda. Jharula Das was not a Brahmin Panda, he was of an inferior caste, and was not competent to hold the office of *shebait* of the temple, or to provide for the performance of the duties of that office. The appropriation from time to time by Jharula Das of the income derivable from the 3½ annas share did not deprive Musammat Grihimoni, or, after her death Bhaiaji Thakur, of the possession of the office of *shebait*, although that income was receivable by them in right of the *shebaitship*. The

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right to the office of *shebait* did not arise from, or depend upon, the receipt of a share of the surplus daily income from the offerings to the temple, although the right to receive daily a share of the net income from the offerings to the temple was attached to and dependent on the possession of the right to the *shebaitship*. Unless the *shebait* received their share of the daily net income from the offerings, it does not appear how the ministrations of the temple could be provided for. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, Jharula Das acquired no title and no right to a share of that income. On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the *shebait* was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the *shebait*. But it did not constitute him the *shebait* for the time being or affect in any way the title to the office.

The Appellants here are entitled to have the decree of the High Court so far as it relates to the 3½ annas share, and to the costs in the High Court and in the Court of the Subordinate Judge, varied by setting aside that part of the decree of the High Court which relates to the 3½ annas share and those costs, and by giving them a decree for all the costs in the High Court and in the Court of the Subordinate Judge, and a declaration that Bhaiaji Thakur was at the date of the suit entitled to the 3½ annas share of the net daily income of the offerings to the temple. Their Lordships will advise His Majesty accordingly.

The Respondent must pay the costs of the appeal.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 298 OF 1911.

FLETCHER, J.
N. R. CHATTERJEA, J.
1914,
Heard, 28th, 29th and 30th January.
Judgment, 27, March.

HEMENDRA NATH ROY, Defendant, Appellant,
v.
UPENDRA NARAIN ROY, Plaintiff, and others, Respondents.

Digwari tenure, incidents of—Limitations subject to which such tenures are hereditary—Powers of Government to decide fitness of heir—Sanction of Government, if means prior approval—Jurisdiction of Courts—Grounds of disapproval of heir by Government, if open to review by the Court—Sanction of Government, if may be withheld on grounds other than that of fitness—Temporary appointment if signifies approval of fitness for permanent post.

One K, who was a Sardar Digwar, was dismissed for neglect of duty and improper conduct, and two persons were successively appointed to the post, and ultimately the Plaintiff's father. Thereafter on the recommendation of the Police for the re-employment of K, K was informed that in the case of a vacancy occurring, the appointment would be first offered to him. Prior to his death, the Plaintiff's father was allowed leave for six months and the Plaintiff was appointed as being a fit person to act in his place. On the death of his father the Plaintiff was directed by the District Magistrate to act in place of his deceased father until further orders. The widow of K thereupon applied to the Dis-

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trict Magistrate on behalf of her minor son praying that he might be appointed in accordance with the promise made to his father, but the District Magistrate rejected her application and confirmed the appointment of the Plaintiff. The Divisional Commissioner reversed this decision of the District Magistrate and appointed K's son not on the ground of Plaintiff's unfitness, but upon his view of the legal rights of the parties. On appeal to the Lieutenant-Governor, the Plaintiff was referred for remedy to the Civil Court and brought this suit:

Held—*That a Digwari tenure in the District of Bankura which is similar to a Ghatwali tenure is hereditary, but the right of the heir to the tenure is subject to the approval or sanction of the Government, and notwithstanding that the tenure is hereditary, the Government has the power of dismissing the Ghatwal for misconduct.*

Per N. R. CHATTERJEA, J.—*When a Ghatwal is dismissed and has no male member of the family fit to be appointed at the time of his dismissal, there is a forfeiture of the tenure so far as his family is concerned, and where in such a case a stranger to the family is permanently appointed in his place, a subsequently born son of the dismissed Ghatwal on the death of the latter and after the tenure has passed to another family, cannot claim it on the ground that it is his hereditary tenure.*

It is for the Government to say whether the heir is a fit and proper person, and so far as that question is concerned, the Government is the sole Judge, and the Civil Courts cannot go into that question; but the Government cannot disapprove of the heir or withhold its sanction upon any ground it likes, and apart from the question whether he is a fit and proper person.

That in the present case, having regard to the proceedings taken, the Plaintiff should be held to have been approved by Government as a fit and proper person.

Per FLETCHER, J.—*Sanction in its ordinary signification means prior approval and implies a power to disapprove. It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post.*

In view of the authorities that the Court cannot interfere to reinstate a person who has actually been in possession of the Ghatwali land, it must be held that the Court cannot interfere in favour of a person who has never in fact been appointed Ghatwal.

That in the present case, the Plaintiff failed to obtain the sanction of the Government which was a condition-precedent to his succeeding to the Ghatwali lands.

That the decision of the Executive authorities refusing to sanction the appointment of the heir of a deceased Ghatwal as Ghatwal cannot be challenged in the Civil Court on the ground that sanction has been unreasonably withheld.

A Civil Court is not in a position to determine what are the qualifications necessary in a Ghatwal. It is a matter solely for the Executive authorities.

NILMONEY SINGH *v.* BIKRANATH SINGH (1), JOGENDRA NATH SINGH *v.* KALI CHARAN ROY (2), DEBEE NARAIN SINGH *v.* SREE KISHEN SEIN (3), THE SECRETARY OF STATE *v.* PORAN SINGH (4), LALL DHAREE ROY *v.* BROJO LAL SINGH (6) *considered.*

(1) I. L. R. 9 Cal. 187, 199 (1882).
(2) 9 C. W. N. 663 (1905).
(3) 1 W. R. 321 (1864).
(4) I. L. R. 5 Cal. 470 (1878).
(6) 10 W. R. 401 (1868).

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This was an Appeal preferred on the 1st of August 1911 against the decree of Babu Mohini Mohan Dutta, Subordinate Judge of Zilla Bankura, dated the 24th of March 1911.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, *Babus Jogesh Chandra De*, *Jyotish Chandra Sirkar* and *Srish Chandra De* for the Appellant.

Mr. S. P. Sinha, *Babus Dwarka Nath Chakravarti*, *Lalit Mohan Ghose*, *Karunamoy Ghose*, *Sarat Chandra Das* and *Jyotish Chandra Hazra* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an appeal preferred by the Defendant No. 1 against the judgment of and decree passed by the learned Subordinate Judge of Bankura decreeing the Plaintiff's suit.

The present dispute relates to the office of Digwar of the Ghat Burra in the Pargana Mahisara, in the District of Bankura and the Ghatwali lands held therewith.

Neither the origin of the jaigir nor the precise time at which it was created is known ; but it appears that as far back as 1771, corresponding with 1178 B. S., the villages of which it was composed were held by Jaigirdars who paid to Government ⅔rds of the annual value thereof as revenue and retained the other ⅓rd as remuneration for the services under which the jaigir was held. The villages included in the jaigir were permanently settled as part of the zemindari of which the Defendant No. 3 is the Zemindar. In fixing the Government revenue at the time of the Decennial Settlement, the lands included in the jaigir were assessed at the ⅔rds then payable by the Jaigirdar to the Government and the ⅓rd retained by the Jaigirdar in lieu of services formed no part of the assets of the zemindari in respect of which the Government revenue was fixed.

The above statement I take from the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Nilmoney Singh* v. *Bikranath Singh* (1). That decision of their Lordships was with reference to the nature of the estate taken by the heir of a deceased Ghatwal in lands situate in the same zemindari and Pargana as the present and the statement is based on a report of Lalla Kanji, Tahsildar of Pachit, made on the 8th of July 1799. This same report is a portion of the evidence in this case being marked "Ex. K."

Their Lordships also found in that case that the Jaigirdar before them was not one of the Ghatwals referred to in the report of Lalla Kanji as being subordinate to and paid by the Digwars out of their jaigirs, "for they were paid by the ⅓rd of the malguzari which they were allowed to retain as compensation for their services."

It is clear therefore that the holding of the Jaigirdar in that case corresponds very closely to the Digwari holding in the present case.

Excluding the report of Lalla Kanji the earliest document that we have in the present case is a document called a Hukumnama [Ex. I (14)], dated the 23rd of May 1847. This document is addressed to Adwaita Charan Rai (grandfather of the Defendant No. 1) and Gour Mohun Rai (ancestor of the Defendant No. 8), the then Digwars of the Burra ghat informing them that they were not entitled to make a gift or permanent settlement of the

(1) I. L. R. 9 Cal. 187, 199 (1882).

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lands, but that they could only grant pattas limited to the period of their incumbency. The next document we have is the Isamnabisi for the year 1849 (Ex. D). The eighth column thereof is headed "In what year, what date, what person, in whose place and in what capacity appointed temporarily or permanently" and in column 7 these remarks appear which obviously ought to have been placed in column 8 "In the year 1221 Aditya Rai was appointed in place of Madan Rai who was dismissed. Gour Mohan Rai was appointed on the 25th of Bhadra 1238, in place of his deceased father Anand Rai." On the 20th February 1855, one Bistu Das Baistab presented a petition to the Magistrate charging the then Digwars with neglect of duty and other improper conduct. The Magistrate appears to have summoned the Digwars before him; for on the 10th of May 1855, there is an order of the Joint Magistrate of Bankura dismissing Kartick Rai from the post of Sardar Ghatwal and warning Muktaram Rai (who had succeeded Gour Mohan Rai) to be more careful in the discharge of his duties in the future. The order of the Joint Magistrate concluded in these words: "that notification be duly served in the Sadar and Mufassal for attendance of candidates for the post." Accordingly we find that the Joint Magistrate on the 21st of June 1855 (Ex. 92) appointed Rasik Lal Upadhya as Sardar Ghatwal in place of Kartick Rai. Rasik Lal however held the post for a very short time; for it having been brought to the notice of the Commissioner that Rasik Lal was a relative of the Nazir of the Criminal Court at Bankura, and that his appointment was in breach of an order passed by the Superintendent of Police, the Commissioner directed the Joint Magistrate of Bankura to dismiss Rasik Lal and appoint some other person in his place.

On the 14th of April 1856 the Joint Magistrate of Bankura appointed Rajaram Rai, grand-uncle of the Plaintiff in the place of Rasik Lal, the dismissed Sardar Ghatwal. It appears from a petition (Ex. I) (19) of Manjur Ahmed, Sub-Inspector of Police, addressed to the Superintendent of Police and dated 18th of July 1869 that the Sub-Inspector reported that Kartick had rendered important services to the Police in a criminal case and suggested that Kartick should be appointed in place of "the suspended Sardar Mohendra Narain Rai, so that he will be useful (torn) in the (illegible) case of Pargana Mahisara while public duty will be satis factoriiy discharged." The Superintendent of Police forwarded this petition to the Magistrate endorsing thereon "Forwarded to the Magistrate who is kindly requested to inform the undersigned if there is any serious objection to l is being re employed."

The Magistrate returned the petition with the following endorsement: "None, but I think he should not displace the man apppointed to his (post). Let him (have the next) vacancy." On the 18th of August 1869 Kartick was informed through an order of the Superintendent of Police that he would get the next vacancy.

The suspension that Mahendra was under appears to have resulted in his dismissal; for Ex. M shows that Kartick was appointed Sardar Ghatwal in the vacancy caused by the dismissal of Mahendra. Mahendra appealed against the order dismissing him first to the Commissioner of the Burdwan Division, who rejected his appeal (Ex. F) and then to the Lieutenant-Governor who reversed the order of the Commissioner and directed that Mahendra should be "reinstated in service" (Ex. 95);

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It appears that in the year 1904 the Pachit Zemindari had become an encumbered estate under the management of the Court of Wards and that proceedings were being taken for the purpose of revising the assessments. Mr. Gupta, the Magistrate and Collector, had summoned 21 Ghatwals (including Mahendra) to appear before him at his camp at Nagardang.

The 21 ghatwals presumably on the ground that they did not wish their assessments to be revised failed to appear before Mr. Gupta.

Thereupon by an order dated the 19th of July 1904 [Ex. L (I)], Mr. Gupta summarily dismissed them. There can be no doubt as regards Mahendra at least that Mr. Gupta's order of dismissal was never acted on. From a letter from Mr. Gupta dated the 6th of August 1904 (Ex. 9) addressed to the Manager of Pachit Encumbered Estate, it appears that Mahendra and the other Digwars had consented to execute kabuliyats for the revised assessments and that the orders for their dismissal would be cancelled in execution of the kabuliyats. This coupled with the fact that Mahendra continued as Digwar down to the date of his death shows conclusively that Mr. Gupta's order of dismissal was never put into effect.

On the 27th of August 1907 Mahendra presented a petition to the District Magistrate (Ex. 98) asking that owing to ill health he might be allowed 6 months' leave and that his son the Plaintiff might act in his place. On the same day the District Magistrate granted Mahendra's prayer.

Before the expiry of his leave Mahendra died. The Plaintiff thereupon presented a petition to the District Magistrate praying that he might be "either appointed in the said post or to be allowed time." Upon a report by the Police upon this petition the District Magistrate passed orders that "Upendra Rai will continue to act in place of his deceased father Mahendra Narain Rai, Sardar of Bharra, until further orders."

Kartik died in the year 1900 leaving his infant son, the Defendant No. 1, and his widow Karunamayi him surviving.

Shortly after the death of Mahendra, Karunamayi acting on behalf of the Defendant No. 1 presented a petition to the District Magistrate praying that in accordance with the promise made to Kartick in 1864 the Defendant No. 1 might be appointed Sardar Ghatwal. The District Magistrate referred this petition for enquiry and report to Babu S. C. Mukherjee, Deputy Magistrate. The Deputy Magistrate reported that Karunamayi's petition should be rejected and that the acting Ghatwal, the Plaintiff, should be appointed in place of his deceased father. On the 16th of June 1908, the District Magistrate confirmed the report of the Deputy Magistrate [Ex (19)].

On appeal to the Commissioner of Burdwan Division, the Commissioner set aside the order of the Magistrate and directed that the Defendant No. 1 should be appointed Sardar Ghatwal (Ex. 130).

Thereupon the Plaintiff appealed to the Board of Revenue, who said they had no jurisdiction in the matter and then to the Government of Bengal. On the 29th of March 1909, the Commissioner of the Burdwan Division was directed to inform the Plaintiff that in the opinion of the Government of Bengal the remedy for any grievance which he may have lies in the Civil Court (Ex. 133).

Thereupon the Plaintiff filed this suit making as Defendants the Defendant No. 1, who is the Appellant before us, the Defendant No. 2, the Secretary of State for

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India in Council, who has filed a written statement supporting the case of Defendant No. 1, the Defendant No. 3, the Zemindar—the Raja of Panchit, the Defendants Nos. 4, 5, 6 and 7, the Plaintiff's brothers and the Defendant No. 8, the other Digwar of the Burra ghat.

On the appeal before us it has been contended on behalf of the Appellant, *first*, that the office of Sardar Ghatwal is merely a personal office held under the Government, the Ghatwal being remunerated for his services by the profits of the lands in lieu of wages. *Secondly*, even if the jaigir in the hands of Kartick was an ancient permanent heritable tenure that upon his dismissal the tenure was forfeited and Mahendra did not hold the lands on such tenure; and *thirdly*, that in any event the Plaintiff cannot succeed to the jaigir and office without the sanction of the Government.

On behalf of the Respondent it has been urged that the jaigir is an ancient permanent heritable tenure to which the Plaintiff on the death of his father was entitled to succeed as of right. *Secondly*, if the sanction of the Government was requisite, such sanction has in fact been given or that it cannot be unreasonably withheld and that the acts of the Executive authorities show that the Plaintiff is a fit and proper person to discharge the duties of the office, and the refusal of the Executive authorities is subject to review by the Court.

If the various appointments and dismissals of the Digwars stood alone, there might be a good deal to be said in favour of the view that the office of Sardar Ghatwal was merely a temporary office held at the pleasure of the Government. But in this case we have the very valuable assistance of the judgment in the case of *Nilmoney Singh Deo* v. *Bikranath Singh* (1) to assist us to come to a conclusion in the present appeal. But before passing to the consideration of that judgment, I shall deal with the second point urged on behalf of the Appellant, *viz.*, assuming that Kartick had a permanent heritable holding, on his dismissal the tenure was destroyed and that Mahendra got merely an office which he held at the pleasure of the Government.

I am not inclined to give much force to this argument. Kartick's father was appointed in place of a dismissed Ghatwal and presumably both Kartick's father and Mahendra were placed in possession of the jaigir on the same terms as the original Digwars. This would appear to be so from the payments made by Mahendra, which are proved by the evidence, for the pay of men at the Thana and documents addressed to him, calling on him to perform the duties of his office. The next question is as to whether the sanction of the Government is requisite in order to enable the heir of Mahendra to succeed.

In case of *Nilmoney Singh* v. *Bikranath Singh* (1), the question in dispute was whether Ghatwali lands in this Pargana in the hands of a son who had been appointed Ghatwal upon his father's death were assets liable for the payment of the father's debts.

The appeal therefore raised directly what was the nature of the interest the son of a deceased Ghatwal took in the Ghatwali lands upon his father's death. In the course of delivering the opinion of their Lordships, Sir Barnes Peacock made the following remarks (at p. 203 of the Report): "Their Lordships entertained no doubt that whether it was

(1) I. L. R. 9 Cal. 187 (1882).

a Ghatwali or not, the tenure was analogous to a Ghatwali tenure of the nature described in the preamble to Reg. XXIX" (at p. 206). "These Jaghirs though hereditary are not governed by the ordinary rules of inheritance under Hindu or Mohammedan Law and are subject to the condition of the Government's approval of the heir." (At p. 207.) "In a case between the Appellant and the Respondent Bikranath Singh, it was held that the holder of the tenure in question in this suit is not responsible for the debts of a former Jaghirdar. The Deputy Commissioner in his judgment said: 'As Jaghirdar the Defendant has what his father had—a life interest in the Jaghir. Whether the son will succeed or not is notwithstanding the tenure is hereditary uncertain, as he may at any moment be dismissed from Government employ', rather he should have said 'may never be sanctioned as Jaghirdar' (At p. 208). It is quite clear that if the Jaghir were transferable without the consent of Government either by descent to an heir or by voluntary sale or sale in execution or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which lands are held at the reduced rent."

We have also been referred to the 4th volume of Sir William Hunter's Statistical Survey of Bengal (p. 254), where it is stated that Ghatwali lands in Bankura are neither transferable nor hereditary.

As against this, the Respondent relies on the judgment of Harington and Mookerjee, JJ., in the case of *Jogendra Nath Singh* v. *Kali Charan Roy* (2). That was a judgment of these learned Judges on a second appeal, and the report merely gives the judgment without a statement of the facts or of the argument. That case came before the learned Judges on second appeal, so that they were bound by the finding of fact of the lower Appellate Court, and what was apparently argued in that case was whether the dismissal of Ghatwal when he had been acting as deputy for his father operated as a dismissal of him after his father's death. Further, the case of *Nilmoney Singh Deo* v. *Bikranath Singh* (1) was not referred to in the judgment of and presumably was not cited before the learned Judges. The case did not therefore purport to explain or distinguish the decision of the Privy Council, and I do not think it assists us in dealing with this case of lands within the Pargana Mahisara. Next it was argued on behalf of the Respondent that he did in fact obtain the sanction of the Government. This, it is said, is so, since the Magistrate approved of Upendra acting as Ghatwal and therefore the Government must consider that the Respondent is a person fit to discharge the duties of the office, and it is not open to the Government to disapprove of the Respondent, unless he is unfit for the office.

But the words used in the judgment in the case of *Nilmoney Singh* v. *Bikranath Singh* (1) are "the sanction." "Sanction" in its ordinary signification means prior approval and implies a power to disapprove. It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post.

Appointments of practically all posts under the Crown in India are at some time or other held by persons in what is called an acting capacity. This appears

(2) 9 C. W. N. 668 (1905).

(1) I. L. R. 9 Cal. 187 (1882).

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from the report in the case of *Nilmoney Singh* v. *Bikranath Sing* (1). The judgments in the lower Courts in that case were the decision of the officiating Judge and the decision of a Bench of this Court, one of the members of which Mr. Justice L. Jackson is described in their Lordships' judgment as the acting Chief Justice. I cannot think that the Government intended, nor that the Respondent thought, that when the District Magistrate after the death of his father continued him in an acting capacity that he was appointed to the permanent post with the sanction of the Government. Then it is said that the sanction of the Government to the Respondent's appointment cannot be unreasonably withheld and, that the refusal to sanction is open to review by the Court. But many reasons which may properly be considered by an Executive officer in discharge of his duties could not be considered by a Court. Further, what are the qualifications which the Court should require a Digwar to have? I have no idea. It appears to me to be a matter solely for the Executive authorities. It was admitted by the learned Counsel for the Respondent before us, that the Commissioner had power to overrule the order of the District Magistrate rejecting the petition of the Appellant's mother and confirming the Respondent in the office. I think, it must be taken that the Respondent has failed to obtain the sanction of the Government which was a condition-precedent to his succeeding to the Ghatwali lands.

It was held in the case of *Debee Narain Singh* v. *Sree Kishen Sein* (3), that the Civil Courts cannot interfere to reinstate a Ghatwal who has been dismissed by the Police authorities from the land which he formerly held as Ghatwal. Apparently the same view was taken in the case of *The Secretary of State* v. *Poran Singh* (4). If these authorities are correct that the Court cannot interfere to reinstate one who has actually been in possession of the Ghatwali land and then dismissed, I am unable to see how the Court can interfere in favour of a person who has never in fact been appointed as Ghatwal.

In my opinion, the judgment appealed against should be reversed and the Plaintiff ordered to pay to the Appellant his costs both in this Court and in the Court below.

N. R. CHATTERJEA, J.—The suit out of which this appeal arises relates to a Digwari tenure in the district of Bankura.

The facts appear to be these: One Kartick Roy, the father of the Defendant No. 1, and his ancestors before him held the lands in dispute as Sardar Digwar of Ghat Burra in the Bankura District. Kartik Roy was dismissed for neglect of duty and improper conduct in the year 1855. Notifications were thereupon issued inviting "candidates for the post," and one Rasik Lal Upadhya was appointed in place of Kartick Roy. Rasik Lal was also dismissed shortly after, and on the 14th April 1856, the Joint Magistrate of Bankura appointed Rajaram Rai, the paternal uncle of the Plaintiff's father in his place. In 1863 Rajaram having become incapable of performing the duties, his nephew the Plaintiff's father (Mahendra) was appointed in his place. Mahendra, it appears, was suspended for alleged misconduct in 1869, and while he was under suspension, the Police Sub-Inspector having reported that Kartick Roy since his dismissal had

(1) I. L. R. 9 Cal. 187 (1882).
(3) 1 W. R. 321 (1864).
(4) I. L. R. 5 Cal. 470 (1878).

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been useful in giving assistance to the Police, the District Superintendent wrote to the Magistrate asking him whether he had any serious objection to Kartick Roy being re-employed. The Magistrate thereupon made the following order: "None, but I think he should not displace the man appointed to his (torn). Let him (torn) vacancy." Kartick was accordingly informed that when any Sardari or Sodiali becomes vacant, it will be offered to him in the first instance. Mahendra Narain was dismissed in 1870, and Kartick Roy was appointed in his place. The order of dismissal however was ultimately set aside by order of the Lieutenant-Governor of Bengal and Mahendra Narain was reinstated in the Ghatwali. Mahendra since his re-instatement held the tenure as Ghatwal until the 19th July 1904, when the Magistrate Mr. Gupta summarily dismissed him along with other Ghatwals for failure to appear before him in connection with the revision of the assessment of their tenures. This order of Mr. Gupta, however, was not given effect to, as appears from the facts found by the lower Court, and Mahendra continued to act as before. In August 1907, Mahendra was granted six months' leave owing to ill health, and his son, the Plaintiff, was approved and appointed to act in his place. Mahendra died in October 1907, and thereupon the Plaintiff presented a petition to the Magistrate praying that he might be "either appointed in the said post or be allowed time." The Magistrate ordered that "Upendra Rai will continue to act in place of his deceased father Mahendra Narain Rai, Sardar of Burra, until further orders."

Kartick died in 1900 leaving his widow Karunamayi and an infant son the Defendant No. 1. In 1907 a petition was presented by Karunamayi on behalf of her minor son the Defendant No. 1 to the Magistrate praying that the Defendant No. 1 might be appointed in accordance with the promise made to his father Kartick in 1869. The Deputy Magistrate considered the claims of both the Defendant No. 1 and the Plaintiff, and submitted a report to the District Magistrate who agreed with the former and held that Defendant No. 1 had no right, and confirmed the appointment of the Plaintiff. On appeal, the Commissioner Mr. Maddox, by his order, dated the 11th August 1908, reversed the order of the Magistrate, and held that the tenure was hereditary and that the Defendant No. 1 was entitled to the Ghatwali. Defendant No. 1 was accordingly appointed Ghatwal. The Plaintiff moved the Board of Revenue, but the application was rejected on the ground that the Board had no jurisdiction in the matter. The Plaintiff then moved the Lieutenant-Governor of Bengal, and was informed that "the remedy for any grievance he may have lies in the Civil Court." The present suit was thereupon instituted by the Plaintiff.

The suit was decreed by the Court below, and the Defendant No. 1 has appealed to this Court. The first question for consideration is what is the nature of the tenure? Having regard to the manner in which the Ghatwali in the present case has been dealt with by the Executive authorities down to 1908, the date of Mr. Maddox's order, it would seem as if it was merely a Government service held at the pleasure of the Government. But the liability to dismissal for misconduct or neglect of duty is one of the conditions upon which a Ghatwali tenure is held, and it does not appear from the evidence on the record that any case of

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succession of the heir of a deceased Ghatwal arose before the year 1908. The tenure is situate in 'Pargana Mahisara' and within the Pachit Zemindari which at one time was included in Birbhum. In the case of *Nilmoney Singh* v. *Bikranath Singh* (1), the Judicial Committee had to consider the nature of a jaigir which was also situate in the same pargana and in the same Zemindari. Their Lordships with reference to the jaigir in that case observed as follows :—"Neither the origin of the jaigir nor the precise time at which it was created is known; but it appears that as far back as 1771, corresponding with 1178 B. S, the villages of which it was composed were held by jaigirdars who paid to Government two-thirds of the annual value thereof as revenue, and retained the other one-third as remuneration for the services under which the jaigir was held. The villages included in the jaigir were permanently settled as part of the Zemindari of Pachit of which the Defendant-Appellant is the Zemindar. In fixing the Government revenue at the time of the Decennial Settlement, the lands included in the jaigir were assessed at the two thirds then payable by the Jaigirdar to the Government, and the one-third retained by the Jaigirdars in lieu of service formed no part of the assets of the Zemindari in respect of which the Government revenue was fixed," and that the jaigir although not falling within Reg. XXIX of 1814 (which relates to Birbhum Ghatwali tenures) was a tenure of the nature of those described in the preamble to that Regulation. Their Lordships held that the jaigirs are hereditary, though not governed by the ordinary rules of inheritance, and are subject to the condition of the Government's approval of the heir.

(1) I. L. R. 9 Cal. 187 (1882).

The tenure in the present case is not a jaigir, but a Digwari tenure. A Digwari tenure, however, is similar to a Ghatwali tenure.

The nature of Ghatwali tenures, it is true, varies in different places, and the Executive authorities in the present case have appointed and dismissed Ghatwals from time to time. But the Government has the power of appointment and dismissal, and notwithstanding that the said powers were exercised by the Government with reference to the jaigir in the case of *Nilmoney Singh* v. *Bikranath Singh* (1) the tenure was held to be hereditary. In the present case, it was stated in a Hukumnama, dated the 23rd May 1847, that "Ghatwali lands are held merely for remuneration for labours for their services." But the incidents of Ghatwali tenures such as the present do not appear to have been well understood before the case of *Nilmoney Singh* (1) was decided by the Privy Council, nor are all the incidents settled by judicial decisions even now. The report of Lala Kanji, dated the 19th July 1799, which was part of the evidence in, and was relied upon by, the Judicial Committee in that case, is also part of the evidence in the present, and having regard to the fact that the tenure in the present case is situate in the same pargana and in the same Zemindari as that dealt with by the Privy Council in that case, and held under similar conditions, I think, the incidents of the jaigir laid down by the Privy Council should be held applicable to the Digwari tenure in the present case.

We must take it therefore that the tenure is a hereditary one. But before the Plaintiff can be held entitled to succeed,

(1) I. L. R. 9 Cal. 187 (1882).

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it is to be seen whether there was anything to prevent the Defendant No. 1 from succeeding his father Kartick in the Ghatwali. Notwithstanding that the tenure is hereditary, the Government has the power of dismissing the Ghatwal for misconduct. Kartick Roy was dismissed. Now what was the effect of the dismissal of Kartick Roy? There can be no doubt that the dismissal operated as a forfeiture of the tenure, so far as Kartick himself was concerned. It is contended, however, that as the tenure is hereditary, such dismissal did not affect the rights of his heir. It is unnecessary to consider any usage under which the next male heir of the dismissed Ghatwal may be appointed in his place on his dismissal, because in the present case Kartick Roy presumably had no son at the time of his dismissal, which took place so far back as 1855, the Defendant No. 1 not being born then, as he is still a minor. A stranger to the family, *viz.*, Rajaram, was appointed permanently in his place, and the tenure held by him has devolved on the members of his family. The question is whether under these circumstances the Defendant No. 1 can claim the tenure on the death of his father, on the ground that it is his hereditary tenure. It seems to me that the contention, if given effect to, will lead to anomalous results. For instance, a person may be appointed Ghatwal, and dismissed for misconduct, and another (a stranger to the family) appointed in his place. The latter again may be dismissed and a third one (also a stranger) appointed, and so on. If the dismissal of a Ghatwal, under such circumstances, does not operate as a forfeiture of the rights of the heir, the tenure being by its nature hereditary, the heir of each of the dismissed Ghatwals, on their death, may equally claim the tenure on the ground that it is his hereditary tenure. I think, therefore, that where a Ghatwal is dismissed and has no male member of the family fit to be appointed at the time of his dismissal, there is a forfeiture of the tenure so far as his family is concerned, because the estate cannot remain in abeyance for the benefit of the heir who may be subsequently born. And where in such a case a stranger to the family is permanently appointed in his place, I do not see how a subsequently born son of the dismissed Ghatwal on the death of the latter and after the tenure has passed to another family, can claim it on the ground that it is his hereditary tenure. The case of *Jogendra Nath Singh* v. *Kali Charan Roy* (2) does not in my opinion support the contention of the Appellant. In that case it was held that the dismissal of the Plaintiff, who was acting as a deputy of his father, even if it was intended to operate as a dismissal of his father, could not in law have that effect, and did not destroy the Ghatwali tenure, and that the dismissal of the Plaintiff while he was acting as a deputy of his father did not disentitle him from succeeding on the death of his father. The learned Judges after commenting on the case of *Secretary of State* v. *Poran Singh* (4), and pointing out that "the actual decision in that case may be supported on the ground that the Ghatwal had been rightly dismissed by reason of misconduct, and that such dismissal carried with it as a necessary consequence the forfeiture of his tenure" proceeded to discuss whether the Plaintiff's father had been dismissed. Had the learned Judges been of opinion that the Plaintiff in that case was entitled to succeed his father, although the latter had

(2) 9 C. W. N. 663 (1905).
(4) I. L. R. 5 Cal. 470 (1878).

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been dismissed, it would have been unnecessary to consider whether a certain order of the Magistrate was intended to operate as a dismissal of the Plaintiff's father, and even if so intended, whether it could in law operate as a dismissal of his father. No doubt the Plaintiff in that case was held entitled to succeed on the death of his father on the ground that the tenure was hereditary, although he had been dismissed while acting as deputy of his father. But according to the view taken by the learned Judges, there was no dismissal of the father, and the question we are now dealing with, *viz.*, whether the rights of the heir are affected by the dismissal of the father, therefore, was not considered in that case. There is no authority for holding that although a Ghatwal may be dismissed and another person appointed permanently in his place, the subsequently born heir of the dismissed Ghatwal after any lapse of time is entitled to succeed by displacing the person so appointed or his heir. I am accordingly of opinion that Kartick Roy having been dismissed for misconduct and another person having been appointed in his place, his son the Defendant No. 1 had no right to succeed to the Ghatwali on his death. If the Plaintiff however has no right to the tenure, and it is at the absolute disposal of the Government, the Defendant No. 1 has certainly acquired a right to the tenure, having been appointed Digwar by the Government. But the estate taken by Rajaram presumably was the same as that which was held by Kartick Roy. Tenures held under similar conditions have been held by the Privy Council to be hereditary. The tenure has been the subject of inheritance in the Plaintiff's family for more than half a century. The Plaintiff therefore had a hereditary right and would be entitled to succeed, subject to the approval by Government. Now if the heir of the Ghatwal gets the Ghatwali by hereditary right, subject to approval by Government and not merely by virtue of the appointment by the Government, it is difficult to hold that the Government can disapprove of the heir even if he is a proper person and fit to discharge the duties. In *Bukranath* v. *Nilmoney Singh* (5), Mitter, J., observed that " as a general rule, the heir of the last incumbent was considered as eligible to be appointed in the place of his ancestor, unless some special ground of unfitness rendered him incompetent to perform the duties of the jaigir." Markby, J., referring to the admission of the Advocate-General said " he admits that the tenure is a hereditary one, unless there is some special objection to a person entitled to succeed by which, I conclude, is meant something which disqualifies him or unfits him for the personal discharge of the duties, whatever these duties may be, but he claims for the Government the right to appoint, and the right to dismiss the Jaigirdars—a right, however, which is to be exercised (as I understand it) only in cases of disqualification or unfitness or in the absence of any legal heir." The Judicial Committee in that case observed as follows :—" It is quite clear, that if the jaigir were transferable, without the consent of the Government, either by descent to an heir or by voluntary sale, or sale in execution, or otherwise, there would be no security that the transferee would be a proper person to discharge the duties, in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character." The precise nature of the

(5) I. L. R. 5 Cal. 389 (1879).

right of the Government or the grounds upon which the right of approval is to be exercised were not necessary to be decided and were not decided in that case. So far as can be gathered from the observations made by the Judicial Committee, the consent of the Government would seem to depend upon the question whether the heir is a proper person and fit to discharge the duties of a Ghatwal. At any rate there is nothing in the judgment of the Privy Council to indicate that Government can disapprove on any ground it likes.

In the case of *Debee Narain Singh* v *Sree Kishen Sein* (3), this Court held that the Civil Courts cannot interfere to reinstate a Ghatwal, who has been dismissed by the Police authorities, in the land which he formerly held as Ghatwal. But the Ghatwal was dismissed by the Magistrate for non-performance of his services; and there can be no doubt that the Magistrate has the power to dismiss a Ghatwal for misconduct or neglect of duty. The question raised was whether the dismissal affected his right to continue to possess the Ghatwali lands, and all that this Cour said was that the Civil Court has no power to interfere with the order of dismissal and that the right to possess the lands depends on the tenure of the office. The same observations apply to the case of *The Secretary of State* v. *Poran Singh* (4), where it was held that the dismissal of a Ghatwal will carry with it the forfeiture of his tenure. On the other hand, in the case of *Lall Dharee Roy* v. *Brojo Lal Singh* (6), it was held that a Commissioner of Revenue is not warranted by law, on the demise of a Ghatwal, to consider the eligibility of rival claimants to a tenure (a perpetual and descendible one) and to reject the claims of the natural heir on considerations purely moral, *e.g.*, having evinced a want of filial respect and dutiful feeling to his father, and that the Plaintiff was quite competent to question the order of the Commissioner by a suit in the Civil Court. One of the learned Judges (D. N. Mitter, J.) observed: "A Ghatwali tenure in Beerbhum is not resumable at the mere good will and pleasure of the Executive authorities." The Ghatwali appears to have been a Birbhum Ghatwali, the incidents of which were governed by the provisions of Reg. XXIX of 1814, and are not exactly those of a Ghatwali which we are dealing with in the present case. But the Ghatwali in the present case is analogous to a Birbhum Ghatwali; and the Government has the power of sanctioning the appointment in either case. The case cited above shows that the Government cannot disapprove of the heir on any ground it likes, and apart from the question of fitness.

If we are to hold that the Government can refuse to sanction or approve on any ground it likes, what becomes of the hereditary nature of the tenure? No authority has been placed before us to show that the Government can do so on any ground, and apart from the question whether the heir is a fit and proper person. So far as the particular tenure is concerned, the authorities have appointed and dismissed Ghatwals from time to time, but there does not appear to have been any case in which the heir of the Ghatwal, although fit, has been superseded by a stranger.

Once it is held that these tenures are hereditary, it seems to me that it cannot be held that the Government can withhold its sanction to the succession of the heir

(3) 1 W. R. 321 (1864).
(4) I. L. R. 5 Cal. 470 (1878)
(6) 10 W. R. 401 (1868)

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upon any ground it likes. No doubt it is for the Government to say whether the heir is a fit and proper person. So far as that question is concerned, the Government, I think, is the sole Judge and the Civil Courts cannot go into that question. But I am unable to hold that the Government can disapprove of the heir or withhold its sanction upon any ground it likes, and apart from the question whether he is a fit and proper person.

It has been pointed out on behalf of the Respondent that the heir of the Ghatwal in the case of *Jogendra Nath Singh* v. *Kali Charan Roy* (2) was held entitled to succeed to the tenure, although he had not been approved by the Government and on the contrary had been dismissed while he was acting as deputy of his father. But the question of approval by the Government does not appear to have been raised in that case, and there can be no doubt, as laid down in *Nilmoney Singh* v. *Bikranath Singh* (1) by the Privy Council, that the right of the heir to the Ghatwali is subject to the approval or sanction of the Government.

The next question is whether the Plaintiff in the present case has been approved by the Government. It appears that in August 1907, Mahendra Narain, the father of the Plaintiff, applied for six months' leave owing to ill health, and the Deputy Magistrate submitted the following note to the District Magistrate: "Sardar Mahendra Narain being ill, he prays that his son Upendra Narain Roy may be allowed to act for him for 6 months. Upendra is present and seems to be a fit person to act as Sardar. Submitted to Collector for orders." The order of the District Magistrate Mr. R. Krishna on the note was "Approved." It is true, he was appointed in an acting capacity and as deputy of his father for six months, but the fact remains that so far as the ground of fitness was concerned, he was approved. After the death of Mahendra Narain, the Plaintiff was ordered by the Magistrate to continue to "act in the place of his deceased father Mahendra Narain Roy until further orders." Then when the matter came up before the Magistrate upon the application of the Defendant No. 1, the Magistrate confirmed the Plaintiff in the appointment. The above orders taken together go to show that the Plaintiff was approved. The last order of the Magistrate had no doubt been set aside by Mr. Maddox, the Commissioner, who is the higher authority, but he did not reverse the order of the Magistrate upon the ground of unfitness of the Plaintiff, but merely upon his view of the legal rights of the parties, and the Government of Bengal referred the Plaintiff to a Civil Court. There is no suggestion in the proceedings that the Plaintiff was in any way an unfit person and the very fact that the Commissioner considered the legal rights of the parties shows that it was on the footing that both the parties were fit to discharge the duties and were proper persons to be appointed. We have the distinct approval by the Magistrate, having regard to the fitness of the Plaintiff, and the said finding has not up to this time been reversed by any authority. The Commissioner disallowed the Plaintiff's claim merely on the ground that the Defendant No. 1 was under the law entitled to succeed.

If the power of approval is to be exercised with reference to the question whether the heir is a fit and proper person, as I think it is, then the Plaintiff,

(1) I. L. R. 9 Cal. 187 (1882).
(2) 9 C. W. N. 668 (1905).

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having regard to the above proceedings, should be held to have been approved.

I am accordingly of opinion, that the decree of the Court below is correct, and should be affirmed. But in the circumstances, I think each party should bear his own costs.

[The appeal was dismissed by the following order.]

As we are unable to agree in this case under sec. 98, C. P. C., the decree of the lower Court is confirmed and the present appeal dismissed, each party bearing his own costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 97 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.

1913,
10, March.

MADHO PERSHAND,
v.
A. L. WALTON.

Provincial Insolvency Act (III of 1907), sec. 6, sub-sec. (2)—Jurisdiction of Court—"Ordinarily resides". Meaning of—Order of adjudication by Court not having jurisdiction—Sec. 47, sub-sec. (1), effect of—Civil Procedure Code (Act V of 1908), sec. 21, if applies to proceedings under the Provincial Insolvency Act.

The Respondent lodged an application for insolvency in the Court of the District Judge of Midnapur and obtained an order of adjudication. It appeared that the Respondent who was employed as a guard on the Bengal-Nagpur Railway resided at Dungagarh in the Central Provinces and ran his train ordinarily from Dungagarh to Nagpur and only occasionally from Dungagarh to Kharagpur, where he stopped with his son-in-law having no permanent residence there. The application for insolvency was filed immediately after the Appellant had obtained a decree against the Respondent in the Court of the Munsif of Midnapur:

Held—*That it could not be held that the Respondent ordinarily resided or personally worked for gain at Kharagpur within the meaning of sub-sec. (2) of sec. 6 of the Provincial Insolvency Act, and consequently the Court of the District Judge of Midnapur had no jurisdiction to deal with the application for insolvency filed by the Respondent.*

That sub-sec. (1) of sec. 47 of the Provincial Insolvency Act does not directly or by implication make sec. 21 of the Civil Procedure Code of 1908 applicable to proceedings under the Provincial Insolvency Act and consequently the doctrine that no objection as to the place of suing shall be allowed by an Appellate Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a failure of justice, could not be applied to proceedings under the Provincial Insolvency Act.

Meaning of the term "resides" in sub-sec. (2) of sec. 6 considered.

This was an Appeal from an order of J. Cornes, Esq., District Judge, Midnapur, dated the 30th of November 1911.

The facts of the case will appear from the judgment.

Babus Bepin Behari Ghose and *Ambica Pada Chowdhury* for the Appellant.

Mr. J. W. Chippendale for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against an order of adjudication made in a proceeding under the Provincial Insolvency Act, 1907. The Respondent is employed as a guard on the Bengal-Nagpur Railway. He resides at Dungagarh in the Central Provinces and has worked there for over two years. But he runs his train ordina-

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rily from Dungagarh to Nagpur. He adds that he works also from Dungagarh to Kharagpur, but has no permanent residence at the latter place, where he stops with guard Atkins, his son-in-law. The application for insolvency was lodged in the Court of the District Judge of Midnapur on the 8th August 1911, immediately after the Appellants had obtained a decree against him in the Court of the Munsif at Midnapur. There is no controversy that his debts exceed Rs. 500. Consequently the only question for consideration is, whether the petition has been presented to a Court having jurisdiction under the Provincial Insolvency Act in the local area in which the debtor ordinarily resides or carries on business or personally works for gain, within the meaning of sub sec. (2) of section 6. The District Judge has held that as a decree for money has been obtained against him in the Court at Midnapur, the application might be entertained there. This view clearly cannot be supported. It is possible that a suit for realisation of a debt may be instituted in a place other than the one where the debtor ordinarily resides or carries on business or personally works for gain. The question for determination consequently is, where does the debtor in this case ordinarily reside or personally work for gain, because there is no room for suggestion that he carries on business within the meaning of sub sec. (2) of section 6 within the jurisdiction of the Court of the District Judge of Midnapur. In our opinion, upon the facts stated, it cannot be held that the debtor ordinarily resides at Kharagpur. The term "resides" is not defined in the statute, but its ordinary interpretation is explained in the case of *Kumud Nath Roy Chowdhury v. Jatindranath Chowdhury* (1). If the Respondent had ordinarily run his train from Dungagarh to Kharagpur, it might possibly have been contended with some show of reason that he resided in both places, it might also have been argued that he personally worked for gain at Dungagarh as well as at Kharagpur. But, as already stated, he runs his train, ordinarily from Dungagarh to Nagpur, and only occasionally from Dungagarh to Kharagpur. The mere fact that when at Kharagpur he stops with his son-in-law does not show that he resides at Kharagpur, much less can it be said that he ordinarily resides at Kharagpur. The language used in sub-sec. (2) of section 6 is identical with that of section 6 of statutes 46 and 47, Victoria, Chap. 52. With reference to the latter statute, it was ruled in the case of *In re Erskine* (2) that a man who paid several visits to London during a period of more than a year, and who, when in London, had his bed-room in a lodging house where he slept could not be said to have ordinarily resided in London during the required period. That there may be room for difference of opinion in the application of the law to the facts of a particular case is illustrated by the decision in *In re Norris* (3), where it was ruled that a foreigner who had a room at a hotel in London for about eighteen months before the presentation of petition and paid for the same continuously during that period had ordinarily resided in London during the required time. The tendency of Courts in this country as is illustrated by the decision in *In re Tietkins* (4) and *In re Rampaul Singh* (5)

(1) 13 C. L. J. 221 (1911).
(2) 10 T. L. R. 32 (1893).
(3) 5 Mor. 111.
(4) 1 B. L. R. O. C. 84 (1868).
(5) 8 C. L. R. 14 (1884).

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has been to construe the expression "ordinarily resides" strictly. [See also *In re Cockburn* (6), *In re Tarineychurn Guha* (7), *Subramaniam* v. *Pichai* (8)]. But whether the expression be strictly or liberally construed, upon the facts of this case, it is impossible for us to hold that the Respondent ordinarily resided at Kharagpur at the time of the presentation of the application for insolvency. It must further be remembered, as pointed out in *In re Erskine* (2), that the burden is upon the Petitioner to establish that the Court to which he has presented his application has jurisdiction to entertain it. In the case before us, the Petitioner has failed to discharge that burden. We are not prepared to hold that the Petitioner ordinarily resides or personally works for gain at Kharagpur within the meaning of sub-sec. (2) of sec. 6. Consequently, the inference follows that the Court below had no jurisdiction to deal with this matter.

We desire to add that we cannot accept as well-founded the argument advanced with considerable ingenuity by the learned Vakil for the Respondent that we should apply to this case the principle which underlies sec. 21 of the Civil Procedure Code of 1908, in view of the provisions of sec. 47, sub-sec. (1), of the Provincial Insolvency Act. Sub sec. (1) of sec. 47 provides that, subject to the provisions of the Act, the Court, in regard to proceedings under the Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. But this section does not, directly or by implication, render sec. 21 of the Civil Procedure Code of 1908 applicable to proceedings under the Provincial Insolvency Act. Consequently, we cannot apply to these proceedings the doctrine that no objection as to the place of suing shall be allowed by any Appellate Court, unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. The question of jurisdiction is thus open for examination, and for the reasons assigned, must be decided against the Respondent.

The result is that this appeal is allowed and the order of the Court below discharged. But the Respondent will be at liberty to present a fresh application under the Provincial Insolvency Act in a Court of competent jurisdiction. Under the circumstances of the case, there will be no order for costs either here or below.

Appeal allowed.

(2) 10 T. L. R. 32 (1893).
(6) 2 Ind. Jur. N. S. 326 (1867).
(7) 11 B. L. R. App. 26 (187?).
(8) [1911] 4 Bur. L. T 81.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 164 OF 1910

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 19 and 20, August.
Judgment, 22, August.

RAM CHANDRA NEOGI, Petitioner, Appellant,

SHYAMA CHARAN BOSE, Objector, Respondent.

Provincial Insolvency Act (III of 1907, sec 16, sub-sec. (2), cl. (a), secs. 27, 42, sub-sec. (1)—Civil Procedure Code (Act V of 1908), sec. 60—Direction for deposit in Court of one-fourth of insolvent's monthly salary which exceeded Rs. 40, if legal—Order for adjudication when can be subsequently annulled—"Salary" if "property" of insolvent—Jurisdiction of High Court to give directions regarding order of adjudication, when only the order annulling it is under appeal.

A debtor who was arrested in execution of

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a decree applied to be and was adjudged an insolvent. In the order of adjudication the insolvent was directed, pending realisation by sale of his assets, to pay a quarter of his monthly salary of Rs. 100 a month into Court until the sum realised from him should equal one-third of the debts for which the creditor had obtained a decree. Subsequently the District Judge annulled the order of adjudication on the ground that the insolvent had failed to abide by the condition regarding payment of one-fourth of his salary :

Held—*That the direction regarding the payment of one-fourth of the insolvent's salary could not have been given under the Provincial Insolvency Act. The proper course for the District Judge would have been to direct the Receiver to arrange for payment to him of one-half of the salary earned by the insolvent, "salary" being "property" of the insolvent within the meaning of sec. 16, sub-sec. 2, cl.* (a), *only one-half of the salary which exceeded Rs. 40 a month being exempt from attachment under sec. 60, C. P. C.*

That the subsequent order of the District Judge annulling the order of adjudication could not have been made under sub-sec. (1) of sec. 42, the conditions required by that section being absent in the present case.

That when setting aside, at the instance of the insolvent, the order of the lower Court whereby it annulled the adjudication and which was the only order under appeal, it was open to the High Court to consider what directions should be given regarding the order of adjudication, which was modified to the extent that the condition imposed was discharged, the District Judge being ordered to give the necessary direction according to law.

This was an Appeal preferred on the 15th April 1910 against an order of F. Roe, Esq., District Judge of Zilla 24-Parganas, dated the 11th April 1910.

The facts of the case will sufficiently appear from the judgment.

Babus Narendra Kumar Bose and *Surendra Kumar Bose* for the Appellant.

Dr. Dwarka Nath Mitter and Babu Rishendra Nath Sarkar for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This Appeal is directed against an order under sec. 42 of the Provincial Insolvency Act. The circumstances under which the order has been made are no in controversy and may be briefly stated. On the 26th May 1909, the Appellant made an application to be declared an insolvent, inasmuch as he had been arrested in execution of a decree. The order for adjudication was made on the 24th August 1909, and the insolvent was directed, pending realisation by sale of his assets existent or suspected, to pay Rs. 25 a month into Court until the sum realised from him should equal one third of the family debts for which the creditor had obtained a decree. It is plain that this direction could not have been given under the provisions of the Provincial Insolvency Act. In fact, on the 24th February 1910, the District Judge recorded an order to the effect that the amount deposited by the insolvent should remain in deposit and that the insolvent should show cause why the adjudication should not be annulled on the ground that the proper order would have been an order for composition under sec. 27 ; at the same time he expressed a doubt, whether the Court had power to order instalments from pay after an order of adjudication had been made. On the 11th

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April 1910, he ordered that as the insolvent had failed to abide by the condition that he should pay one-fourth of his salary to the Receiver, the order of adjudication must be annulled. We are now invited to hold that this order for annulment was erroneously made.

There is no room for serious controversy that the order could not have been made under sub-sec. (1) of sec. 42 of the Provincial Insolvency Act. Sub-sec. (1) provides that where, in the opinion of the Court, the debtor ought not to have been adjudged an insolvent, the Court shall, on the application of the debtor or of any other person interested, by order, in writing annul the adjudication. The order can also be made if it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full or that a composition or scheme has been approved by the Court under sec. 27. In the case before us, the debts of the insolvent have not been paid in full, nor has there been any composition or scheme approved by the Court. Consequently the order can be supported, only if it is established that the debtor should not have been adjudged an insolvent. But it is plain that the debtor was rightly adjudged an insolvent. He had been arrested in execution of a decree and had applied to be adjudged an insolvent. Under the circumstances the order for adjudication was properly made and it could not be annulled under sub-sec. (1) of sec. 42. The position consequently is that the order of annulment made on the 11th April 1910 must be set aside.

The question next arises, what further direction, if any, should be given in this matter. On behalf of the insolvent, it has been contended that the order now under appeal is the erroneous order of the 11th April 1910, and that it is competent to the Court to set aside that order alone. In our opinion it is open to the Court, not only to reverse that order, but also to consider what direction should be given when the order has been set aside at the instance of the insolvent. As already explained, the order for adjudication was properly made on the 24th August 1909; but the condition, which was annexed to that order, was imposed without jurisdiction; consequently that condition must be discharged.

It is desirable to point out in this connection that the proper course for the District Judge would have been to direct the Receiver to arrange for payment to him of one-half of the salary earned by the insolvent. Sec. 16, sub sec. (2), cl. (*a*) provides that when an order for adjudication has been made, the whole of the property of the insolvent, except so far as it includes such properties as are exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment, shall vest in the Court or in the Receiver and shall become divisible amongst his creditors. Now sec. 60 of the Code of Civil Procedure of 1908 provides that one-half of the salary of a public officer is exempt from attachment when the salary exceeds Rs. 40 a month. In the present case, it has been stated to us that the insolvent is in receipt of a salary of Rs. 100 a month as a clerk in the office of the Official Assignee. Consequently, under sec. 60 one-half of his salary is liable to attachment, and, therefore, one-half of the salary is vested in the Receiver appointed by the Court under sec. 16, sub-sec. (2), cl. (*a*). There can be no room for reasonable doubt that "salary" is "property" of the insolvent within the meaning

of sec. 16, sub-sec. (2), clause *(a)* : this view accords with that adopted in England under the Bankruptcy Act, as is evident from the cases of *Re Ward* (1), *Mercer v. Vans Colina* (2) and *Re Graydon* (3). It has been explained that in making an appropriation of income for the benefit of creditors, the Court acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for his proper maintenance according to his condition in life. The Statute law in this country fixes this amount by sec. 60, C. C. P., read with sec. 16, sub-sec. (2) of the Provincial Insolvency Act.

The result is that this appeal is allowed, the order of the 11th April 1910 set aside and the order of the 24th August 1909 modified in so far as it directed the insolvent to pay into Court Rs. 25 a month, until the sum realised from him should equal one-third of the family debts. The District Judge will now give the necessary directions in accordance with the law as explained in this judgment, and subject to the provisions of sec. 44 of the Provincial Insolvency Act, which entitles him to make an order of discharge of the insolvent under defined circumstances. There will be no order for costs either here or in the Court below.

Appeal allowed.

(1) [1897] 1 Q. B. 266.
(2) [1903] 1 Q. B. 130n (1897).
(3) [1896] 1 Q. B. 417.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 67 OF 1912.

CARNDUFF, J.
RICHARDSON, J.
1914,
Heard, 6, and 26, January.
Judgment, 26, January.

UPENDRANATH SEN ROY CHOWDHURY & ors., Decree-holders, Appellants,

BIMALA KANTA SEN CHOWDHURY and ors., Judgment-debtors, Respondents.

Court of Wards Act [IX of 1879 (B. C.)], secs. 48, 60A—Decree obtained against ward before estate taken over, if may be executed in the ordinary manner.

A decree obtained against the ward before his estate came under the management of the Court of Wards can be executed against the ward's property in the hands of the Court of Wards in the usual manner under the provisions of the Civil Procedure Code without reference to the order, in which, under sec. 48 of the Court of Wards Act, the manager is directed to satisfy the ward's liabilities out of the free funds at the manager's disposal.

This was an Appeal preferred on the 16th of February 1912, against the order of R. Garlick, Esq., Additional District Judge of Zilla Backerganj, dated the 21st of November 1911, modifying the order of the Munsif, 1st Court at Barisal, dated the 1st of July 1911.

The facts of the case were briefly as follows :—

In execution of a simple money-decree, an attachment was issued under sec. 52 of the Civil Procedure Code against the property of a ward under the Court of Wards and in compliance with the order of the Munsif the Collector attached the cash balance of the estate, *i.e.*, the amount to the credit of the estate in the personal

ledger in the Collectorate. Afterwards the manager of the estate filed a petition of objection to the effect that the attachment of the balance in the Collectorate to the credit of a Court of Wards estate was illegal as being contrary to the provisions of sec. 48 of the Court of Wards Act. [That section lays down that all moneys received by a manager under the Court shall be devoted to certain purposes in a specified order of priority, and in the table of priority the discharge of instalments of Government revenues and the payment of charges necessary for the maintenance of the ward and the management of the property are given precedence over the liquidation of debts.] It appeared from the evidence adduced in the case that sums due under Class I of sec. 48 were, at about the time when the attachment was issued, very much in excess of the balance to the credit of the estate, and that the maintenance allowance of the ward had not been paid for 6 months.

The Munsif, while conceding that the attachment of the cash balance of the estate was likely to cause serious inconvenience to the management of the estate, held that the attachment must prevail, because he was not satisfied that any sum was due under Class I of the purposes specified in sec. 48 of the Court of Wards Act such as must be given priority to the sum due under the decree (which comes under Class II).

On appeal to the District Judge, the Government Pleader, on behalf of the Court of Wards, prayed that the attachment should subsist subject to the payment of the Government revenue and of the daily expenses of the estate, and urged that as the powers of a manager are restricted by the provisions of sec. 48 of the Court of Wards Act, the attachment under sec. 60, C. P. C, of property over which he has only a limited disposing power must be subject to similar restrictions.

The District Judge accepted this contention, holding that as no property can be attached which cannot be transferred by or on behalf of the judgment-debtor, and as the power of disposition of the cash balance is restricted by sec. 48 of the Court of Wards Act, the attachment also must be subject to similar restrictions. The District Judge accordingly ordered that the attachment shall subsist subject to the provisions of sec. 48 of the Court of Wards Act which in his view gave priority to arrears of Government revenue and the ordinary expenses of the estate.

Babu Gunada Charan Sen for the Appellant.

Babu Ram Charan Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

CARNDUFF, J.—The question raised by this appeal is whether the provisions of sec. 48 of the Court of Wards Act, 1879 (Bengal Act IX of 1879), control the provisions of the Code of Civil Procedure as to the attachment and sale of property in execution of decrees. The Court of first instance held that they did not; the lower Appellate Court has taken the contrary view.

Sec. 48 of the Act of 1879 provides that all moneys received by the manager of an estate in the hands of the Court of Wards shall be applied to certain specified purposes, and that priority shall be given to the purposes included in Class I over those included in Class II, and so forth. Class I includes the payment of all charges necessary for the maintenance, education and religious observances of the ward and

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Contents.

NOTES.

City Civil Court.

We publish in this issue a letter addressed to us by an influential member of the Vakil Bar vehemently protesting against our views concerning the resolution proposed to be moved in the Bengal Council for the establishment of a City Civil Court in this City. The writer charges us with 'vehemence' of language and makes other uncharitable imputations against us. But we leave it to our readers to compare what we had written with the reply and its tone and temper and judge for themselves on which side all the "vehemence" of expression and argument lies. We cannot but regret that the reply far transgresses the limits of forensic latitude and imports into it an amount of heat which makes the learned writer lose sight of the real issues raised by us.

Our point of view of looking at the question is that we would welcome by all means all practical suggestions for the revision of the scale of costs on the Original Side where it really presses hard on litigants, but we would stoutly oppose any attempt to replace or transfer any part of its jurisdiction to any inferior tribunal. The problem of problems before the Indian public now is to raise judicial efficiency and to make the judiciary independent of the executive. The High Court of Calcutta is the only Court in India which is independent of the Local Government, and we are naturally loth that it should be replaced in any degree by a Court which would be controlled in every respect by the local executive. There is not only a strong feeling against it amongst the leaders of the Bar but also amongst the thoughtful section of the public. We are therefore sorry that a member of the Vakil Bar for whom we have high regard should import passion into the question and thus cloud the real issues regarding the question of a City Court.

Adverting to facts, we doubt whether any well-informed member of any section of the legal profession will for a moment question that in matters of procedure, practice, despatch of business and in the effectual and even dispensation of justice there is any Civil Court in this country which comes up to the standard of the Original Side of the High Court. The only objection urged by the learned writer which is deserving of any serious notice is that some litigants in certain class of cases find it costly to prosecute or contest the suits on the Original Side. No doubt some of them do and we are not sure that the parties are not often to blame for that. But assuming that the Original Side procedure proves costly where questions of account, administration and partition are concerned, the duty of a legal reformer should be to suggest practical remedies for keeping costs in such matters within reasonable bounds. But we have had no suggestions in this connection from the learned Vakil or the Hon'ble Member whose cause he espouses.

Barring such matters, the learned Vakil admits that in uncontested mortgage suits on the Original Side—and mortgage suits are seldom contested—the proceedings are less costly and more efficacious than in the Mofussil. He also maintains silence as to the costs in undefended cases and suits for liquidated claims and we may take it that he admits that such suits do not cost more on the Original Side than in the Mofussil. In the course of his long attack, the writer does not also contradict the fact, as he cannot, that ordinary defended suits are also disposed of both quickly and inexpensively on the Original Side. The learned writer goes the length of suggesting, however, that in spite of the inexpensive nature of the remedies in such suits, they should nevertheless be transferred to an inferior tribunal. So his argument comes to this that in any event let us have a less efficient tribunal and by all means lower the judicial standard, because in some matters the Original Side proceedings prove costly.

We quite admit that a suit for Rs. 5,000 may be fought out by the parties for five days, but

the chances of their so doing are infinitely greater in the Mofussil than on the Original Side. Ordinarily such suits are disposed of on the Original Side in a few hours. The exception never proves the rule in spite of the common saying that it does. If people choose to incur costs, nothing but good sense can prevent them from so doing. The Hon'ble Member who would have a City Civil Court in this city has himself elicited the fact from the Bengal Government that the defence of a bailiff in the Calcutta Police Court cost the Government Rs. 43,000. We doubt whether ordinarily all the cases tried on the Ordinary Original Criminal Jurisdiction of the High Court, cost the Crown as much in a normal year. So the cost does not often depend on the Court, but varies according to the inclination or the wisdom of the parties. We have never doubted or questioned that the costs in certain classes of cases on the Original Side are quite disproportionate to the relief obtained. But the remedy for that, we repeat, lies in moving the High Court for revising its scale of costs and making it commensurate with the relief. Since it is the scale of costs and not the Court or the Judges who are to blame for this, the law reformer has to direct his attention to where the shoe pinches and not amputate the leg and put up a wooden one in its place.

CURRENT INDIAN CASES.

(CIVIL.)

Judgment of Foreign Court.

RAMANATHAN CHETTIAR *v.* KALIMUTHU PILLAI, I. L. R. 37 Mad. 163.

The Plaintiffs sought to recover a certain sum of money from the Defendants being balance of the amount with interest due under a decree obtained by them in the Supreme Court of Singapur.

Held—That the circumstances that give jurisdiction are alternatively (1) when the Defendant is a subject of the foreign country in which the judgment has been obtained, (2) when he was resident in the foreign country when the action began, (3) when the Defendant in the character of Plaintiff has selected the forum in which he is afterwards sued, (4) when he has voluntarily appeared, and (5) when he has contracted to submit himself to the forum in which the judgment was obtained.

Limitation Act (IX of 1908), Arts. 133, 145—Deposit.

V. BALA KRISHNUNDU *v.* NARAYANASWAMY CHETTY, I. L. R. 37 Mad. 175.

The word "deposit" in Arts. 133, 145 is a deposit of goods to be returned in specie. It must be taken to mean the sort of bailment known to lawyers under [illegible] name in the Roman Law of Bailments.

Correspondence.

CITY CIVIL COURT.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

You have expressed yourself on the question of the Hon'ble Mr. S. N. Roy's proposed resolution on the City Civil Court with an amount of vehemence with which the readers of the *Weekly Notes* are not generally familiar. But I hope, you will not grudge a little space to an answer from one who, whatever his "professional interests" might be supposed to be, has perhaps in his own humble way taken some interest in public affairs outside the profession.

My chief object will be to meet your arguments such as they are, but I cannot altogether put aside the vast amount of passion, sarcasm and flattery with which you have dressed them up and which certainly are not suggestive of their strength. Thus you have questioned the propriety of Mr. Roy's moving the resolution, first because he is doing so without being asked by anybody, and secondly because as a member of the profession he ought to have approached the Chief Justice rather than the Government. As regards the first proposition, it must be a revelation to most legislators that they are not at liberty to move any resolution which they think would further public interest, if the public is not vociferously clamouring for it. Have you never heard of cases in which the public feelings did not become manifest to those in power till they burst out in a hurricane? And have there not been many occasions on which statesmen have averted calamities by anticipating public clamour? The argument from Mr. Roy's profession is weaker still. Mr. Roy is on the Council not as a Vakil, but as a member of the public. He would hardly be doing his duty, if he allowed his activities as a citizen and a legislator to be hemmed in by every imaginary rule of professional etiquette. Further, I do not know what makes you assume that Mr. Roy did not consult public opinion.

You have been pleased to refer to Mr. Roy's professionl interests. You cannot surely be unaware that Mr. Roy does not depend on his profession for his daily bread. Nor is your appeal *ad hominem* to His Excellency the Governor and the Chief Justice calculated to give one any better idea of the merits of your cause. In your desperate struggle for a forlorn cause you have struck hard on all sides and have not spared the lions of your own profession. But who ever heard of leading Counsel being engaged by people, as you say, to "gamble in, litigation" "by way of a bet on their favourite Counsel, on the off-chance of securing judicial favour?" The unvarnished fact is that people engage expensive Counsel so that they may get the best legal assistance—the

fools, who seek to secure judicial favour thereby, are not many.

In the same category you will excuse my placing the select epithets you have heaped on the poor judges of a hypothetical Court. "A glorified Small Cause Court" with "Judges of indifferent qualifications" reads well, but what, you think, you kill by these expressions is entirely a figment of your imagination. You are perhaps not unaware that the Small Cause Court is what it is chiefly on account of the summary procedure that it follows, which is not likely to be copied in any regular Court. As for judges "with indifferent qualifications" who must be either weak or "self-opinionated," is it seriously contended that the only men who are not so are to be found in the two or three judges who happen to be sitting on the Original Side for the time being? And must it be assumed that the Calcutta High Court, even on the Original Side, has always been a stranger to judges with indifferent qualifications or to judges who are weak or self-opinionated? Nor is it always the case that you get worse recruits for less paid posts than for higher paid ones. There have been judges in the Mofussil who have tried very difficult cases with infinite credit, and the occasions have not been few on which their judgments have been upheld by the Privy Council over the head of the High Court. The fact is that *a priori* arguments on the quality of judges are always dangerous. The junior who would accept a judgeship for Rs. 3,000 is not necessarily inferior to the man who is earning ten to twenty thousand in the profession, and it does not follow *a priori* that the latter would make a better judge than the former. Sir Barnes Peacock who held an honoured place among members of the Judicial Committee was not a particularly successful member of the Bar when he came out to India. The salary of a City Court Judge would, I suppose, be high enough to attract all juniors specially with the prospects of promotion to the High Court. The quality of Judges whether in the High Court or elsewhere really depends upon the persons who select them, and if proper discrimination is exercised in the selection of a City Court Judge, there is no reason why good judges should not be available for that Court.

Putting aside these matters which really do not touch the issue, your arguments appear to be founded on (1) the efficiency of High Court Judges, (2) the expedition of work here, and also (3) on the real cheapness of justice in the High Court.

About the ability of judges, I have already spoken of the absurdity of *a priori* arguments on this head. I may point out that those who want a City Court insist on Judges of that Court being professional men "who have practised at the Bar for a good many years," before whom, as you point out, long drawn cases would be impossible. If Mr. Roy's resolution does not provide for that, it is a defect which should surely be cured and can be cured by a simple amendment. I suppose that would completely meet your argument based on the protracting of cases in the Mofussil so far as there is any substance in it.

The argument from the superior ability of High Court Judges, I may add, really cuts just the other way. Is it not unfair to the tax-payer that these highly paid officers should have a great deal of their time wasted in hearing cases in which there is no "real and substantial contest of law or facts" which, according to your estimate constitute ninety per cent. of the work before all Courts including the High Court. Surely these matters would bear decision by an inferior tribunal, say, a City Court.

In passing, let me note that while I am not sure that the comparative dilatoriness of Mofussil Courts would be borne out by statistics, such delay as there is in the Mofussil would appear to be very largely the result of circumstances there which cannot be reproduced in Calcutta. The Mofussil judiciary is overburdened with work, they have to work with a very imperfectly trained and undermanned ministerial staff; the assistance that they get from the Bar is not half as efficient and technically perfect as the High Court Judges get; their jurisdiction covers a wide area with imperfect communications and with infinite opportunity to litigants to evade the processes of the Courts. The facility with which, under these circumstances, designing litigants can protract cases must needs be infinitely greater than would be possible within the compact area of Calcutta with a vigilant and efficient ministerial staff and a body of able and well-equipped lawyers.

And then, with all this, I believe there is nothing in the Mofussil to compare with the endless proceedings arising out of Gopal Lal Seal's estate, Salaji's estate and other big estates in the present generation and the Bhukailash (Ghosals') estate and the Sobhabazar Raj estate in the last. All these would go to show that *Jarndyce* v. *Jarndyce* in not a thing of the past on the Original Side.

Your attempt to make out that the cost of litigation on the Original Side is less on the whole than in the Mofussil is really bold, but with one who knows how facts stand it will hardly pass muster. They will see the point of your referring to undefended mortgage suits, for that is the only case in which it is possible to say that business on the Original Side is cheaper than in the Mofussil. But let us take any other case, say a fairly contested suit of the value of Rs. 5,000. The *ad valorem* court-fee on the plaint in such a suit in the Mofussil would be Rs. 275. The suit could no doubt be instituted on the Original Side for only Rs. 10, but that represents an insigni-

ficant fraction of the real Court costs for which the *ad valorem* fee stands. In the Mofussil Court, you pay the *ad valorem* fees for getting practically all the work done by the Court; here you have to pay liberally for every bit of work that you get done by the Court or its officers separately. So assuming that the case is heard for five days and only a reasonable number of witnesses is examined on each side, not more than ten documents on each side are put in and no adjournments are taken, the Court costs of the suit would be about Rs. 250 for the Plaintiff and about Rs. 125 for the Defendant, who, in the Mofussil Court could have managed with not more than Rs. 5 or 6. This is a very modest estimate and assumes a simplicity of procedure which you do not find in the Original Side. So we find that the Court costs on the Original Side for which the *ad valorem* fee stands in the Courts below, greatly exceed what both the parties together have to pay in the Mofussil Courts. The disproportion would appear all the greater, if we were to take cases like suits for declaration in which fixed fees of Rs. 10 or less are payable in the Mofussil. Your arguments on *ad valorem* fees might in any event furnish grounds for a revision of the Court Fees Act, but offer none against the establishment of the City Court.

If we pass from Court costs to the fees to be paid to the lawyers, we shall find the difference to be enormous. In the High Court you have got to pay Attorney and Counsel, while in the case supposed you could manage with a single pleader whose fees on the fixed scale would be Rs. 250. In the High Court the Attorney's costs assessed on a moderate scale on the basis of taxing rules as between party and party would come up to between four to five hundred rupees on either side without the Counsel's fees. Costs as between Attorney and client would usually be much more; and it is notorious that people pay much more than taxed costs, for few people care to have bills taxed. As regards Counsel's fees, if the scale as between party and party is taken as a fair index, in the hypothetical case above it would come up to Rs. 2,006, assuming, as is usual, that costs on scale No. 2 is allowed. In any case, the amount could hardly be less than Rs. 1,200 on either side.

It comes to this then that in a suit for Rs. 5,000 both sides have to spend between them about Rs. 4,000, more or less, rather more than less. In the Mofussil the same suit including costs of appeal to the High Court could hardly cost Rs. 2,000 all told. For convenience of comparison I have discussed this hypothetical case with reference to the taxing rules. As an illustration of what the actual costs come up to, I may refer to a case in my personal experience in which the costs for getting a decision on a simple issue went Rs. 15,000 on one side and Rs. 80,000 altogether. Out of the 15,000, over Rs. 3,000 had to be paid for briefing charges, when the actual costs of preparing the brief could not on any estimate have exceeded Rs. 400.

In fact your argument from cost would hardly bear even a superficial examination. If your argument is correct, considering that the High Court is self-supporting, you would have to say that the High Court costs less than a District Court. That would be an excellent argument for abolishing District Courts forthwith and establishing circuits of the High Court all over the country. From the point of view of costs the proposition has only to be stated to be hooted as absurd.

So much for costs. You set much store by the facts that the public are evidently content with the High Court and have not set up a clamour for a City Court. A large part of the public silence is due to the fact that the public do not know that this would be a remedy for what they are daily suffering. By the "public" I do not mean the comparatively few people who can afford the luxury of a litigation in the High Court, but the vast body of poorer people who are compelled to put up with injuries because they have not the means to seek redress in the High Court. One has only to go about among small merchants, middle class property-owners and people with moderate means to see that these unredressed wrongs are a painful reality. It is to this greater public that the City Court would come as a welcome blessing, and with such a tribunal in Calcutta less wrong could be done to poorer people by their more resourceful neighbours, with the strong assurance of impunity that the present costly system of administration of justice gives them. If the proposed City Court is shown to be capable of doing this much, the proposal would seem to be amply justified.

I need only add in conclusion that this question must be decided solely from the point of view of public interest and not from that of the real or supposed interest of one branch of the profession or the other. Speaking personally, I am of opinion that the establishment of a City Court will not really be conducive to the professional interests of the Vakil Bar. I believe the establishment of a City Court will mean a great reduction in the fees of leading Barristers and is bound to tell upon the fees of the leading members of my branch of the profession. The prizes of my branch of the profession would surely be less attractive though the blanks may be fewer. However that may be, the interests of any branch of the profession should not be allowed to obscure the issue from the point of view of public interest.

Yours faithfully,
VAKIL.

his family, for the management and supervision of the ward's property and for the discharge of the Government revenue and other public demands. Class II includes, *first*, the payment of all rents, cesses and other demands due to any superior landlord in respect of any land held on behalf of the ward, and, *secondly*, the liquidation of debts payable by the ward.

The view of the learned District Judge is that the words "debts payable by the ward" include decretal debts, and that, therefore, where property in the hands of a manager is attached in execution of a decree, the manager is bound nevertheless to pay the other charges referred to above before he satisfies the decree.

In my opinion, this view cannot be maintained. One has only to look to the provisions of, for example, secs. 23, 23A, 24 and 60A of the Act to infer that the Legislature had no such intention. The learned District Judge has referred to sec. 60A as supporting his view. That section provides that no property which is or has been under the charge of the Court of Wards, shall be liable at any time, except with the leave of the Court, to be taken in execution of a decree made in respect of any contract entered into by the ward without the leave of the Court while his property was under such charge. The inference which I draw from this is that the Legislature did not intend to interfere with the execution of decrees in any cases other than those specified. The other sections, to which I have referred, seem likewise to show that it was not contemplated that the provisions of the general law should be overridden in this connection.

I would, therefore, allow this appeal with costs, discharge the order of the learned District Judge and restore that of the first Court. I would assess the costs at two gold mohurs.

RICHARDSON, J.—I agree. So far as I can see, all that sec. 48 of the Court of Wards Act does is to lay down instructions for the guidance of the manager in the due course of management and as to the order in which the ward's liabilities are to be satisfied out of the free funds at the manager's disposal. We have been shown nothing in the Act at all similar to the provisions, for instance, contained in sec. 3 of the Chota Nagpur Encumbered Estates Act. The execution of decrees, obtained against the ward before his estate comes under the management of the Court of Wards, is not barred, and sec. 51 of the Court of Wards Act shows that after the estate is taken over, the ward can both sue and be sued, subject to his being properly represented. The provisions in secs. 60 and 60A do not meet the present case, and apart from those provisions, our attention was drawn to nothing in the Act to prevent a decree against a ward from being executed under the general law like any other decree obtained by a creditor against a debtor. The learned Government Pleader has been unable to produce any authority for the view for which he contended. If that was the right view of the effect of sec. 48, I should certainly have expected that some authority would be forthcoming to support it.

I agree that the appeal should be allowed.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.

1914,
Heard, 24, and 27, April.
Judgment, 18, May.

RAGHUNATH DAS and ors., Appellants,
v.
SUNDAR DAS KHETRI, since deceased, and another, Respondents.

Attachment, effect of—Insolvency of judgment-debtor after attachment—Effect—Official Assignee if takes subject to attachment—Official Assignee how to be bound by execution proceedings—Substitution of Official Assignee for judgment-debtor, if necessary—Civil Procedure Code (Act XIV of 1882), secs. 32, 372, if apply—Summons on substituted party to appear, necessity of—Civil Procedure Code (Act XIV of 1882), sec. 248—Notice of proceedings, necessity of, to bind Official Assignee—Stay of execution proceedings when judgment-debtor declared insolvent—Insolvent Debtors (India) Act, 11 and 12 Vict., C. 21, sec. 49—Sale without serving notice, effect of—Irregularity.

Attachment in execution of a money-decree followed by an order for sale does not confer on the judgment-creditor any charge on the land.

SARKIES *v.* BUNDHO BAEE (1) *referred to.*

An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Insolvent Debtors (India) Act of 1848, and an order for sale, though it binds the parties, does not confer title.

Where after an order for sale made at the instance of an attaching creditor, an order vesting the property to be sold in the Official Assignee was made on 8th September 1904, and on the 12th September 1904, the Judge stayed the sale until further orders, and the attaching creditor then applied for and obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors; and the Official Assignee though duly served took no notice of it, and when the time fixed by the notice to show cause expired, the attaching creditor applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors, but directing the sale to proceed, and the sale took place and the purchaser obtained the usual certificate which referred to the right, title and interest of the judgment-debtors as the property sold:

Held—*That the sale was altogether irregular and inoperative.*

That the execution could not proceed until the Official Assignee had been properly brought before the Court by taking out and serving on him a notice under sec. 248 of the Civil Procedure Code of 1882.

That the notice served was not a proper notice under sec. 248.

That taking the notice to be a proper notice preliminary to adding the Official Assignee as a party under sec. 32 of the Code, in order to bind the party added, it was necessary after he had been added to serve him with a summons to appear and answer.

That no such proceeding having been taken under either sec. 32 or under sec. 372 of the Code, the Official Assignee (who did not appear to have been aware of the order for sale) was not bound by the sale.

Quære.—*Whether these sections were applicable after the final decree.*

GOODALL *v.* MUSSOORIE BANK, LTD. (2) *referred to.*

(1) 1 N. W. P. H. C. Rep. 172 (1869).

(2) I. L. R. 10 All. 97 (1887).

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Held—*That the judgment-debtors had at the time of the sale no right, title or interest which could, be sold to or, vest in a purchaser.*

If the judgment-debt was included in the schedule filed by the insolvents under the Act of 1848, the executing Court was bound to stay the sale under sec. 49 of the Act.

MALKARJUN *v.* NARHARI (3) *did not apply to this case, as no notice was served under sec. 248 of the Civil Procedure Code and the purchaser (the attaching creditor himself) had full notice of and were responsible for the irregularities of the procedure adopted.*

GOPAL CHUNDAR CHATTERJEE *v.* GUNAMONI DASI (4) *referred to.*

This was an Appeal from a judgment of the Calcutta High Court, dated the 4th June 1912. The facts of the case fully appear from the Judgment of Chitty and Teunon, JJ., which was as follows :—

"This appeal arises out of a suit brought by the Plaintiffs to establish their title to, and recover possession of, certain lease-hold properties along with the colliery, engines, machinery, tools, plant and whatever else there might be standing thereon. The contest is between the Plaintiffs as purchasers from the Official Assignee of Bengal and the Defendants as purchasers in execution of a decree.

"The facts are shortly as follows :—On 1st December 1899, the Defendants granted a patta of coal lands to Atul Nath Chatterji and Rajendra Nath Chatterji at an annual jama of Rs. 3,626-11-10 and a salami of Rs. 4,001. The lessees were two of four brothers, the others being Aghore Nath Chatterji and Chandra Nath Chatterji. The four brothers, who were members of a joint family, became heavily indebted to several creditors. On 6th December 1903, the present Defendants filed a suit against their lessees for rent under the patta, and on 23rd June 1904 obtained a decree against them for Rs. 3,090-10-6 and costs Rs. 350-7 annas. The other two brothers were also parties to that suit as *pro formâ* Defendants. On 13th July 1904, the Defendants applied for execution of their decree by attachment of the immoveable properties belonging to the judgment-debtors. The lease-hold property was accordingly attached, and 5th September 1904 was fixed for the sale. On that day, the judgment-debtors Nos. 1 and 2 applied for time to enable them to raise money by sale of the attached property, and the sale was accordingly adjourned until 10th September. On the 8th September, all four brothers filed their petition in the Court for the Relief of Insolvent Debtors at Calcutta and, on the same day, the Court made the usual vesting order under sec. 7 of the Indian Insolvents Act. On 30th September 1904, the Defendants applied to the Subordinate Judge of Burdwan to substitute the Official Assignee in the place of the judgment-debtors in the execution proceedings under their decree. On 23rd November, notice was ordered to issue to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors and it was made returnable on 22nd December 1904. On 10th January 1905, the Subordinate Judge finding that Mr. Miller had been duly served with the notice, ordered that he be substituted in the place of the judgment-debtors and 6th March 1905 was fixed for the sale of the attached property. On that day, the property was

(3) L. R. 27 I. A. 216: s. c. I. L. R. 25 Bom. 337 (1900).

(4) I. L. R. 20 Cal. 370 (1892).

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sold and purchased by the Defendants, the decree-holders. On 18th April 1905, the sale was confirmed,* and on the 14th June 1905, an order was made for delivery of possession to the Defendants as purchasers and they accordingly took possession under it. Meanwhile, on the 23rd May 1905, the Official Assignee applied to the Insolvency Court and obtained an order that he should be at liberty to sell either by public auction or private contract to the best purchaser the properties of the insolvents including the lease-hold premises in question. He did not, as a matter of fact, sell at that time; but, on the 24th March 1908, he sold the premises now in question to Hormusji Pestonji Banker *alias* Billimoria, a Parsi gentleman of Asansol. On the 24th June 1908, three months later, Banker sold the property to the present Plaintiffs. On 16th July 1908, this suit was instituted to recover possession of the property.

"The learned Subordinate Judge has decreed the Plaintiffs' suit and the Defendants have appealed.

"The first question is one of fact—whether the notice for substitution was duly served on the Official Assignee in the execution case. The Judge says that it is shown to have been served on a clerk of the Official Assignee and, in the absence of evidence to show that this amounted to service on the Official Assignee or that the clerk had authority to receive it, he finds that it was not properly served. This finding appears to us to be entirely against the evidence on the record. The clerk of the Official Assignee, Lakhinarayan Dhar, states that he has been an Assistant in the Official Assignee's office for 29 years. He admits that the notice was served in that office, and that he signed acknowledging the receipt. He states that he received the notice on behalf of the Official Assignee, and made over the copy to Mr. Langer, the Head Assistant. The Small Cause Court bailiff (who has been a bailiff for 30 years and who served the notice) says that he has known Lakhinarayan Babu as the head clerk or Bara Babu for 20 years and that he served notices for the Official Assignee upon him 20 or 30 times. He states that he always served notices for Mr. A. B. Miller on Lakhinarayan Dhar in this manner. There can be no question on this evidence that the notice was served in the Official Assignee's office in the usual way, and, in the absence of any evidence to the contrary, we must presume that Lakhinarayan Dhar was a person authorized to receive such notices within the meaning of sec. 75 of the Code of Civil Procedure of 1882. It would have been simple for the opposite party to have called evidence from the Official Assignee's office to disprove this, had it been incorrect. We therefore hold that the notice for the substitution was duly served on the Official Assignee.

"The next question is what was the effect of the sale in execution as against the Official Assignee. It was argued for the Appellants (1) that the Official Assignee was bound by the execution proceedings and by the sale which took place, as we

* The certificate of sale was in terms following:—

"This is to certify that whatever right, title and interest the judgment-debtors had to and in the properties specified in the schedule have been in execution of decree in Money Suit No. 407 of 1903, sold at public auction on the 6th March 1905, and that at that sale for the consideration of Rs. 1,315 the aforesaid two decree-holders have purchased the properties."

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have stated; (2) that the lease-hold interest did not vest in the Official Assignee, because he did not take possession; and (3) that the decree being one for rent, the decree-holders were entitled to sell the lease-hold interest of the insolvents and to give a good title.

"(1) With regard to the first question, it must be conceded that the order for substituting the Official Assignee in place of the judgment-debtors in the execution proceedings was incorrect [*see* the case of *A. B. Miller* v. *Budhsingh Dudhuria* (5)]. But the Official Assignee having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence and as binding upon him. The fact that a person who was not the representative of the judgment-debtors was brought upon the record as such representative would not affect the validity of the sale. See *Malkarjun* v. *Narhari* (3). The Official Assignee having taken no steps to have that sale set aside in the manner provided by law, the sale must be taken to be good as against him.

"(2) We cannot accept the second contention raised by the learned pleader for the Appellants that the property had not vested in the Official Assignee. It is true that in cases of lease-hold property the Official Assignee has the right to elect whether or not he will accept the property under the vesting order. If he does so, there is no question that his acceptance relates back to the date of the vesting order. See *Abdul Razak* v. *J. G. Kiernan* (6). That was the converse case, and the question there was whether the Official Assignee could be made liable for the rent of the lease-hold property. It was held that, inasmuch as he had taken possession, he must be regarded as having elected to take over the property. Here, he paid no rent, nor did he take actual possession; but the property did vest in him by the vesting order and that he regarded it as having vested in him is made plain by the application which he made to the Insolvency Court, on the 23rd May 1905, for leave to sell the property. He could not sell it unless it were vested in him. That being so, we must hold that the sale was effective as against the Official Assignee and also against the Plaintiffs who claim through him. The Plaintiffs are, in fact, in a *dilemma*. If the property had not then vested in the Official Assignee, it was sold away, before the Official Assignee acquired any title to it; if it had vested in him—and we think that it had—it was sold in his presence and the sale was binding on him.

"It is not necessary, under these circumstances, to discuss the third point raised by the learned pleader for the Appellants that, the decree being a decree for rent, it gave the Defendants a first charge on the property. But we may say that we cannot understand how that could be the case with regard to a decree of this kind which was for rent of coal lands and not agricultural lands.

"The appeal must be allowed and the Plaintiffs' suit dismissed with costs in both Courts." Hence this Appeal.

Mr. L DeGruyther, *K. C.*, and *Mr. A. M. Dunne* for the Appellants submitted that the Appellants had established their title to the property in question. It was settled law that mere attachment of property does not create any charge upon the property in favour of the attaching judgment-creditor: *Peacock* v. *Madan*

(3) L. R. 27 I. A. 216: s. c. I. L. R. 25 Bom. 337 (1900).

(5) I. L. R. 18 Cal. 48 (1890).

(6) I. L. R. 22 Bom. 617 (1898).

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Gopal (7). After the order of the High Court vesting the property of the insolvents in the Official Assignee, there was no interest or title in the property left in the judgment-debtors. Assuming that the notice of the execution proceeding was served on the Official Assignee, the Official Assignee was not bound to interfere with the sale. What was being sold was the right, title and interest of the judgment-debtors and not the interest of the Official Assignee in the property. Under sec. 49 of the Insolvent Debtors Act, 1848 (11 and 12 Vict. Chap. 21), the Court executing the decree was bound to stay the execution proceedings. In the section "the said Court may stay the proceedings in such suit or action," the word "may" ought to be construed to mean must. The Court did in fact stay the sale, but afterwards again proceeded with the sale without any jurisdiction. Sec. 372 of the Code of Civil Procedure, 1882, was applicable to a suit only and not to the execution proceedings: *Goodall* v. *Mussoorie Bank, Ltd.* (2) and *Collector of Muzaffarnagar* v. *Husaini Begam* (8). The only remedy of the judgment-creditors was to prove the debt in the insolvency proceedings. The Official Assignee is a trustee of the property vested in him for the benefit of all the creditors of the insolvents. It would defeat the object of the Insolvency Act, if one judgment-creditor were to be allowed to take the property for himself alone. The Appellants had purchased, the property from the Official Assignee in whom the title to the property really vested on the date of the sale. There was no decree against the Official Assignee and no order of sale was passed against him, and the sale therefore did not affect his title. Reference was made to *Hunt* v. *Bholagir* (9).

Mr. Bhugwandin Dubé for the Appellants submitted that the Official Assignee was made a party to the execution case under sec. 244 of the Code of Civil Procedure, 1882, as the representative of the judgment-debtors. The Court executing the decree had jurisdiction to make the order and it was immaterial whether the order made by it was right or wrong. The Official Assignee had notice of the execution and the order for sale. He had a remedy to object to the sale under sec. 244 [*Punchanun* v. *Rabia Bibee* (10)] and not in a separate suit. The Court executing the decree sold the property to the knowledge of the Official Assignee. It had jurisdiction to decide rightly or wrongly, but the remedy of the Official Assignee was to set aside the sale under sec. 244. He did not do so. The Appellants could not succeed without setting aside the sale which had become binding on the Official Assignee. Further, the period prescribed for setting aside the sale was one year from the date of the sale under Art. 12 of the 2nd Schedule to the Limitation Act, 1877, and the Plaintiffs' suit was consequently barred by limitation. Reliance was placed on *Malkarjun* v. *Narhari* (3). After the Official Assignee had been made a party to the execution, he must have received all notices relating to the execution proceedings, although they were not printed in the Record.

[MR. AMEER ALI—Referred to *Gopal Chundar Chatterjee* v. *Gunamoni Dasi* (4);

(2) I. L. R. 10 All. 97 (1887).
(7) I. L. R. 29 Cal. 428 (F. B.) (1902).
(8) I. L. R. 18 All. 86 (1895).

(3) L. R. 27 I. A. 216, 224: s. c. I. L. R. 25 Bom. 337 (1900).
(4) I. L. R. 20 Cal. 370 (1892).
(9) 1 Bom. H. C. R. 251 (1864).
(10) I. L. R. 17 Cal. 711 (1890).

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absence of notice under sec. 248 of the Code of Civil Procedure vitiates the sale.]

Counsel submitted that it ought to be presumed that the Court held and conducted the sale after complying with all the requirements of the law: *Bimola Soondyree* v. *Kalee Kishen* (11). (Counsel asked their Lordships to adjourn the hearing of the appeal in order to enable the Respondent to print such further documents as were necessary, but their Lordships refused the application.) In any case, even if the sale was held without a notice under sec. 248, it was not a nullity and the sale could not be set aside in a separate suit.

[LORD MOULTON.—The terms of the certificate of sale shewed that what was sold was the right, interest and title which the judgment-debtors had in the property at the time of the sale. They had no title by reason of the vesting order. Whether the Official Assignee was a party to the execution or not, his interest in the property was not in fact sold by the Court.]

What was sold was the lease-hold property. It was sold to the knowledge of the Official Assignee. It was admitted that the Appellants purchased the property with full knowledge of the execution proceedings. The Appellants were barred by equity from disputing the sale. At any rate the Appellants' claim as to the moveables was barred by limitation.

Counsel for the Appellants were not heard in reply.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—The action in which this appeal arises is an action for the recovery of a lease-hold colliery. The Plaintiffs (the present Appellants) claimed title to the property under the Official Assignee in the insolvency of the lessees. The order vesting the property in such Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September 1904. At the date of this order the colliery had been attached in execution case No. 303 of 1904, in which the lessees were the judgment-debtors and the Defendants (the present Respondents) were the judgment-creditors, and an order had been obtained for the sale of the interest therein of the judgment-debtors. Counsel for the Respondents admitted that attachment in execution of a money-decree followed by such an order for sale does not confer on the judgment-creditor any charge on the land [see *Sarkies* v. *Bundho Baee* (1)]. An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Act of 1848, and an order for sale, though it binds the parties, does not confer title.

It follows that under the order of the 8th September 1904, the property vested in the Official Assignee free from any charge in favour of the judgment-debtors. The Official Assignee in due course, by order of the Court having jurisdiction in the insolvency, sold the property, and the Appellants derived title through the purchaser. Their title is thus *primâ facie* a good and valid title, but it is disputed by the Respondents under the following circumstances:

On the 12th September 1904 the Judge in the execution proceedings stayed the

(11) 22 W. R. 5 (1874).

(1) 1 N. W. P. High Court Rep. 172 (1869)

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sale therein directed until further order. This was the proper and indeed the only thing he could do, for the judgment-debtors had no longer any interest which could be sold. Further, if, as was no doubt the case, the judgment debt was included in the schedule filed by the insolvents under the Act, their Lordships are of opinion that he was bound to stay the sale under sec. 49 of the Act. At any rate, the executor could not proceed until the Official Assignee had been properly brought before the Court, and an order binding on him had been obtained. In their Lordships' opinion this could only be done by obtaining an order for the issue of, and by serving him with, a notice under sec. 248 of the Civil Code of 1882, which was the Code then in force. It was suggested in argument that he might have been made a party to the proceedings either under sec. 32 or under sec. 372 of the Code, but even if these sections are applicable after final decree, as to which there is considerable doubt [see *Goodall* v. *Mussoorie Bank, Ltd.* (2)], no proceedings seem to have been taken thereunder. What the judgment-creditors did was this: they applied to the Judge in the execution case for an order, and on the 30th September 1904, and again on the 3rd November, obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors. This was not a proper notice under the 248th section. A notice under that section should have called upon the Official Assignee to show cause why the decree should not be executed against him. Had the Official Assignee been served with such a notice, it is at least probable that he would, as in their Lordships' opinion he certainly could, have shewn good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally. It is possible that the notice might be upheld as a proper notice preliminary to adding the Official Assignee as a party under the 32nd section, if that section were applicable, but in order to bind a party added under the 32nd section, he has, after being added, to be served with a summons to appear and answer, and it is not suggested that any such summons was served. Similarly, it is not suggested that any order to carry on proceedings was obtained under the 372nd section.

Having obtained leave in that behalf the Respondents proceeded to serve the notice in question, and their Lordships will assume that the notice was duly served on the Official Assignee. The Official Assignee took no notice of it, possibly because he had no objection to being substituted as a party, and expected to be served with notice of any further application against him. There is no evidence that he knew that an order for sale had been already made. The time fixed by the notice for cause to be shown having expired, the Respondents, without further notice to the Official Assignee, applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors, but directing the sale to proceed. The sale accordingly proceeded. There had to be a fresh sale proclamation by reason of the 291st section of the Code. Such proclamation is not in evidence, but their Lordships must presume in default of evidence to the contrary that

(2) I. L. R. 10 All. 97 (1887).

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the property offered for sale was the property ordered to be sold, that is to say, the right and interest of the judgment-debtors in the colliery. At the sale, the Respondents (the judgment-debtors) having obtained leave to bid became the purchasers. The sale was confirmed by the Court on the 8th April 1905, and on the 25th April 1905, the Appellants obtained the usual certificate which refers to the right, title and interest of the judgment-debtors in the property sold. Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place, the property having passed to the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-debtors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place, no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place, the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser, and consequently the Respondents acquired no title to the property.

Their Lordships' attention was called in this connection to the case of *Malkarjun* v. *Narhari* (3), but in their opinion there is nothing in that case which has any bearing upon the present appeal. As laid down in *Gopal Chundar Chatterjee* v. *Gunamoni Dasi* (4), a notice under sec. 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case in *Malkarjun* v. *Narhari* (3), such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section, and the Respondents had full notice of, and indeed were responsible for, the irregularities of the procedure adopted.

The Respondents suggested that with regard to certain machinery which was included in the sale of the colliery by the Official Assignee, and which was also sought to be recovered in this action, the statute of limitations was a good defence. This point does not appear to have been taken at any time prior to the hearing before their Lordships' Board. It was not one of the issues settled by the Court on the action, nor did the Respondents mention it among their grounds of appeal from the decision of the Subordinate Judge. Their Lordships consider that it involves an inquiry as to the nature of the machinery to which it is said to be applicable, and that it is therefore too late to raise it.

Their Lordships will humbly advise

(3) L. R. 27 I. A. 216: s. c. I. L. R. 25 Bom. 337 (1900).

(4) I. L. R. 20 Cal. 370 (1892).

(3) L. R. 27 I. A. 216: s. c. I. L. R. 25 Bom. 337 (1900).

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His Majesty that the appeal ought to be allowed and the decree of the High Court of the 4th June 1912 set aside with costs, here and below, and that the judgment of the Subordinate Judge of Burdwan of the 8th September 1909 ought to be restored.

Solicitors: *Messrs. W. W. Box & Co.* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Respondents.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

P. C. APPLICATION No. 85 OF 1913.

JENKINS, C. J.
WOODROFFE, J.
1914,
5, May.

SYED ABDULLAH HUSAIN CHOUDHRY, Plaintiff, Petitioner,
v.
ANANDA CHANDRA RAY, Defendant, Opposite Party.

Indian Limitation Act (IX of 1908), sec. 12—Application for leave to appeal to Privy Council—Time taken for obtaining copy of decree if may be excluded—Indian Statute permitting exclusion, if ultra vires—*Order in Council of 1838—Government of India Act of 1858, sec. 64—Letters Patent, cls. 39, 44—Privy Council Appeals Act (VI of 1874).*

An application for leave to appeal to His Majesty in Council is not time-barred, if excluding the time taken for obtaining a copy of the decree appealed from it is found to have been made within 6 months.

Sec. 12 of the Limitation Act of 1908 is within the legislative powers of the Government of India in permitting such exclusion.

This was an application presented on the 22nd December 1913, for leave to appeal to His Majesty in Council from a judgment and decree of this Court passed in Appeal from Original Decree No. 513 of 1910, dated the 16th of June 1913.

This application was made in connection with a suit for rent valued at Rs. 11,000. The judgment of the High Court being one of reversal, an appeal lay to His Majesty as a matter of course. The judgment of the High Court was passed on the 16th June 1913. Application for a copy of the judgment and decree was made on 21st November 1913; the copy was ready on 1st December 1913. The petition for leave to appeal was filed on 22nd December 1913. On the application for leave to appeal coming on for hearing,

Mr. Chuckerbutty (with him *Babus Upendra Lal Ray* and *Bhupendra Chandra Guha*) for the Opposite Party submitted that the application was out of time, having been filed six days beyond the statutory period of six months. The provision enacted in sec. 12, sub-sec. (2), Indian Limitation Act, allowing time for taking copy of the decree was *ultra vires* of the Indian Legislature in view of the order of Her Majesty in Council, dated 10th April 1838, passed under 3 and 4 William IV, C. 41, V. 24, which makes six months' time peremptory and which could not be superseded by an Act passed by the Indian Legislature. Reads the Order in Council from Bentwich's Privy Council Practice, p. 149 (Edn. 1912), Sufford and Wheeler, p. 491, etc., etc., Order in Council, dated 11th April 1838, the provisions of Order in Council of 1838, renewed by sec. 64, C. 106, of 21 and 22 Vict., C. 106 (Government of India Act of 1858). The Indian Legislature must not override Parliamentary legislation concerning India: Letters Patent of 1866, secs. 39 and 44; 24 and 25 Vict., Cap. 10, sec. 11. This is the position taken up by the Legislature in India: sec. 112 of the Civi

SYED ABDULLAH HUSAIN CHOUDHRY *v.* ANANDA CHANDRA RAY.

Procedure Code, Ilbert's Government of India, p. 179. Cites *Queen* v. *Burah* (10), *Gajadhur* v. *Emam Ali* (11), *Jawahir Lal* v. *Naraip Das* (12), *Collector of Khaira* v. *Pestonjee* (13), *Alter Caufman* v. *Government of Bombay* (14), *In re Sitaram* (4), *Anderson* v. *Peryasami* (3), *Ram Chandra* v. *Ganasham* (6), *In re Feda Hossain* (15), *In re Mahomed Cozum* (16), *East India Co.* v. *Syed Ally* (17). *Eastern Mortgage and Agency Co.* v. *Purna Chandra* (8)—the only decision after the Amending Act of 1908—does not touch the point.

It is not necessary to file a copy of the judgment with the application for leave; so there is no necessity for the Legislature allowing an extension of time on this ground.

[WOODROFFE, J.—Is it not the invariable practice to entertain such applications?]

[THE CHIEF JUSTICE.—Such applications are invariably entertained, if presented on the re-opening day, when the period of limitation expires during the holidays.]

The question was never raised before and never considered. The matter was not provided for in former legislation. The six months' time was first embodied in the Civil Procedure Code of 1877 and then re-enacted in the Limitation Act of 1877 and so omitted from the Civil Procedure Code of 1882. The extension of time was first provided for in the Amending Act of 1908. The present question could not have arisen before.

[THE CHIEF JUSTICE—Refers to the *preamble* to 21 and 22 Vict. and enquires if it does not indicate the intention of the Legislature in enacting sec. 64.]

The section clearly revives the Order in Council of 1838: Secs. 22 and 24 of 3 and 4 Will. IV, C. 41, Order in Council, realise above Statute. Field's Regulations, p. 139, shows how the Sudder Dewani Adawlat came into existence; see 24 and 25 Vict, C. 10, sec. 8, which abolishes Sudder Dewani Adawlat. The provisions of the Order in Council made applicable to the Supreme Court and Judges of that Court sec. 14: Morley's Digest, Vol. I, p. cxxxv.

Babu Gunada Charan Sen (with *Babu Surendra Nath Das Gupta*) for the Petitioner Appellant to England:—

The provision in sec. 12, sub-sec. (2), Indian Limitation Act, entitling me to compute the time necessary for obtaining copy is quite within the jurisdiction of the Indian Legislature. The legislative powers of that Legislature with regard to the administration of justice in our Courts is defined by sec. 22, Indian Councils Act, 24 and 25 Vict., c. 67. Among the exceptions provided by that section, the one in favour of the Government of India Act, 21 and 22 Vict., c. 106, is the only provision relevant to the present enquiry. But that exception does not affect the present questions, for the object and scope of 21 and 22 Vict., C. 106, are entirely different, *viz.*, to regulate the administrative government of the country and not the business of our Courts of Justice. Reads the title of the Act, the preamble and the various headings and subdivisions of the Act and the subjects discussed in

(3) I. L. R. 15 Mad. 169 (1891).
(4) I. L. R. 15 All. 14 (1892).
(6) I. L. R. 19 Bom. 301 (1894).
(8) I. L. R. 39 Cal. 510 (1912).
(10) L. R. 5 I. A. 178 at p. 193 (1878).
(11) 15 B. L. R. 221, 223 (1875).
(12) I. L. R. 1 All. 644 (1878).
(13) 3 Moo. I. A. 220 (1843).
(14) I. L. R. 18 Bom. 636 (1894).
(15) I. L. R. 1 Cal. 431 (1876).
(16) 5 Moo. I. A. 196 (1852).
(17) 7 Moo. I. A. 555 (1827).

them. The object of that Act was merely to provide for the transfer of the government of this country from the East India Company to the Crown and to make some changes relating to the control and regulation of that Government which were deemed necessary for that purpose. Sec. 64 clearly speaks of the Charter granted to the Company and the Government, *i.e.*, the executive or administrative government of India. The Act therefore does not in any way fetter the absolute right of the Indian Legislature to pass an Act relating to the administration of justice and the conduct of business in our Courts, *e.g.*, regulating the time within which an application of the present nature may be presented in this Hon'ble Court.

The question is placed beyond the sphere of doubt by sec. 11 of the Charter Act, 24 and 25 Vict., C. 104, authorising the establishment of High Courts and defining their jurisdiction, an Act which was passed in the very same year as the Indian Councils Act. By that section, all orders passed by the Sovereign in Council and relating to the conduct of business in the High Courts are made subject to the legislative powers of the Indian Legislature relating to the administration of justice in this country which powers are unfettered in this respect as already submitted. Reads sec. 11 and also sec. 9 of the Charter Act. The Letters Patent that were authorised by and issued under that Act provide for appeals to the King in sec. 39, and by sec. 44 makes all the provisions contained in the Letters Patent subject to the legislative powers of the Governor-General in Council.

The Order in Council of the 10th April 1838 has since been considerably varied by introducing additional provisions for appeal to the Judicial Committee, *e.g.*, cases coming within the second clause of sec. 110, C. P. C. This variation has been made evidently under the authority of the Charter Act, 24 and 25 Vict., C. 104, and the above provision of the Civil Procedure Code and the provision in sec. 39 of the Letters Patent to a similar effect all derive their authority from the Charter Act itself.

[JENKINS, C. J.—Have you looked into the history of Art. 179 of the Limitation Act providing for the six months' time?]

Yes, I have. The provision was originally in the Civil Procedure Code of 1859, and in 1877 it was transferred to and made part of the Limitation Act of that year. The section in the Civil Procedure Code of 1859 provided that the application for leave to appeal might be filed on the opening day, if the Court happened to remain closed on the day on which such six months' time expired. If my learned friend's argument were sound, that provision of the Code of 1859 would also be *ultra vires* of the Legislature, though it stood and was regarded as good law for at least 18 years, and I take it, even by the Judicial Committee.

Though the question has never before arisen in this form, there are authorities to show that secs. 5 and 12 of the Limitation Act, 1908, apply to an application of the present nature. Refers to *Eastern Mortgage and Agency Co.* v. *Purna Chandra* (8). The cases cited by my learned friend do not apply. The Privy Council decision in *Gajadhur* v. *Emam Ali* (11) refers evidently to the irregularity of there having been no formal application made to the High

(8) I. L. R. 39 Cal. 510 (1912).
(11) 15 B. L. R. 228 (1875).

Court on which leave to appeal might be granted and which was as a matter of fact granted upon an application for review. The question of limitation though raised in the argument was not decided by their Lordships. The other cases cited are either under the old Limitation Act of 1877 which did not allow time for copy of cases in which neither the question that arose nor the decision given throws any light on the present matter, *e.g.*, *Burah's* case (10). With them I have no quarrel.

Mr. Chuckerbutty in reply.

The JUDGMENT OF THE COURT was as follows :—

This is an application by one who desires to appeal to His Majesty in Council for a certificate that, as regards amount or value and nature, the case fulfils the requirements of sec. 110 of the Civil Procedure Code.

It is conceded that if the application is within time, a certificate ought to issue. It is however contended that the appeal is not within the period of 6 calendar months prescribed by the Order in Council of 1838. To this it is answered that the application is within 6 months from the date of the decree appealed from, if in computing the period of limitation the time requisite for obtaining a copy of the decree is excluded.

The Order in Council does not expressly allow this exclusion ; but the Limitation Act of 1908, sec. 12, purports to direct it. The question for our decision is whether it was within the competence of the Indian Legislature to enact this provision. The Governor-General in Council has power at legislative meetings to make laws for all Courts within British India subject to certain exceptions, and among them is this, that he cannot make any law repealing or affecting any provision of the Government of India Act, 1858 (24 & 25 Vict., C. 67, sec. 22).

Sec. 64 of the Government of India Act, 1858, provides that all Acts and provisions now in force under Charter or otherwise concerning India shall subject to the provisions of this Act continue in force and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of Directors and Court of Proprietors thereof.

Therefore it is contended, sec. 12 of the Limitation Act, so far as it relates to an application for leave to appeal to His Majesty in Council, was beyond the powers of the Indian Legislature.

This section is not the first instance in which the Indian Legislature has made provisions which purport to modify the absolute terms of the Order of 1838.

Thus by the Privy Council Appeals Act, 1874, it was provided that application by any one desiring to appeal to Her Majesty in Council must ordinarily be made within six months from the date of the decree ; but if that period expired, when the Court was closed, the application might be made on the day the Court re-opened (see sec. 8).

The Bill which afterwards became this Act is said to have been submitted to and approved by the Judicial Committee (see note in Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 435).

I have looked further into this, and found a statement by Mr. Arthur Hobhouse, as he then was, that fully bears out this note. Addressing the Governor-General's Council he said, "The Bill was now put into a shape which was acceptable to the Judicial Committee of the

(10) I. R. 5 I. A. 178 at p. 193 (187).

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Privy Council. The Secretary of State had been in correspondence with the Judicial Committee at our desire, and they have approved of the Bill as it stood."

This provision was repeated in the Codes of 1877 and 1882 (see sec. 897), and though the section in the Code of 1882 was repealed in 1887, that was not, as I understand, by reason of any doubt as to the competence of the Indian Legislature.

By the Limitation Act of 1877, it was provided that an application for the admission of an appeal to Her Majesty in Council should be presented within six months from the date of the decree appealed against (Article 177).

Though an opinion was once expressed that this provision was repealed by the Code of 1882 [*Fazulunnissa* v. *Mulo* (1)], no doubt seems ever to have been entertained as to the power of the Indian Legislature to deal with this subject [*Lakshmanan* v. *Peryasami* (2), *Anderson* v. *Peryasami* (3), *In re Sitaram* (4), *Thurai* v. *Jainilabdeen* (5), *Ram Chandra* v. *Ganasham* (6)]. Prior to 1874, the more general view in this Court seems to have been that when the time for appealing expired in vacation, the petition could not be presented on the day the Court re-opened [*Zamvaco* v. *Skinner* (7)]. But I find that it has now become the established practice to receive an application made on the day the Court re-opens, though beyond the prescribed six months, and this has been in reliance on sec. 8 of the Privy Council Appeals Act, 1874, and of the provisions that have taken its place

(1) I. L. R. 6 All. 250 (1884).
(2) I. L. R. 10 Mad. 373 (1887).
(3) I. L. R. 15 Mad. 169 (1891).
(4) I. L. R. 15 All. 14 (1892).
(5) I. L. R. 18 Mad. 484 (1895).
(6) I. L. R. 19 Bom. 301 (1894).
(7) 1 B. L. R. O. C. 39 (1867).

in the Code and the Limitation Acts. It is true that neither the 2nd clause of sec. 5, nor the 2nd paragraph of sec. 12 of the Limitation Act of 1877 has been applied to an application for leave to appeal to His Majesty in Council, but that is because an application for that purpose did not come within the terms of either section. The Limitation Act of 1908 has been extended to such an application.

I do not rely on the decision in *Eastern Mortgage & Agency Co.* v. *Purna Chandra* (8), as showing that this extension was valid, as the objection to the powers of the Indian Legislature was not advanced in that case. This is the first occasion on which the point has been taken.

But if sec. 8 of the Privy Councils Act of 1874 was within the competence of the Indian Legislature, I think, sec. 12 of the Limitation Act of 1908 must equally have been within its power. And I have shown that there is strong reason for thinking that sec. 8 was valid legislation.

The Court's power to deal with applications for leave to appeal rests primarily on cl. 39 of the Letters Patent, which ordains that any person may appeal to the Privy Council in the cases there mentioned, "subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders are hereby varied and subject also to such further rules and orders as he may with the advice of our Privy Council hereafter make in that behalf."

Cl. 44 of the Letters Patent is in these terms:—"And we also further ordain and

(8) I. L. R. 39 Cal. 510 (1912).

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declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and regulations and. . . . . may be in all respects amended and altered thereby."

Apart from sec. 64 of the Government of India Act, 1858, there would seem to be no bar to the legislation under consideration. Even if it be that legislation regarding the admission of appeal affects the prerogative of the Crown [see *Motichand* v. *Gunga Prasad* (9)], still it would not be deemed invalid by reason of that only, though subject to the power of disallowance by the Crown. Nor do I think the enactment of sec. 12 of the Limitation Act, 1908, so far as it relates to applications for leave to appeal to His Majesty in Council, is forbidden by sec. 64 of the Government of India Act, 1858.

The whole section must be read, and it must be borne in mind that it is a part of an Act dealing with the transfer to the Crown of the Government of India.

The conclusion then to which I come is that sec. 12 of the Limitation Act of 1908 was within the legislative powers of the Government of India, and that the present application is within time. A certificate must therefore issue that as regards amount, value and nature, the case fulfils the requirements of sec. 110 of the Code.

The Respondent must bear the cost of this application which we assess at 3 gold mohurs.

(9) L. R. 29 I. A. 40 at p. 42 (1901).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES
Nos. 202, 255 TO 258 OF 1912.

COXE, J.
IMAM, J.
1914,
Heard, 24 and 25, March.
Judgment, 2, April.

MUSSTT. SAMBHO KUOR, Defendant No. 3, Appellant,
v.
HARIHAR PERSHAD, Plaintiff, Respondent.

*Revenue Sale Law (Act XI of 1859), secs. 14, 33—Separate share—Whole estate put up for sale, if arrears not deposited within 10 days—Sharers of defaulting share if may buy—Several co-sharers paying dues within 10 days—Purchaser, who is—Right of co-sharer declared, purchaser how may be challenged in Civil Court—*Benami, *proof of—Circumstantial evidence—Court's discretion in granting time to deposit deficit court-fees—Mistake—Limitation.*

When an order allowing a Plaintiff to deposit deficit Court-fees has been made and complied with, no question of limitation can be raised. But it is not proper for a Court to extend the period of limitation allowed by law to the prejudice of Defendants, by giving the Plaintiff time to deposit deficit Court-fees when there is no question of any mistake, merely to suit the convenience of the Plaintiff.

Direct evidence to prove a transaction benami, *cannot be expected, since the whole object of such a transaction is to suppress evidence of the real facts. The true facts can be proved by circumstantial evidence.*

When on a share of a revenue-paying estate, in respect of which a separate account has been opened, being put up for sale, the highest offer does not equal the amount due thereon, and the Collector stops the sale and declares that the entire estate will be put up to sale for arrears, unless the other recorded sharer or sharers or one or more of them shall within 10 days purchase the

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share in arrear by paying to Government the whole arrear due from the share, and more than one such recorded co-sharer separately make the necessary payment within the time specified, the Collector must recognize as purchaser the depositor who first pays the whole amount, or if there are more depositors than one to recognize as joint purchasers those whose payments first amount to the total arrears due.

Sec. 33 of Act XI of 1859 applies to sales under sec. 14, and when the first payer has been declared by the Collector to be the purchaser, a co-sharer who has paid up the arrears subsequently cannot have the sale set aside by suit in the Civil Court except upon proof of the circumstances specified in sec. 33. Such a sale under sec. 14 cannot be attacked as a nullity and as such not requiring proof of those circumstances.

CHOOTURBHUJ DUTT *v.* ISHRI MUL (2), GOBINDLAL RAY *v.* RAMJANAM MISSER (3) *followed.*

Quære :—*Whether sec. 14 of Act XI of 1859 precludes sharers of the share exposed for sale from purchasing the defaulting share.*

This was an Appeal preferred on the 25th June 1912 against the decree of H. Foster, Esq., District Judge of Zilla Saran, dated the 6th June 1912.

The facts of the case will sufficiently appear from the judgment.

Dr. Dwarka Nath Mitter and *Babu Bejoy Kumar Bhuttacharjee* for the Appellant.

Babus Umakali Mukerjee, Gonesh Dutt Singh, Shiva Nandan Ray and *Rajendra Prosad* for the Respondent.

(2) I. L. R. 21 Cal. 884 (1894).
(3) I. L. R. 21 Cal. 70 (1893).

The JUDGMENT OF THE COURT was as follows :—

No. 202.

COXE, J.—In this case it appears that Tauzi No. 3306 comprised numerous separate accounts. The Plaintiff had an interest in separate account No. 282, the first Defendant in No. 168 and the second Defendant in No. 222. Several of these accounts fell into arrears, among them being No. 222 and the residuary share. They were advertised for sale, and the sale was fixed for the 20th September 1909. On that date No. 222, among others, was put up for sale, but no bids were received. Accordingly the Collector under sec. 14 of the Revenue Sales Act, 1859, declared that the entire estate would be sold unless the other sharers paid up the arrears within 10 days. The next day, the 21st September, the 1st Defendant paid in the arrears due on No. 222 and on the 28th he paid all the sums due on the various separate accounts. On the 22nd September the Plaintiff offered to pay in the money due on the various separate accounts with the exception of the residuary account. The Collector said that they needed no permission of his to deposit the money, and that the question, with whom the shares in default would be settled, would be decided after the expiry of the 10 days. After that on the 4th November the Collector declared the 1st Defendant to be the purchaser on the ground that he had paid in the money first. This order was upheld on appeal by the Commissioner on the 8th February, 1910, and the sale was confirmed. Possession was delivered to the 1st Defendant on the 31st March 1910 and in the following December he sold the property to the 3rd Defendant. On the 7th February

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1911, this suit was brought for possession of the whole of No. 222. and in the alternative for possession of half. The learned District Judge held that the first Defendant was a mere *benamidar* for the second Defendant, who was a defaulting proprietor of No. 222 and not entitled to purchase under sec. 14 of the Act. Accordingly, he decreed the Plaintiff's suit in full. The 3rd Defendant appeals.

An objection taken that the suit was instituted out of time was dropped. It appears that the suit was instituted on the last day with a Court-fee of Rs. 800 in defect. The Sub-Judge, in whose Court the case was instituted, weakly allowed two adjournments to put in this money and subsequently the Court was closed for three days. The money was paid on the opening day. The order of the Sub-Judge was in my opinion quite unjustifiable. It is not proper for a Court to extend the period of limitation beyond that allowed by law, to the prejudice of Defendants, when there is no question of any mistake, merely to suit the convenience of the Plaintiff. But the order having been made and complied with, the question of limitation cannot now be raised.

Next it is contended that the lower Court erred in holding that the 1st Defendant was a *benamidar*, and it is urged that there is no evidence to support this finding. In my opinion, however, the finding is perfectly right. You cannot expect direct evidence of a *benami*. The whole object of such a transaction is to suppress evidence of the real facts. But the true facts can be proved by circumstantial evidence, and this has been done in the present case. The learned District Judge has dealt fully with this question, and as I agree with his reasoning and conclusions, it is unnecessary to repeat them. Suffice it to say that in my opinion there can be no doubt that the 2nd Defendant was the real purchaser, both in the purchase by the 1st Defendant in September 1909, and in the sale by the 1st Defendant to the 3rd Defendant in December 1910.

Assuming then that the 2nd Defendant was the real purchaser in September 1909, it must next be decided whether, being a defaulting proprietor of No. 222, he could purchase under sec. 14. The learned District Judge holds that he could not do so, not being "another sharer" within the terms of the section.

The section is not very easy to construe, and perhaps it will be convenient to set it out in full.

"XIV. If in any case of a sale held according to the provisions of the last preceding section, the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale, the Collector or other officer as aforesaid shall stop the sale, and shall declare that the entire estate will be put up to sale for arrears of revenue at a future date, unless the other recorded sharer or sharers or one or more of them, shall, within ten days, purchase the share in arrear by paying to Government the whole arrear due from such share. If such purchase be completed, the Collector or other officer as aforesaid shall give such certificate and delivery of possession as are provided for in secs. XXVIII and XXIX of this Act, to the purchaser or purchasers, who shall have the same rights as if the share had been purchased by him or them at the sale. If no such purchase be made within ten days as aforesaid, the entire estate shall be sold, after notification for such

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period and publication in such manner as is prescribed in sec. VI of this Act."

As there is no previous reference in the section to any sharer, the words "other recorded sharer" must, I think, mean "a recorded sharer of a share other than the share exposed for sale." This perhaps would by implication exclude any sharer of the share exposed for sale, even though he himself might have paid his quota of the revenue due on the share exposed for sale. It seems doubtful if the Legislature intended this. It is clear from sec. 53 that defaulting proprietors may purchase at sales for arrears of revenue, and I can see no reason why they should be excluded from sales under sec. 14. Of course at a sale under sec. 14 they merely have to pay the arrears due, whereas at an auction they would have to pay the full value. It may therefore be said that to allow them to purchase under sec. 14 might defeat the law, because such a purchase would come to the same thing as depositing the arrears after the latest day of payment, which cannot be done without the Collector's leave, whereas in the case of an auction they would have to pay the full value. But as they would be entitled to the balance after the arrears were satisfied, the distinction would not make much practical difference. If the defaulting sharer could have purchased the share on the day of sale under sec. 13, and this would seem from sec. 53 to be permissible, it is difficult to understand why he should not purchase under sec. 14. I am inclined to think therefore that the word "other" in sec. 14 is a mere inadvertence, though in the view that I take of the case it is not necessary to come to a definite decision on this point.

Next it is argued that as the Plaintiff did not pay in the arrears due on all the separate accounts, he is not entitled to the benefit of sec. 14. It seems that the framers of the section did not advert to the possibility of more than one separate account falling into arrears and some difficulty might arise in that case. Suppose an estate consisting of 3 separate accounts A, B and C. The revenue of A is paid up exactly with nothing over, and B and C are in arrears to the extent of Rs. 100 each. Declarations are made with respect to B and C. The owner of A hearing of the declaration about B pays in Rs. 100 and becomes the owner. He still apparently may lose both A and B, for the arrears on C, and his purchase of B in that case would go for nothing. But I do not think that in this case the materials justify us in saying that the Plaintiff's deposit was insufficient. The estate could only be sold, if the whole of it was in arrears, and we cannot say that the Plaintiff's deposit was insufficient without proof of that fact. This might depend on the question whether the accounts, which were not in arrears, showed balances in favour of the owners and this question has not been considered. Indeed it would appear at first sight from Ex. II (opposite page 42 of the paper-book) that the arrears on the whole estate were much less than the Plaintiff's deposit.

The next point to be considered is whether the Collector was right in holding that the Defendant was the sole purchaser. It is argued that sec. 14 gives all the co-sharers the right to deposit the arrears for ten days and that no co-sharer can defeat that right by depositing the arrear due a little earlier than his fellows. Reference is made to the case of *Debi Pershad v. Aklio Koer* (1). In that case however this point did not arise. It was not stated

(1) 4 C. W. N. 465 (1899).

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who paid the arrears first. The Collector issued a joint certificate to all those who had paid and the Plaintiff sued to recover a third. The only question discussed was whether he was entitled to a third, or to a share proportionate to his interest in the parent estate.

It seems to me that the section was intended merely to give co-sharers a chance of saving the estate and to secure the payment of the revenue and was not at all intended to define the rights of the co-sharers *inter se*. The words "unless the other recorded sharer or sharers or one or more of them, shall, within ten days, purchase the share in arrear by paying to Government the whole arrear due from such share" mean in my opinion that the purchase is effected by the payment of the arrears. As soon as the payment is made, the purchase is complete and there is nothing left for any one else to buy. The Collector is bound therefore, in my opinion, to recognize the depositor who first pays the whole amount, or, if there are more depositors than one, to recognize as joint purchasers those whose payments first amount to the total arrears due.

Finally, it seems to me that even if the Collector's order was wrong, and even if the purchase was bad as being made by a defaulting proprietor of No. 222, the suit is barred by sec. 33 of the Act. It was held in *Chutoorbhuj Dutt* v. *Ishri Mul* (2), that section 33 applies to sales under sec. 14, a view with which I entirely agree, and as the Plaintiff has suffered no injury, the section is fatal to the suit. It is argued that the sale was a nullity and therefore it is unnecessary to annul it. That contention was dealt with once for all in *Gobind Lal Ray* v. *Ramjanam Misser* (3). Sec. 33 lays down that sales for arrears of revenue cannot be annulled except in a certain way. The operation of the section had been frequently avoided by holding that some particular defect alleged prevented the sale from being a sale under the Act, or in other words, made it a nullity. All these refinements were swept away by the decision I have quoted, and now a sale for arrears of revenue can only be assailed in accordance with the provisions of the Act. Even if there had been a distinct provision in sec. 14 that a separate account should not be sold to a defaulting proprietor, I think that such a sale could under this decision be questioned only in accordance with the Act. But when there is no such distinct prohibition, the sale cannot possibly be regarded as a nullity.

Next it is contended that the Plaintiff does not want the sale annulled, but merely that he may be declared the purchaser. To accept this contention would in my opinion be twisting the plain English of the statute. The Defendant has been formally declared the purchaser and the land has been delivered into his possession. To take it away from him and give it to the Plaintiff would in my opinion be a manifest annulment of the sale: a complete annulment if the whole land were taken away from him, and an annulment *pro tanto* if a portion were taken. In my opinion therefore the suit is barred by sec. 33 of the Revenue Sales Act, 1859. The appeal must be decreed and the suit dismissed with costs throughout.

The same order must be passed in Appeals Nos. 255—258. The decision of *benami* does not arise in these cases, but

(2) I. L. R. 21 Cal. 844 (1894)

(3) I. L. R. 21 Cal. 70 (1893).

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they are equally barred by sec. 33 of the Act.

IMAM, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3182 OF 1912.

FLETCHER, J. RICHARDSON, J. 1914, Heard, 22, May. Judgment, 28, May.	SRIMATI RAJANI BALA DASI, Plaintiff, Appellant, *v.* BHAJA HARI KOLEY and another, Defendants, Respondents.

Cess Act (IX of 1880), sec. 95—Returns filed by certificated guardian of minor, if admissible in favour of minor—"Authorised agent."

A road-cess return filed on behalf of a minor by his certificated guardian is not admissible in favour of the minor.

The words in sec. 95 of the Road and Public Works Cess Act requiring returns filed under the Act to bear the signature and address of the person or his authorised agent are directory only, and the fact that the certificated guardian was not the authorised agent of the minor does not make the returns admissible in his favour.

This was an Appeal preferred on the 22nd November 1912, against the decree of Babu Lalit Mohan Das, Additional Subordinate Judge of Hooghly, dated the 19th July 1912, modifying a decree of Babu Malati Nath Bose, Munsif, 2nd Court, Hooghly, dated the 6th September 1911.

The Plaintiff-Appellant was the widow of one Sarat Chandra Ghosh and sued for recovery of an 8as. share of certain arrears of rent due in respect of three *jamas* held by the principal Defendant Bhaja Hari Koley, making Kalidas Ghose, the *malik* of the remaining 8as. share and who in the lifetime of Sarat was for some time his certificated guardian, *pro forma* Defendant. Plaintiff alleged that her husband's share of the rent used to be collected separately, but that the tenants in collusion with Kalidas were objecting to separate payment. The tenant Defendant who alone contested the suit alleged that Kalidas was the sole landlord and that Plaintiff or her husband had no share in the *maliki* interest and that he had duly paid the rents due to Kalidas. He also disputed the amount of the *jamas* as alleged in the plaint.

Both the Courts found that Plaintiff's title to an 8as. *maliki* interest was established by, amongst other evidence, the road-cess returns which Kalidas had filed for himself as also on behalf of the minor Sarat Chandra Ghosh and in which the latter's name appeared as a co-sharer. The Munsif relied on these road-cess returns also to determine the question of the amount of the rents payable on the *jamas*, and finding that they agreed with those claimed by the Plaintiff gave her a decree on that basis. On appeal, the Subordinate Judge reversed this finding, holding that the road-cess returns were inadmissible in evidence in Plaintiff's favour to prove the amount of the *jamas*. He accordingly gave a decree to the Plaintiff at the rates admitted by the Defendant, though he rejected certain *dakhilas* purporting to have been given to the Defendants by the Plaintiff's co-sharer as forgeries.

Babu Nagendra Nath Ghosh, for the Appellant, submitted that sec. 95 of the Cess Act did not make the road-cess returns admissible against Sarat or his widow, and equally it did not make them inadmissible in their favour. The returns were not filed by Sarat, nor by his

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authorised agent. Kalidas was not Sarat's authorised agent. Compare the language of sec. 95 of the Road Gess Act with that of sec. 18 of the Evidence Act. It has been recently held by the Privy Council with reference to this and other sections of the Evidence Act that an admission by a guardian does not bind a minor: *Manokarnika* v. *Haripada* (1). Sec. 95, Road Cess Act, has been held to be in the nature of a proviso or exception to sec. 21 of the Evidence Act. If sec. 95 of the Road Cess Act does not stand in the way, the returns would be admissible in favour of Sarat under sec. 32 of the Evidence Act. They were no doubt not proved as required by sec. 32, but no objection to mode of proof was raised at the trial: *Ram Prasad* v. *Sham Narain* (2). Moreover, in this case such proof is unnecessary, as the returns are admissible under sec. 19 of the Evidence Act, which applies specially, as the tenant says that he paid the whole rent to Kalidas, and Kalidas's gomasta comes and supports him.

If Sarat is a stranger to the Road Cess returns, then there is ample authority that such returns are admissible in favour of strangers under sec. 11 or 13 of the Evidence Act: *Ram Prasad* v. *Sham Narain* (2), *Daitari* v. *Jugobundhoo* (3), *Chalho Singh* v. *Jharo Singh* (4).

Babu Bepin Behari Ghosh (*Sr.*), for the Respondents, submitted that the section expressly makes Road Cess returns inadmissible in favour of the person on whose behalf the returns are filed. The returns here on the face of them were filed as well on behalf of Kalidas himself as on behalf of Sarat. Cites *Mahomed* v. *Safar Ali* (5), *Nuseerun* v. *Gouree Sankar* (6).

Babu Nagendranath Ghosh in reply:— In the cases cited, the returns were sought to be used in favour of persons who or whose authorised agents filed them. Here they were filed by a person who was not authorised in law to file them. To test the applicability of sec. 95, you have to ask whether the returns would be admissible against Sarat. If not, neither can they be inadmissible in his favour. Sec. 95 applies or does not apply as a whole. It cannot be inapplicable in part and applicable as to the rest.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is an Appeal against the judgment of the Additional Subordinate Judge of Hooghly, dated the 19th of July 1912, modifying the decree passed by the Munsif.

The suit was brought by the Plaintiff as heir of her deceased husband Sarat Chandra Ghosh to recover against the Defendant No. 1 an 8 annas share of the rent for certain holdings. The Defendant No. 2 is the uncle of the late husband of the Plaintiff and owns the other 8 annas share in the holding.

The only point that has been argued before us is whether the learned Judge in the lower Appellate Court rightly rejected certain road-cess returns which had been given in evidence by the Plaintiff in the Court of first instance.

The Defendant no. 2 is a formal Defendant to this suit, and no relief was asked against him.

The road-cess returns in question were filed by the Defendant No. 2 during the

(1) 18 C. W. N. 718 (1914).
(2) 6 C. L. J. 22 (1907).
(3) 23 W. R. 298 (1875).
(4) I. L. R. 39 Cal. 995, 1005 (1911).
(5) I. L. R. 11 Cal. 407 (1885).
(6) 22 W. R. 192 (1874).

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minority of the late husband of the Plaintiff as his certificated guardian.

Sec. 95 of the Cess Act, 1880 [Act IX of 1880 (B. C.)] provides that "every return filed by or on behalf of any person in pursuance of the provisions of this part shall bear the signature and address of such person or his authorised agent and shall be admissible against such person, but shall not be admissible in his favour."

It has been argued before us that as the returns in question were not signed by Sarat Chandra owing to his minority and as the Defendant No. 2 as his certificated guardian was not his authorised agent, the section allows the returns to be used as evidence in favour of the Plaintiffs. But this argument is not borne out by the language of the section.

The section provides that the returns filed by or on behalf of any person in pursuance of the Act are admissible in evidence against him, but not admissible in his favour.

The words as to the return bearing the signature and address of the person or his authorised agent appear to me to be directory only.

I can see nothing in the section that provides that if for instance a wrong address is given that the return would be admissible in evidence in favour of the person by or on whose behalf it was filed.

I think the learned Judge in the lower Appellate Court was right in refusing to accept these returns in favour of the Plaintiff.

The present appeal therefore fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 900 OF 1913.

IMAM, J.
1914,
4, June.

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v.
MOHIM CHANDRA RAI.

Indian Copyright Act (III of 1914)—Copyright Act (1 and 2 Geo. V, C. 46)—Law Reports, copyright in—Reports of judgment, copyright in—Selection of judgments, copyright in—Judgments obtained by expenditure of time, labour or money by one, if may be reproduced by another—Extracts from judgments and facts taken from record, copyright in—Common source of information, reference to—Injunction, perpetual—Pirated matter, direction for delivery and destruction—Damages, assessment of.

It is generally true that in the reports of judgments, the reporter has no copyright, but it cannot be said that in the selection of cases and in the arrangement of the reporting, the reporter has not the protection of law. One is entitled to report such judgments as he obtains by expenditure of his time, labour, money, but when he fails to exert his own energies, he cannot be allowed to avail himself of other peoples' industry. Nor will he be allowed to take quotations from judgments or facts obtained by another from the records of a case.

The principle is, that whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works, subject to copyright and entitled to protection.

LEWIS *v.* FULLARTON (1) *followed.*

The Plaintiff abovenamed is the Editor and Proprietor of the *Calcutta Weekly Notes* wherein are published amongst other things reports of appeals to the Judicial Committee of the Privy Coun-

(1) 2 Beav. 6 at p. 8 (1839).

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cil and of cases determined by the Calcutta High Court with head-notes, statement of facts, notes of arguments and extracts from judgments of the lower Courts, where necessary. The Defendant No. 1 is the Editor, Proprietor and Publisher of a certain publication known as the *Calcutta Case Law*, and Defendants No. 2, the printer thereof. It was stated in the plaint that these reports were the result of considerable labour and expense on the part of the Plaintiff and of the staff in his employment. That the Plaintiff claimed an exclusive copyright in such reports and every portion thereof. That the Defendant No. 1 abovenamed systematically printed, reproduced and published reports from the *Calcutta Weekly Notes* with colourable alterations without the Plaintiff's permission and sold and offered for sale the said *Calcutta Case Law* containing such pirated reports for the Defendant No. 1's own profit. The Plaintiff gave some instances of such piracies in a schedule annexed to the plaint and craved leave to refer to the offending volumes of the *Calcutta Case Law* when produced. The Plaintiff prayed for a declaration of his subsisting copyright in the *Calcutta Weekly Notes* as aforesaid and that the Defendants had pirated from it by printing and publishing the said *Calcutta Case Law*. That the Defendants, their servants and agents be restrained by perpetual injunction from pirating as aforesaid, and for account of the pirated publication and of its sale and profits made by the Defendants and for damages and the delivery of the unsold copies to the Court for destruction. The plaint was filed on the 30th of August 1913, and on the application of the Plaintiff a rule was issued on the Defendants to show cause why an *ad interim* injunction restraining them from selling or circulating the pirated publication should not issue.

The Defendant No. 1, the Editor and Proprietor of the said *Calcutta Case Law*, stated in his affidavit in opposition as also in his written statement which he filed in the case that he had not infringed the alleged copyright of the Plaintiff. That the Plaintiff had not any copyright in the judgment portions of the reports published in the *Calcutta Weekly Notes*. That the head-notes, statement of facts, etc., in his publication were not similar, but were distinctly different and independant, that he was entitled to get hints, suggestions, references or informations from the Plaintiff's work and that small quotations taken by him with the author's initials did not amount to piracy. That the common errors or omissions pointed out in the plaint were either accidents and coincidences or the result of comparison of the proof-sheets of his publication with the reports in the *Calcutta Weekly Notes* for the sake of convenience and formed no proof of piracy.

At the hearing of Plaintiff's application for *ad interim* injunction before the Hon'ble Mr. Justice Chitty on the 1st of December 1913, the Defendants No. 2 stated that they had printed only a few issues of the pirated publication and that they did not know that the matter was printed from the *Calcutta Weekly Notes*, that they had no copy or copies of the said publication in their possession and gave an undertaking in Court not to print in the future any issue or issues of the *Calcutta Case Law* containing any pirated matter and that they had no intention of defending the suit and were willing to submit to an injunction. Thereupon

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the Plaintiff waived his claim for damages against him, but the suit being in the nature of a tort he did not withdraw the suit against him, but gave an assurance in Court that he would not ask for costs of subsequent hearing against Defendant No. 2 if he would not defend, but submit to a decree.

Against Defendant No. 1 on the same day an *ad interim* injunction was granted restraining him from selling, circulating or otherwise disposing of any of the pirated publications. The suit came on for hearing before Imam, J., on the Original Side on the 14th of May 1914.

Messrs. B. Chakravarti, H. D. Bose and *B. K. Lahiri* for the Plaintiff.

Mr. M. N. Basu for Defendants No. 2, the City Printers, Ld.

Defendant No. 1, Mr. M. C. Rai, appeared in person and stated that he was a lawyer of standing and would defend his own case.

Mr. B. Chakravarti after opening the case said :—The Plaintiff's grievance is that the 1st Defendant systematically pirated from the reports of cases published in the *Calcutta Weekly Notes* in preparing reports for his legal publication, the *Calcutta Case Law.* The Plaintiff had to employ both in this country and in England a paid staff of reporters for attending Court and obtaining information regarding important decisions of the Privy Council and the Calcutta High Court and for supplying him with references of cases and notes and other materials necessary in reporting the same. The judgments of the Court were also copied by a paid staff of clerks in his employ. Then it required a great deal of labour and discrimination on the part of the Plaintiff and his paid staff to make a selection of cases out of the copies of judgments so obtained. It was not every judgment of which copies were taken that was reported. But it was such cases as the Editor and his paid staff considered worth reporting that were reported. The Defendant published most of these reports in his publication after they appeared in the *Calcutta Weekly Notes*, with colourable alterations. That he has taken them from the *Calcutta Weekly Notes* admits of no doubt. He has copied errors and reproduced with identical omissions. He has further copied the judgments and reports with reporters' initials and his explanation is that his clerk or proof-reader considered the initials as part of the judgments. We have given a classified list of instances which will prove the piracy beyond any question. Such instances given in the schedule to the plaint are not exhaustive, but would raise the presumption that the Defendant No. 1 has committed wholesale piracy from the *Calcutta Weekly Notes*. The Defendant No. 1 has not produced his manuscripts and that amounts to positive proof that he has so pirated. In the schedule annexed to the plaint the Plaintiff gave some of the instances of piracy which may be classed as follows :—

(1) Reports of judgments were reproduced with reporter's note thereon, the latter being in several cases copied verbatim with the reporter's initials.

(2) Facts of cases were reproduced with colourable alterations.

(3) Reports of judgments were reproduced in the same form where a judgment is reported in a particular form in the *Calcutta Weekly Notes*, *e.g.*, where only such portions of a judgment are reported in the *Calcutta Weekly Notes* as are considered material to the report omitting other portions with suitable editorial

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observations, the same portions of the same judgment are published in the Defendant's publication with the same or very similar editorial observations.

(4) Head-notes of cases were reproduced with colourable alterations.

(5) Cases in which the judgment is very short and does not contain the facts of the case are reported in the *Calcutta Weekly Notes* with the facts given as collected from the records of the case and the head-notes in such cases are, as they can only be, prepared by studying the judgment and the facts together. These judgments were also published in the Defendant's publication without any facts given, the head-notes having been prepared from the head-notes as given in the *Calcutta Weekly Notes.*

(6) Short head-notes of cases were reproduced verbatim or only with colourable alterations.

(7) Reports of cases in which the Plaintiff corrected obvious errors or mistakes in the judgments were published with the identical corrections. Where, again, in reporting a case there was any error, omission or misprint in the Plaintiff's publication, the same error, omission or misprint appeared in the subsequent report of the same case in the Defendant's publication.

(8) The general arrangement of the reports of cases in the *Calcutta Weekly Notes* was adopted by the Defendant in reporting the same cases in his publication.

The defence set up by the Defendant is worthless. It is characterised by a frankness which amounts to boldness. His defence is that he can appropriate the fruits of other peoples' labour and expense with impunity. That he can appropriate other peoples' literary property for his own personal gain, because he has been offering his publication pirated from different sources cheap and thus doing public benefit. In every case of larceny, literary or otherwise, a similar plea may be set up, and no Court of law would tolerate such a defence. The Plaintiff prayed for a perpetual injunction restraining the Defendants from pirating from his publication and printing, publishing, selling and circulating the pirated publication, for accounts, for damages, for delivery to Court and destruction of the pirated copies of the Defendant's publication and for such other relief as to the Court might seem fit.

Mr. M. N. Basu after Mr. Chakravarti's opening stated to Court that he was willing to submit to a *perpetual injunction* on behalf of Defendants No. 2, the City Printers, Ld., and prayed for being excused the costs of this hearing as he intimated at the hearing of the rule for *ad interim* injunction that he would do so and would not defend the suit.

Mr. Chakravarti.—If the Defendants No. 2 would submit to a *perpetual injunction* in the form given in the case of *The Incorporated Council of Law Reporting in England* v. *William Green and Sons* (2) [*vide* the *English Weekly Notes* (1912)], he would not ask for costs against Defendants No. 2 after the 1st of December 1913, when they appeared at the hearing of the rule for *ad interim* injunction and intimated that they were willing to submit to a perpetual injunction.

(2) [1912] W. N. (Eng.) 243. The injunction given there was in this form:—"Injunction to restrain the Defendants from printing, publishing or selling a series of reports containing any reprints of cases or judgments from the Law Reports of the Plaintiff Council or for otherwise infringing the Plaintiff's copyright in the said Law Reports."

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Mr. Chakravarti.—What issues does the Defendant No. 1 raise?

The Defendant then raised issues which after discussion were settled as follows:—

(1) Has the Plaintiff any copyright in the judgment portion of the Report?

(2) Do the instances given in the schedule to the plaint constitute any infringement of copyright?

(3) Is the suit barred by limitation?

(4) To what relief, if any, is the Plaintiff entitled?

Mr. Chakravarti.—Does the Defendant wish me to go into evidence that Mr. Chaudhuri is the Proprietor, Editor and Author of the reports?

Mr. M. C. Rai, Defendant No. 1.—I admit that Mr. Chaudhuri is the sole Proprietor, Editor and Publisher of the reports and also that it is the result of labour and expense on his part as also of the staff in his employment as stated in para. 2 of the plaint and I also admit that he is the Author of the reports.

Mr. Chakravarti.—Does the Defendant admit that the copyright of the *Calcutta Weekly Notes* is duly registered? [Although I submit that under the new Indian Copyright Act (III of 1914) it is not necessary to register or prove registration.]

Mr. Rai.—I do not dispute that. I do not call any evidence.

Mr. Chakravarti—Puts in Volumes 13 to 18, *Calcutta Weekly Notes*, and Mr. Rai 1 to 6, *Calcutta Case Law.*

Mr. Rai.—The real question is, has Mr. Chaudhuri any copyright in judgments? If not, my quoting of error and omissions in judgment won't matter. Refers to sec. 10 of the Indian Copyright Act. Mr. Chaudhuri has not composed the judgments. Refers to *Sweet* v. *Benning* (3). There can be no copyright in verbatim reports of judgments. See foot-note in Scrutton's Copyright that the Supreme Court of United States has held that neither a judge nor the State as his assignee can get copyright in his judgment: *Bank* v. *Manchester* (4).

Mr. Chakravarti.—American decisions are of no authority in this country. In England also the citation of American authorities is discouraged. Reads extract from an article in the *Law Quarterly Review* quoted in 15 *Calcutta Weekly Notes*—notes p. ii, where such citations are condemned as "Trans-Atlantic Excursions." Refers also to *In re Missouri Steamship Co.* (5). Lord Halsbury, L. C., said:—"The practice of quoting American decisions as authorities is wrong. Among other things it involves an enquiry which often is not an easy one, whether the law of America on the subject in which the point arises is the same as our own." Fry, L. J., observed that it is a waste of time to cite American authorities. Cotton, L. J., also said that he had often protested against it.

Mr. Rai—Refers to *Leslie* v. *Young and Sons* (6). A person reprinting Railway Time-tables with omission of some stations and trains cannot restrain another from reprinting from him. In non-copyright matters, I can re-print with errors and omissions. As to how far an author can take advantage of other's books, see *Jarrould* v. *Houlston* (7). I have every right to quote reporter's initials; it amounts to acknowledgment. As for reproduction, the copyright prohibits exact reproduction, but I can read and reproduce

(3) 16 C. B. 459 (1855).

(4) 21 Davis 244.

(5) 42 Ch. D. 321 at pp. 330-331 (1889).

(6) [1894] A. C. 335 at p. 340.

(7) 3 K. & J. 708; 3 Jur. N. S. 105 (1857).

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the substance from memory. According to Indian law, whole thing must be reproduced to amount to infringement, but in English law a substantial portion would be enough.

[IMAM, J.—You mean to say that you can get round the law by taking facts from another and putting it in your own language ?]

Mr. Rai.—Yes, see Scrutton on Copyright, 3rd Ed., p. 136 (2nd Ed., p. 130). My object is to collect matters for the benefit of the public. If Mr. Chaudhuri committed mistakes, I am not surely to blame for copying them. I did not copy the whole thing. The subject for consideration being same, there must be similarity of thought and language.

[IMAM, J.—Also similarity of mistakes ?]

I avoided exact copying, so I am not within the clutches of law. Refers to *Leslie* v. *Young and Sons* (6). Re-prints with omissions and errors, etc., are no infringement: *Ager* v. *P. & O. S. N. Co.* (8) permits a subsequent author to use information as guide to common source: *Roworth* v. *Wilkes* (9). Extracts must be of material parts. See *Cooper* v. *Stephens* (10); also refers to *Pike* v. *Nicholas* (11).

Mr. B. K. Lahiri in reply:—The Defendant has cited cases from text-books, and the decisions on which he relies far from supporting his own contention go to support the case for the Plaintiff. In *Sweet* v. *Benning* (3), it was never doubted that law reports like any other literary production were protected by the law of copyright. Refers to argument and also to the judgment in the above case. Only Maud, J., doubted, if an honest digest from law reports would amount to piracy. His brother Judges were of opinion, even such digest is not permissible. Defendant's publication is not a digest. He leaves out statement of facts in many cases and pirates Plaintiff's selection of judgments without going to the original sources, without independent labour and expense. Reference given by him at the top of every case reported by him to the *Calcutta Weekly Notes* shows clearly that he has taken them out of the Plaintiff's reports and that he has not only infringed the copyright in each case, but also in his selection of cases.

IMAM, J.— You need not address me on facts but only let me have the cases on which you rely.

Mr. Lahiri—Refers to *Hodges & Smith* v. *Welsh* (12), where relying on English authorities cited therein the Judges held that selections of judgments are protected. There comparative tables are given similar to those given in our schedule to show that colourable alterations as made by the present Defendant would amount to piracy.

That there may be copyright in non-copyright matter by expenditure of labour, judgment and expense is too well-known to require repetition. Refers to *Kelly* v. *Morris* (13).

A decision of Wilson, J. (later on the Rt. Hon'ble Sir Arthur Wilson) of this Court in *McMillan* v. *Suresh Chunder Deb* (14), which has been accepted by English authorities as laying down good law, held many years ago that an author can acquire copyright in his selection of poems, al-

(3) 16 C. B. 459 at p. 480 (1855).
(6) [1894] A. C. 335 at p. 340.
(8) 26 Ch. D. 637 (1884).
(9) 1 Camp. 94 (1807).
(10) [1895] 1 Ch. 567 at p. 572.
(11) L. R. 5 Ch. 251 (1869).
(12) 2 Ir. Eq. R. 266.
(13) L. R. 1 Eq. 697 (1866).
(14) I. L. R. 17 Cal. 951 (1890).

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though the individual poems were non-copyright matter. In this case, the Defendant had not merely re-printed this selection of poems, but gave different readings, corrected punctuations, added biographical and other notes, yet it was held to be piracy and Palgrave's Selection called "Golden Treasury of Songs and Lyrics" was protected against infringement of this character. *Hogg* v. *Scott* (15), referred to in the above case, lays down to what extent previous works may be referred to by subsequent authors and for what purposes.

In *Walter* v. *Lanes* (16), copyright in law reports is recognised. Lord Halsbury lays down that the principle is that a man shall not avail himself of another's skill, labour and expense. Acknowledgment is no defence: *Bohn* v. *Bogne* (17). Occurrence of common blunders is infallible test of piracy. So also recurrence of identical passages, and where Defendant denies piracy, such tests would prove his fraudulent intent, and injunction would issue at once. See Kerr on Injunction, 4th Ed., pp. 296 and 298 and 5th Ed., p. 416, and the cases cited therein.

The most recent case relating to copyright in law reports is that of *Incorporated Council of Law Reporting* v. *Green & Son* (2). There the Defendants submitted to an injunction, and the form in which injunction was given in that case also prohibited Defendants from taking judgments from the English Law Reports. If judgments obtained and reported by the Council were not entitled to protection, Court would not have given injunction in that form. Kerr on Injunction, in the 5th Edition, at p. 405, cites this case as an authority for the proposition that taking of judgments would amount to an infringement and would entitle to an injunction. In the previous edition of Kerr a doubt was expressed on the point. But selection of judgments is in any case protected.

Pike v. *Nicholas* (11) cited by the Defendent does not help him. It is an authority for assessment of damages in cases of literary piracy. The basis is that every copy of the offending journal sold must be considered to have replaced one of Plaintiff's. *See* Kerr on Injunction, 5th Ed., p. 416 and also Woodroffe's Injunction, 3rd Ed., p. 427.

The JUDGMENT OF THE COURT was as follows:—

IMAM, J.—The Plaintiff in this suit is the Proprietor and Editor of a Law-periodical known as the *Calcutta Weekly Notes.* The first Defendant is the Proprietor, Editor and Publisher of a rival Law periodical known as the *Calcutta Case Law.* The second Defendant is a company of printers. The suit is to restrain the Defendants from committing piracy on the Plaintiff's periodical, for account of the profits made by the first Defendant by sale of the pirated issues of the *Calcutta Case Law*, for damages and for other consequential reliefs.

The Plaintiff's case is that the reports of the decisions of this Court as well as of the Judicial Committee of the Privy Council published in the *Calcutta Weekly Notes* are the result of considerable labour and expense on his part as well as on the part of the staff employed by him, and that in his reports he has an exclusive copyright. He complains that the Defen-

(2) [1912] W. N. (Eng.)
(15) L. R. 18 Eq. 444 (1874).
(16) [1900] A. C. 539.
(17) 10 Jur. 420 (1846).

(11) L. R. 5 Ch. 251 (1869).

dants have been systematically pirating reports from the *Calcutta Weekly Notes* and printing and publishing the same in the *Calcutta Case Law*. In the schedule to the plaint, some of the instances of piracy have been set out. A comparison of the reports in the *Calcutta Weekly Notes* with those of the *Calcutta Case Law* establishes the fact of the latter reproducing the reports of the former with a degree of faithfulness that leaves no room for doubt that the Defendants have availed themselves of the benefits of the Plaintiff's labour.

The second Defendant has undertaken not to print any more of the piracies of the first Defendant. The trial, therefore, has proceeded on the contest of the latter only. The contesting Defendant maintains that the Plaintiff has no copyright in the reports of judgments of any Courts of law and denies the alleged piracy.

It is generally true that in the reports of judgments, the reporter has no copyright, but it cannot be said that in the selection of cases, and in the arrangement of the reporting, the reporter has not the protection of the law. The Defendant is entitled to report such judgments as he obtains by expenditure of his time, labour and money, but where he fails to exert his own energies, he cannot be allowed to avail himself of other peoples' industry. The contesting Defendant, instead of restricting himself to reporting the judgments only, has gone much farther. What he has done in the present case is that he has freely drawn on such portions of the Plaintiff's reports as form no part of the judgment. He has also taken from the Plaintiff's reports the quotations from judgments that were appropriate to the reports. The Plaintiff's reports in many instances contain statements of facts not to be found in the judgments, but have been gathered by the reporters from the records of the cases. The Defendant, no doubt, was at liberty to bestow his labour on collecting the facts for himself, but he was not entitled to avail himself of the labours of another.

"Whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works, subject to copyright, and entitled to protection," so said Lord Langdale, M. R., in *Lewis* v. *Fullarton* (1). The offending instances in this case are either copying or merely colourable alterations of the Plaintiff's reports accompanied by blind repetition of obvious errors.

I have no doubt in this case that the contesting Defendant has committed literary piracy on the Plaintiff's periodical, and in this view this suit has to be decreed. The result is that the Plaintiff succeeds, and the Defendant No. 1 will be restrained from pirating from the *Calcutta Weekly Notes* for the purpose of his publication. He is further restrained from selling or circulating any of the copies of the pirated publication since August 1910. The Defendant is directed to render a full account to the Plaintiff of the pirated issues of the *Calcutta Case Law* published since August 1910 and of the profits made by their sale. He is further directed to deliver in Court the unsold copies of the pirated issues of the *Calcutta Case Law*, published since August 1910, and the same shall be destroyed. The Defendant No. 1 will pay to the Plaintiff the costs of this suit on scale No. II. The Defendant company is only to be liable for such costs as are occasioned

(1) 2 Beav. 6 at p. 8 (1839).

by joining it as a Defendant up to December 1st, 1913.

Mr. H. N. Dutt, Solicitor for the Plaintiff.

Suit decreed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 595 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
Heard,
14, May.
Judgment,
21, May.

MANIPUR DEY, Petitioner,
v.
BIDHU BHUSAN SARKAR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec 133—Claim of right, Magistrate's duty to decide bonâ fides *of—Magistrate bound to refer parties to Civil Court, if such claim is not mere pretence—Steps which Magistrate may take, if suit not instituted in Civil Court within reasonable time.*

Per SHARFUDDIN, J. (TEUNON, J, dubitante).—*Sub-sec. (3) of sec. 133, Cr. P. C., provides that no order duly made by a Magistrate under the section shall be called in question in any Civil Court. From this latter provision it is clear that the provision of sec. 133, Cr. P. C., should be sparingly used. Any order passed under the section cannot be questioned in any Civil Court. It is therefore necessary that if the party against whom the order is contemplated to be passed raises a question that the pathway is not a public property in the sense of the provision of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use, but he should, even when the claim of the objection is not substantiated, find whether the claim is* bonâ fide *or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the rule issued by him absolute. If however he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised* bonâ fide, *he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the rule absolute.*

This was a Rule granted on 8th April 1914 against the order of Mr. S. C. Gupta, Sub-Divisional Magistrate of Manikganj, dated the 28th February 1914, making absolute the order passed under sec. 133, Cr. P. C., and directing the Petitioner to remove the obstruction within two weeks, an application for the revision of which order was rejected by M. Smither, Esq, Sessions Judge of Dacca, on the 31st of March 1914.

The facts of the case will appear from the judgment.

Mr. K. N. Chaudhuri and *Babu Upendra Lal Ray* for the Petitioner.

Mr. P. C. Ray and *Babu Ramoni Mohan Chatterji* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

SHARFUDDIN, J.—This is a Rule calling upon the District Magistrate of Dacca to show cause why the orders passed under secs. 133 and 137, Cr. P. C., dated the 28th February 1914, should not be set aside on the ground that having regard to the *bonâ fide* question of title raised and in the absence of any finding that the objection raised was not *bonâ fide*, the order is without jurisdiction. It appears from the order of the Deputy Magistrate concerned, that Manipur Dey, the Petitioner before us, on receipt of

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a notice under sec. 133, Cr. P. C., appeared and alleged that the pathway in question was not a public pathway. The following are the findings of the trying Magistrate with regard to the objection thus raised : "It is contended on behalf of Manipur that the way cannot be called public, if a few neighbours and acquaintances have acquired mere permissive right thereto. . . . It is idle in the present case to urge that the way is Manipur's private property ; it is waste land lying between houses and extending beyond Manipur's house. . . . It is pointed out that the Settlement Department has not recognised the way as a public *rasta*. It is to be remembered that a *rasta* which is less than 15 links in width is incapable of representation on the Settlement map (scale 16" to a mile), and is ordinarily ignored in the *khatians*." Sec. 133 occurs in a chapter headed Public Nuisances, and the section itself deals with unlawful obstruction, etc., of any way, etc., used by the public, etc. ; sub-sec. (2) of sec. 133, Cr. P. C., provides that no order duly made by a Magistrate under this section shall be called in question in any Civil Court. From this latter provision, it is clear that the provision of sec. 133, Cr. P. C., should be sparingly used. Any order passed under this section cannot be questioned in any Civil Court. It is therefore necessary, that if the party against whom the order is contemplated to be passed, raises a question that the pathway is not a public property in the sense of the provision of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land, or if it is for public use, but he should even when the claim of the objector is not substantiated find whether the claim is *bonâ fide*, or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the rule issued by him absolute. If, however, he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised *bonâ fide*, he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the Rule absolute. In the present case the objector, who is the Petitioner before us, had contended that the pathway in question was a private property and that only the neighbours and acquaintances had been using it in a permissive way. The question is whether this contention on the part of the objector is a *bonâ fide* contention or not. From the findings of the lower Court it is clear that the pathway in question is close to the objector's house. It is apparent from the judgment of the lower Court that the path in question has not been shown as a pathway in the map prepared by the Settlement Department. Regard being had to the above two facts, I think it was necessary for the lower Court to have come to a finding as to whether the claim set up by the objector was a mere pretence or whether it was *bonâ fide*. In this view I am supported by a number of authorities of this Court, *viz.*, the cases of *Belat Ali* v. *Abdur Rahim* (1), *Matukdhari* v. *Hari Madhab* (2) *Luckhee Narain* v. *Ramkumar* (3) and *Preonath* v. *Gobordhone* (4).

(1) 8 C. W. N. 143 (1903).
(2) 9 C. W. N. 72 (1904).
(3) I. L. R. 15 Cal. 564 (1888).
(4) I. L. R. 25 Cal. 278 (1897).

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For the above reasons, I would set aside the order complained against and make the rule absolute. I would further direct that the lower Court should try the case from the point reached on the 13th January 1914 and dispose of it according to law.

TEUNON, J.—Having regard to the long series of decisions in which this Court has held that when a person called upon to show cause under sec. 133, Cr. P. C., raises a question of title, the trying Magistrate must decide whether that question has been raised in good faith, I am prepared, in the present case, without agreeing in all the reasons advanced by my learned colleague, to assent to the order proposed by him.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 27 OF 1914.

HOLMWOOD, J. SHARFUDDIN, J. 1914, 13, February.

PROBHAT CHANDRO CHATTERJEE, Petitioner, *v.* PROSSANNO KUMAR SEN, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 145, 522—Infructuous order directing restoration of immoveable property if bar to proceeding under sec. 145.

An infructuous order under sec. 522, Cr. P. C., which was never carried out is no bar to the jurisdiction of the Magistrate taking proceedings under sec. 145, Cr. P. C., in respect of the same property.

This was a Rule against the order of S. Sen, Esq., Deputy Magistrate, Faridpur, dated the 24th October 1913, declaring under sec. 145, Cr. P. C, the Second Party to be entitled to the possession of the disputed land.

On the 1st October 1912, one Ram Charan Mondal, a tenant of one of the first party Petitioners, lodged an information with the Police that the men of the Opposite Party had burnt down and destroyed a number of huts belonging to the tenants of his master in a *chur* and a case under secs. 144, 426, I. P. C., was started on this information in the Court of a Deputy Magistrate.

On the 13th October 1912, a proceeding under sec. 145, Cr. P. C., was drawn up by another Deputy Magistrate on a report submitted by the Police in respect of the same *chur*, although the area included in the proceeding was larger than that in dispute in the case under secs. 144, 426, I. P. C., and the land was attached under cl. (4), sec. 145, Cr. P. C.

On the 21st February 1913, the Magistrate delivered judgment in the case under secs. 144, 426, I. P. C., convicting the accused. On the next day, the Magistrate passed the following order:—"The Complainant files a petition for action under sec. 522, Cr. P. C., to-day. In the judgment my finding is that Complainant and his people were dispossessed by the accused from the *chur* by criminal force and their huts were demolished and new huts erected by the accused. . . . . I now order that complainant and his people be restored to possession of the same."

On the 25th February 1913, the Magistrate passed the following order:—"As the land is already under attachment in connection with a 145 Cr. P. C. case, I order that my order to give possession under sec. 522, Cr. P. C., be kept in abeyance until further orders."

On the 11th September 1913, the High Court in revision set aside the convictions and sentences in the case under secs. 144, 426, I. P. C., and acquitted the accused, but no direction was given as to the order under sec. 522, Cr. P. C.

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NOTES.

Legal Education abroad.

We reproduce elsewhere an article from the English *Law Journal* contrasting the English system of legal education with those prevailing in the continent of Europe and in the United States. This comparative study of the different legal systems, though brief, is yet full of suggestions which cannot but be useful to those interested in legal education and the training of judges and lawyers for purposes of efficient administration of justice.

Mr. Justice Imam.

We are glad to find it announced that Mr. Justice Imam will be made permanent in the place of Mr. Justice Stephen when he retires from the Bench of the Calcutta High Court after the Long Vacation. Mr. Justice Imam has won the golden opinion of the profession during the term of his temporary appointment on the Bench. He has a strong sense of justice, and both suitors and counsel before him always feel assured that all alike will have a patient hearing, and that justice will be done to their cases. He is both firm and courteous, and painstaking and intelligent, and his judgments are always well-considered. He has within this short time succeeded in securing public confidence, and we are confident that not only will he thoroughly maintain the reputation which he has made for himself, but will enhance it as time goes on. We, no doubt, adhere to our opinion that every effort should be made to get really able and experienced men from the English Bar to fill some of the appointments reserved for barristers on the High Court Benches in India, but in so saying we never meant to say that a fair share of such appointments should not go to the Indian section of the Bar. It would have been an unmerited slight on Mr. Justice Imam and a wrong to the Indian community, if after his excellent record on the Bench he had been superseded when an opportunity occurred for making him permanent.

Sir Barnes Peacock.

We feel bound to correct our Vakil friend with regard to a very unwarranted statement to which he gave currency in the lengthy correspondence we published last week to the effect that Sir Barnes Peacock, the eminent Chief Justice of the Calcutta High Court, "was not a particularly successful member of the Bar when he came out to India." As erroneous statements of this kind may be availed of for lowering the efficiency of the High Court Benches and the judiciary generally, we shall mention a few facts which will go to show that Sir Barnes Peacock had risen to a very high position in his profession through his practice at the Bar before he came out to India. He took silk in 1850, and members of the Bar are not made Queen's Counsel unless they enjoy a good practice. Further, it is not generally known that Sir George Jessel, who to this day is regarded as the most brilliant Judge who ever sat on the English Bench, was his pupil and read in his chambers and greatly profited by the training he received under him. We find also from the law reports Sir Barnes appearing as junior to eminent counsel of that time in the House of Lords. In the famous *O'Connell* case, we find (5 *State Trials*, *N. S.*) that not only did Peacock appear as junior to Wilde (who later on became Lord Chancellor—Lord Truro), but at p. 755 of the report we find a note that the point on which the judgment was reversed by the House of Lords was raised by Peacock. All

these facts go to show that not only had he enjoyed a practice at the Bar, but also a good reputation of being a learned lawyer which attracted to him pupils of the rare distinction of Jessel. The fact that he was sent out to India as the Law Member of the Governor-General's Council also confirms the view that he was recognised at the time as a worthy successor of Lord Macaulay, and lawyers of the reputation of Maine, Stephen and Hobhouse succeeded him.

MALICIOUS PROSECUTION.

The question whether in a suit for malicious prosecution by abuse of the process of the Criminal Court it is necessary to show that the prosecution was one within the meaning of the Code of Criminal Procedure is not free from difficulty. To succeed in an action for malicious prosecution, the Plaintiff has to prove, *first*, the prosecution by the Defendant of a criminal charge against the Plaintiff before a tribunal into whose proceedings the Civil Courts are competent to inquire; *secondly*, that the proceedings complained of terminated in his favour, if from their nature they were capable of being so terminated; *thirdly*, that the Defendant instituted or carried on such proceedings maliciously; *fourthly*, that there was an absence of reasonable and probable cause for such proceeding; *fifthly*, that the Plaintiff had suffered damages unless indeed the proceedings necessarily import damage to his fame or person. A prosecution exists when a criminal charge is made before a Judicial Officer or tribunal and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute it and any person who prosecutes another in the sense indicated above is liable as prosecutor. This question, namely, who is a "prosecutor" came up for consideration by the Judicial Committee in *Gaya Prosad* v. *Bhagat Singh*, I. L. R. 30 All. 525: S. C. 12 C. W. N. 1071. Their Lordships laid down that the answer to the question who is the prosecutor must depend upon the whole circumstances of the case. It is not a principle of universal application that if the Police or Magistrate act on information given by a private individual, without a formal complaint or application for process, the Crown, and not the individual, becomes the prosecutor. The mere setting the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. In this case it was not necessary for their Lordships to consider whether to maintain an action for malicious prosecution it must be shown that the prosecution was a prosecution within the meaning of the Criminal Procedure Code.

This was the question for determination in a recent case decided by the Madras High Court (*Sheikh Meran Sahib* v. *Ratnavella Mudali*, I. L. R. 37 Mad. 181). In this case, the Defendant filed a complaint before the Magistrate charging the Plaintiff with the offence of defamation. The Magistrate on receiving the complaint adopted a somewhat novel procedure and issued a notice to the Plaintiff and held an enquiry under sec. 202, Cr. P. C., and after hearing Counsel for both parties dismissed the complaint under sec. 203, Cr. P. C. The notice recited that the Defendant had filed a complaint before the Magistrate charging the Plaintiff with the offence of having defamed the former and praying that a summons might issue against the latter and continued as follows:— "Notice is hereby given that a preliminary inquiry will be held in the matter of the complaint at this Court at 11 A.M. on the 3rd day of July 1912." The Plaintiff brought an action for recovering damages for malicious prosecution and Bakewell, J., held that the Plaintiff had no cause of action inasmuch as under the Code of Criminal Procedure the prosecution of the accused commences with the issue of process after the complaint has been entertained by the Magistrate and all prior proceedings constitute at most an attempt by the complainant to prosecute the accused, and in the present case no process having been issued by the Magistrate and the notice issued not being warranted by the Code, there was no prosecution of the Plaintiff.

The same view was taken in *De Rozario* v. *Golab Chand Anundjee*, I. L. R. 37 Cal. 358. The Plaintiff's case was that the Defendant falsely and maliciously and without any reasonable and probable cause laid a complaint against her under sec. 380, I. P. C., that the Magistrate sent the case to the Police for enquiry and report; that the Defendant thereafter informed the Police Inspector that he did not desire the enquiry to be proceeded with, nor the premises of the Plaintiff searched; that the Defendant failed to appear when the case was called on before the Magistrate who thereupon dismissed the complaint; that the Defendant caused a fresh complaint under sec. 380, I. P. C., to be lodged against her, which complaint was also dismissed. It was argued on behalf of the Plaintiff that the cause of action was complete and it was not necessary in order to maintain an action for malicious prosecution to show that the charge was acted upon by the Magistrate or that process had issued. The prosecution commenced when the complaint was made: *Clarke* v. *Postan* 6 C. and P., 423, *Imp* v. *Lakshman Sakharam*, I. L. R. 2 Bom. 481, *Ahmedbhai* v. *Framji Edulji*, I. L. R. 28 Bom. 226; Addison on Torts, 8th edition, p. 249. Mr. Justice Fletcher held as follows—"There is no doubt that in *Ahmedbhai* v. *Framji Edulji*,

I. L. R. 28 Bom. 226, the learned Judge did say that a prosecution commences when a complaint is made, and it is enough if the charge is made to the Magistrate. This statement is made on the authority of a statement taken from Addison on Torts, 8th Ed., p. 249. The case referred to in Addison is *Clarke* v. *Postan*, 6 C. and P. 423, which has been considered by Lord Justice Cotton in the case of *Yates* v. *The Queen* (L. R. 14 Q. B. D. 648). My opinion is that the decision of Lord Esher and Lord Justice Cotton in *Yates* v. *The Queen* (L. R. 14 Q. B. D. 648) is to be preferred on this point to the ruling in *Clarke* v. *Postan* (6 C. and P. 423)." His Lordship next considered the provisions of the Code of Criminal Procedure and held that the Magistrate never issued process and the Plaintiff was not prosecuted and his suit was liable to be dismissed. The same view was also taken in *Golapjan* v. *Bholanath Khetry* (I. L. R. 38 Cal. 880). The Plaintiff's contention in the Court of Appeal was—"The gist of the action for malicious prosecution is setting the criminal law in motion without reasonable and probable cause and does not contemplate the issue of process. The object is that a person who is put in risk of loss of liberty or reputation should have a remedy. Prosecution commences when the charge is laid *De Rozario* v. *Gulab Chand Anundjee* (I. L. R. 37 Cal. 358) has been wrongly decided. In that case, Fletcher, J., misread *Yates* v. *The Queen* (L. R. 14 Q. B. D. 648), and was wrong in holding that the passage in Addison on Torts, 8th Ed., p. 249 "that it was not necessary that the charge should be acted upon by the Magistrate" was unsupported by authority. *Clarke* v. *Postan* (6 C and P. 423) and *Thorpe* v. *Priestnell* (1 Q B. 159) cover the point. His Lordship the Chief Justice held—"To determine whether or not there was a prosecution, regard must be had to the Criminal Procedure Code. . . ." As process was not issued, the Plaintiff never became an accused; he was not a party to the investigation held under sec. 202, Cr. P. C.; nor was he entitled to claim under sec. 304 the right to be represented by a pleader at that investigation. If, as is said, he was present and was represented by a pleader, that was not by compulsion of law, but at his own free will. In my opinion, therefore, the Court of first instance rightly decided that matters had not advanced to the stage necessary to support a suit for malicious prosecution.

In *Crowdy* v. *Reilly* (17 C. W. N. 554) it has been held by Mookerjee and Beachcroft, JJ., on a review of English and Indian cases that it is not that an action for damages for malicious prosecution lies only when the original proceeding was a prosecution in the sense in which the term is used in the Code of Criminal Procedure. An action for maliciously putting the law in motion lies in all cases where there is concurrence of the following elements: (1) the commencement or continuance of a criminal proceeding; (2) its legal causation by the Defendant against the Plaintiff; (3) its *bonâ fide* initiation in favour of the present Plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage conforming to legal standards resulting to the Plaintiff.

LEGAL EDUCATION ABROAD.

At the outset we are met by the striking circumstance that every other country but our own requires the law student to receive a full and systematic course of instruction before he is qualified to practise. Whether his education is controlled by the State, as in Germany or America, or by a privileged professional corporation, as in Scotland or France, the qualification insisted on embraces at least three years' study by lectures and classes. Not that this instruction is deemed adequate in itself, for in every case there is an additional requirement of a long period of pupilage or apprenticeship, so that the book-knowledge may be deepened by experience It is in England alone, and in the barristers' branch of the legal profession exclusively, that there is no regular requirement either of systematic study or practical initiation, but a man may plead in the Courts who has passed his examination by cramming, and who obtains his experience of the conduct of a case at the expense of his first clients.

SCOTLAND.

An intrant to the Faculty of Advocates in Scotland is required to produce evidence of being duly qualified in general scholarship and in law. He satisfies this condition if he has obtained the degree of Master of Arts in a Scottish university or has graduated in Arts in other recognised universities. In the event of his not having so graduated, he is examined in Latin, Greek (or at his option French or German), Mathematics or Natural Science, Metaphysics or Moral Philosophy, and Logic and History. At the interval of at least one year after he is found qualified in general scholarship, the intrant may proceed with his examination in law, provided that he produces evidence of attendance in a class of Scots law and of conveyancing in a Scottish university; and also evidence of attendance at the university or a recognised school of law in a class of (*a*) Civil Law, (*b*) Philosophy of Law and International Law, Public or Private, (*c*) Constitutional Law and History, and (*d*) Medical Jurisprudence. He is examined in each of these subjects, but if he has obtained the degree of LL B., he is held to be sufficiently qualified in law without other test. Before admission to the Faculty of Advocates the intrant has further to submit a thesis on a title of the Pandects and defend it before two members of the Faculty; and if he successfully accomplishes this ordeal, his admission is decided by a ballot of the Faculty.

FRANCE.

Similar in many ways to the Scottish system of legal education is the French. The law student, whether he intends to be an avoué or an avocat, must first spend at least three years in a law school (of which there are nine in France) and pass a number of examinations in the Civil Law, French Law and Jurisprudence. If he wishes to become a Doctor of Laws, his studies must be continued over a fourth year. He then reaches the point of his training known as the *Stage*, and as a Stagiaire he spends another three years in studying more advanced subjects of law and in attendance at the Courts, which he is compelled to do assiduously. He may or may not be in a lawyer's office during this time, at his option. At the end of the period he presents himself to the Council of the particular Bar which

he desires to join and has to submit a thesis, before admission, with the right to practice. It is a noteworthy feature of the French system of legal education, as of several other foreign systems, that the student in his apprentice stage is required to take part in the work of legal aid to the poor litigant. In this way he obtains valuable experience of practical work under skilled guidance, by which the national service of rendering law, in its application, equal for all classes is immensely facilitated.

GERMANY.

In Germany, as one might expect, the conception of the lawyer as a member of a learned profession is carried to its fullest development. The amount of preparation which is required of a German law student before he is allowed to start on either a forensic or a judicial career is, to a person trained in the English haphazard ways, almost appalling. The training of the German lawyer begins at the Gymnasium or public secondary school, through whose doors alone a young man at the age of 18 or 19 can pass into the University. And it is impossible for him to follow the legal profession without studying law at the University for a period of at least three years, and, in some States, for at least four years. During this period he must obtain a grasp of Roman law and jurisprudence and of the German Civil Code, and penal law and civil and criminal procedure. At the end of his University period he must apply for admission to the final examination, as a condition of taking which he must show attendance at the requisite number of law lectures and classes. The examination includes the writing of a treatise upon some subject of German law, besides a long oral test and written papers. The successful candidate obtains the degree of Referendar, and then he is entitled to begin the practical part of his education. He becomes an apprentice successively of a judge and a counsellor at law, and divides his time between the Courts and the counsellor's office. This period of practical tuition extends in Prussia over nearly five years, which are divided up as follows: For nine months he acts as assistant in one of the smaller County Courts and keeps the records and drafts the decrees, then he spends a year in a Superior Court, engaged in the study of civil and criminal proceedings and preparing opinions for the judge; for the next year he is in the office of an attorney and a counsellor-at-law, after which he returns to a County Court and may act as a substitute-judge in non-contentious business, finally, he passes nine months in an Appellate Court. His knowledge is tested at the end of this period by a very severe examination conducted by a Government commission of lawyers of the highest standing. The candidate has to submit two written treatises, one on a scientific theoretical question, the other on a judgment in a civil case, and to undergo a long oral examination. If successful, he becomes an Assessor, probably at the age of 28, and can elect whether to follow the career of counsellor-at-law, State attorney or judge. If he chooses the first, he applies for admission to the Bar, and, unless there is some objection to his character, he is admitted, and can at last begin to practise for himself.

THE UNITED STATES.

Turning now to America, we naturally do not find a thoroughness comparable to that which exists in Germany. The standard of qualification, indeed, differs very greatly in the various States according to the relative excellence of the sixty-four law schools which are to be found in the Union. But throughout the Northern States, the minimum requirement is a three years' course at a university law school, followed by a test of fitness for admission to a State Bar, and in the South, where there is a less rigorous standard of attainments, most of the State Bars require a candidate to have passed successively through a three years' course of law studies, following a recognised academic course. While no practical apprenticeship is uniformly required, the celebrated case system devised by the late Professor Langdell, of Harvard, and gradually adopted by nearly every law school in the States, accustoms the student from the beginning of his training to deal with concrete cases in a practical way. As to the relative excellence of the American training at its best, Mr. Bryce, in his 'American Commonwealth' (p. 670), says: 'I do not know if there is anything in which America has advanced more beyond the mother-country than in the provision she makes for legal education'

CURRENT INDIAN CASES.

(CIVIL.)

Malicious prosecution—Commencement of prosecution.

K. SHAIK MURAN SAHIB *v.* C. RATNAVELU MUDELI, I. L. R. 37 Mad. 181.

The Plaintiff sought to recover damages for malicious prosecution.

The Defendant preferred a complaint charging the Plaintiff with the offence of defamation. The Magistrate on receiving the complaint issued no process, but only a notice to the Plaintiff, and held an enquiry under sec. 202 and after hearing counsel for both parties dismissed the complaint. The notice was to the following effect—"Notice is hereby given that a preliminary inquiry will be held in the matter of complaint filed by the complainant at this Court at 11 A.M., on the third day of July 1912."

Held—That the prosecution of an accused commences with the issue of process after the complaint has been entertained by the Magistrate and the prior proceedings constitute at most an attempt by the complainant to prosecute the accused and the plaint in the present case disclosed no cause of action.

Civil Procedure Code (Act V of 1908), sec. 92.

N VENKATARANGA *v.* N. KRISHNA CHARLU, I. L. R. 37 Mad. 184

A suit instituted with the consent of the Collector is a good suit for all reliefs referred to in sec. 92, C. P. C.

Limitation.

RAMANA REDDI *v.* BABU REDDI, I. L. R. 37 Mad. 186.

Limitation being the result of statute law, no exemption from it can be recognised except what the statute itself provides.

Presidency Towns Insolvency Act (III of 1909).

IN THE MATTER OF MEGHRAJ GONGABUX, I. L. R. 38 Bom. 200.

Once an order of adjudication has been made, the debtor who presents his own petition or the Respondent in the case of a creditor's petition becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge. The Court has no jurisdiction to annul the order of adjudication except in the manner provided for by the Act. Under sec. 21 (1) the order can be annulled if the Court is of opinion that the debtor ought not to have been adjudged insolvent or if it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full.

Hindu Law.

MALLIK SAHEB *v.* ABDUL SAHEB, I. L. R. 38 Bom. 224.

A Hindu widow with the life estate sold the plaint

property to the Defendants. The then heir was the daughter of her deceased husband. Thirteen days after the sale the daughter assented to it in writing. In the writing she purported to convey nothing, but merely gave her consent to the alienation by her mother. After her death her husband sought to set aside the alienation on the ground that it was without legal necessity.

Held—That no question of that kind could arise.

That the writer was clearly outside and beyond the scope of sec. 17, cl. (*d*) of the Registration Act.

Will.

PIRSAB *v.* GURAPPA, I. L. R. 38 Bom. 227.

An instrument which confers or reserves a life estate to the maker cannot be called a will.

Presumption of right arising from possession.

SITARAM *v* SADHU, I. L. R 38 Bom. 240

The Plaintiffs brought a suit to recover possession of land alleging that they had been wrongfully deprived of their possession by one R who and the Defendants, who derived title under him, have been in wrongful possession ever since.

Held—That in a suit for recovery of possession based upon title the presumption of right arising from possession applies as much to a Defendant as to a Plaintiff, and the fact of possession within twelve years of suit will not avail unless it is shown to be such a possession as gives a better title to the land than the Defendants can show.

To succeed in ejectment it is only necessary for the Plaintiff to establish such title as carries a present right to possession.

Railway receipts, if instruments of title.

S. AMIR CHAND *v.* CHHAGANLAL, I. L. R. 38 Bom. 255.

Under sec. 103 of the Contract Act and 137 of the Transfer of Property Act, Railway receipts shall be taken to be mercantile documents of title fulfilling one or other of the two specified conditions, *viz*, proving in the ordinary course of business the possession or control of goods or authorising or purporting to authorise either by endorsement or by delivering the possession of the document to transfer or receive the goods thereby represented.

Correspondence.

THE STATUS OF ADVOCATES WHO ARE NOT BARRISTERS.

To THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

The letter recently published in your columns regarding the status of advocates who are not barristers in the matter of their eligibility to judgeships of Chartered High Courts has drawn considerable attention in the legal circles of the United Provinces, and while the general feeling undoubtedly is that the argument presented in that letter should not be accepted as sound, the ground for coming to that conclusion are not so easy to find. You, Sir, have brushed aside the argument on the ground that a vakil who had put in ten years' practice becomes on the completion of that period eligible for appointment as a judge and that is a vested right that attaches to his person ever afterwards. With the utmost deference allow me to submit that this chain of reasoning does not appear to me to be sound. To follow it out logically—and all principles are tested by extreme cases—a man who had been a vakil for ten years and afterwards struck off the rolls is eligible for a judgeship, because he had acquired the necessary qualification sometime ago. There are instances in the United Provinces of barristers and vakils who after the necessary period of practice at the Bar laid down in the charter, gave up practice altogether and took to other occupations. One such gentleman who is a resident of the Punjab was removed from the rolls of the Allahabad High Court where also he had enrolled himself as an advocate with his consent because he had taken to another occupation. As I read the charter the person chosen must at the time of his selection belong to one or other of those categories therein specified and then he must be of a certain standing. If at that date he does not belong to one or other of them, the whole thing is at an end so far as he is concerned.

There is, however, another line of argument which has been presented to the public by the *Leader* newspaper of Allahabad This journal has three amongst the home-made advocates among its directors, and it can therefore be expected to present the case on the other side in its strongest light. Now, it says in an Editorial paragraph that the learned judge in question is a vakil and that he had not ceased to be a vakil, because *he was too good a man to remain a Vakil and had therefore been elevated out of that body.* Now, that is exactly my point. A man cannot be a vakil and not a vakil at the same time and cannot soar high up in the air and crawl back to the earth at his own pleasure and convenience. One cannot take up this position that if he gets some advantages by being a vakil he is a vakil and if he is under some disabilities by being a vakil he is not a vakil. It is this subtle, this ethereal and this amphibious nature of the attributes of this class of advocates that eludes my limited intellect and still more limited experience and I must frankly say that I cannot appreciate this argument. If there were any doubts in the matter, the Allahabad High Court has finally settled them by removing the names of the advocates who are not barristers from the list of vakils and publishing that list authoritatively without those honoured names. It is further said that this contention regarding eligibility would also apply to the late lamented Mr. Justice K T. Telang. Possibly it would, if the rules were the same, but it does not appear that the point was ever taken and authoritatively settled. The Privy Council had allowed many appeals under the Land Acquisition Act before its attention was drawn to the point that there were no appeals sanctioned by that Act at all and their previous action in such appeals did not stand in the way of their holding that the particular appeal where attention had been drawn to this point was incompetent. Of course there are technical objections, but the whole of the British Indian Code bristles with technicalities and no lawyer need be ashamed of taking technical objections.

There is one remark made in this connection to which I must take strong exception before I conclude. It is that a particular person can be too good an individual to remain a vakil and anybody requires to be elevated out of that body. I cannot forget that the most

accomplished Indian lawyer that Allahabad ever produced—the late lamented Pandit Ayodhiya Nath—one, regarding whom Sir John Edge said that any race and and any country might well be proud of him, lived and died as a vakil. Nor would anybody have the hardihood to say that the vakils who could claim the late Sir Bhashyam Aiyanger as one of their body and who now proudly point to Dr. Rash Behari Ghose as their head have any reason to be ashamed of their status or position in life and I strongly protest against the implied insinuation that the word *vakil* is now in Allahabad a by-word of reproach. The other point to which attention was drawn in the letter in question that by making a few vakils advocates some years ago and by ceasing to advance others to the same status now for some years the Hon'ble and learned Judges have virtually though unwillingly created a most undesirable monopoly which is working to the great detriment of the Vakil Bar has not yet attracted the notice it deserves. A cursory glance at the printed cause lists of the Allahabad High Court will bear out my contention and in order to remedy this state of things and to remove the hardships caused to every vakil of that Bar of over twenty years' standing and of unblemished character there is no other way now left open but going on creating advocates from year to year so that the glory, the halo and the charm now surrounding a few might disappear by being spread over the many.

Yours faithfully,
AN ALLAHABAD VAKIL.

Notes of Cases.

CALCUTTA HIGH COURT

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION.—Before WOODROFFE and COXE, JJ. APPEALS FROM APPELLATE DECREES NOS 2890 OF 1909 AND 839 OF 1910. BAIDYA NATH PAL, Defendant No. 2, Appellant *v.* KAILAS CHANDRA DEB, Plaintiff Respondent. 19th June 1914.

Redemption, suit for—Occupancy holding—Purchaser in execution of money decrees, title of—Sylhet.

The land in suit was originally the holding of of one Sonatan. It was purchased in execution of a money-decree by the Plaintiff. Before the purchase by the Plaintiff, Sonatan had mortgaged the property with possession and the Defendant No. 2, the Appellant, was the usufructuary mortgagee. The suits were for redemption and the Courts below had decreed them.

It was urged in second appeal, that as the Plaintiff purchased in execution of a money decree, his purchase was no purchase at all and conferred no title on him.

Held, that the point had been settled by the recent decision of the Full Bench, 18 C. W. N. 971.

The recent decision of the Full Bench was applicable to Sylhet, as the Bengal Tenancy Act had made no alteration in the law with regard to the sales of occupancy holdings.

Narendra Narain Roy v. *Ishan Chandra Sen* (22 W. R. 22) distinguished.

Babu Brojo Lal Chuckerbutty for the Appellant.

Babus Mohini Mohan Chuckerbutty and *Gopal Chandra Das* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION.—Before D. CHATTERJEE and N. R. CHATTERJEA, JJ. APPEAL FROM APPELLATE DECREE NO. 2401 OF 1913. BASANTA KUMAR CHAKRABARTY, Plaintiff, Appellant *v.* GOPAL CHANDRA DAS, Defendant, Respondent. Heard 6th May. Judgment 11th June, 1914.

Ejectment—Bengal Tenancy Act (VIII of 1885), sec. 167—Purchaser, death of, testate—No probate taken of will—Son in possession of estate, if can sue—Indian Succession Act (X of 1865), sec. 187.

The father of the Plaintiff purchased a holding in execution of a decree and had notices under sec. 167 of the Bengal Tenancy Act issued on the Defendants who were under-raiyats. On the death of his father the Plaintiff brought this suit for ejectment. The plea of the Defendants was amongst others, that the deceased father of the Plaintiff had left a will under which the Plaintiff was only a part-owner of the property in suit and could not as such eject them. The Plaintiff in his deposition admitted that he had heard of the execution of a will by his father. The Defendant produced the will and the Plaintiff objected to its being proved. The Court of first instance allowed the will to be proved and dismissed the suit of the Plaintiff as incompetent.

Held, that the will uncovered as it was by a Probate or a Letter of Administration could not prove that anybody named therein had title to the estate of the testator, and the plea of non-joinder must fail. "If the legal heir had come into possession of the general estate of his father, he can as the legal heir maintain a suit for the benefit of the estate, so long as any other claimant does not establish his right to the same under the will."

Babu Surendra Kumar Bose (for Babu Prео Sankar Mozumdar) for the Appellant.

Babu Kishori Lal Sarkar for the Respondent.

A. T. M. *Appeal allowed: case remanded.*

CIVIL APPELLATE JURISDICTION.—Before FLETCHER and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE NO. 905 OF 1912. GOPINATH TRIPATI, Defendant No. 3, Appellant *v.* AJODHYA NATH GHOSH AND OTHERS, Respondents. 10th July 1914.

Doctrine of marshalling does not apply in redemption suit—Defendant claiming through pri

mortgagee cannot dispute subsequent mortgage upon which a decree has been passed in a suit in which the prior mortgagee was a party.

Appeal by the Defendant No. 3.—The suit was for a declaration that the mortgage-decree obtained by one Chintamony, the predecessor-in-interest of Defendants Nos. 1/1 to 1/4 and the auction sale held in execution of the said decree were not binding upon the Plaintiff, who was a subsequent mortgagee and in the alternative for redemption of the prior mortgage of Chintamony. One Srinath Chatterjee, the father of the Defendant No. 4, mortgaged the lands in suit and other lands to the Plaintiff in 1898 (simple mortgage). In 1903, Srinath again created an usufructuary mortgage in favour of Chintamony Ghosh, the predecessor-in-interest of Defendants Nos. 1/1 to 1/4. The Plaintiff brought a suit upon his mortgage in 1907 against Chintamony Ghosh and Defendant No. 4. After the mortgage suit had been instituted, the superior landlord of the disputed lands recovered a rent-decree, and the properties were put up to auction in execution of the said rent-decree. Chintamony Ghosh deposited the money under sec. 171 of the Bengal Tenancy Act and acquired a prior mortgage in respect of the disputed properties. Chintamony brought a suit upon this prior mortgage against the Defendant No. 4 without making the Plaintiff a party Defendant in the case. The Plaintiff obtained a decree upon his mortgage on the 3rd July 1908. Chintamony obtained an *ex parte* decree upon his statutory mortgage for Rupees three hundred and odd on the 18th July 1908, and the properties were sold to Defendant No. 2 in auction in execution of the said decree on the 22nd February 1909. The Defendant No. 2 sold the said properties to the Defendant No. 3 on the 19th April 1910 for Rs. 925.

The Court of first instance dismissed the suit, holding that the Plaintiff was not entitled to redeem.

The Plaintiff appealed, and the lower Appellate Court granted him a decree allowing him to redeem the statutory mortgage.

Babu Mohini Nath Bose for the Appellant submitted that his client was not the mortgagee, but had purchased from a stranger who had purchased the properties at the Court-sale. The Plaintiff had no right to redemption. His position is quite different from that of an ordinary mortgagee. Cited Dr. Rash Behari Ghosh's Mortgage, 3rd Edition, p. 364. His client was a *bonâ fide* purchaser for value.

[FLETCHER, J.—Your client is not a *bonâ fide* purchaser. He ought to have been aware of the Plaintiff's mortgage, he should have made searches in the Registration office.]

Referred to sec. 56 of the Transfer of Property Act.

[FLETCHER, J.—That section does not apply to the present case.]

I submit that the doctrine of marshalling applies to the present case: W. R. Gap. No. p. 374, 9 Cal. 406 and 13 Bom. 45.

[FLETCHER, J.—Those cases do not apply. In all these three cases the suit was for the enforcement of mortgage, but in the present case, the suit is for redemption of mortgage. The doctrine of marshalling cannot apply in a suit for redemption.]

One of several properties mortgaged to the Plaintiff has been purchased by my client. He is a subsequent mortgagee.

[FLETCHER, J.—Your client is a prior mortgagee by virtue of sec. 171 of the Bengal Tenancy Act]

The Plaintiff has not proved his mortgage in this case. How is he then entitled to get a decree for redemption?

Babu Kshitis Chandra Chakravarti for the Respondent submitted that the Appellant had purchased from Defendant No. 2 who had purchased in auction sale in execution of the decree obtained by Chintamony upon his statutory mortgage. The Defendant No. 3 claims through Chintamony. Chintamony was a party Defendant in the suit for the enforcement of mortgage by the Plaintiff, and the suit was decreed. This decree was an exhibit in this case. The Defendant No. 3 was thus estopped from raising such a question.

Babu Mohini Nath Bose.—The question of estoppel does not arise in this case.

Held—That the doctrine of marshalling does not apply in a suit for redemption and that the Defendant No. 3 who claimed through the prior mortgagee could not dispute the subsequent mortgage upon which a decree had been passed in a suit in which the prior mortgagee was a party Defendant.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION. Before FLETCHER and RICHARDSON, JJ. APPEAL FROM ORIGINAL DECREE No. 361 OF 1910. KUMEDA PROSANNA BHUIYA, Appellant *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS, Respondents. Heard, 2nd July. Judgment, 7th July 1914.

Tenants, status of—Holding more than 100 bighas—Raiyat—Presumption—Limitation—Bengal Tenancy Act (VIII of 1885), secs. 103B, 104H and 111A.

The Plaintiff brought his suit for a declaration that he was an occupancy raiyat of certain land mentioned in the plaint. The land in question was situate within the limits of a Government khas mahal. At the trial the learned Subordinate Judge dismissed the suit on the ground that the Plaintiff had failed to prove that he had served notice on the Defendant No. 1 pursuant to the

terms of sec. 80 of the Code of Civil Procedure. The other issues the learned Judge decided in favour of the Plaintiff. A remand was directed to the lower Court to try the issue as to whether or not notice under sec. 80 had been served on the Defendant No. 1. The learned Subordinate Judge certified that notice under sec. 80 was in fact served.

The holding in question was of an extent of 203 bighas odd. No document was in existence evidencing the terms on which the Plaintiff held. It was proved that the tenancy in its inception was granted to the predecessor of the Plaintiff for cultivating purposes. The Plaintiff and his predecessors in former settlements were described as having the interest of raiyats. The Plaintiff had also granted rent receipts describing the tenants under him as being under-raiyats.

Held, that the presumption created by sec. 103B of the Bengal Tenancy Act was rebutted.

That the Plaintiff and his predecessors having held the land for more than 12 years had a right of occupancy in the land.

The record-of-rights was finally published on the 14th September 1908. The Plaintiff preferred an appeal to the Revenue authorities against the entry on the record affecting his status. The present suit was filed on the 29th of June 1909.

Held that the suit came under the proviso to sec. 111A and not under sec. 104H of the Bengal Tenancy Act.

Babus Nilmadhab Bose and *Hirendra Nath Ganguli* for the Appellant.

Babu Ram Charan Mitra for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE No. 3662 OF 1912. UMDA BIBI, Plaintiff *v.* ABDUL SAMAD AND OTHERS, Defendants. 8th July 1914.

Dispossession by landlord—Auction sale, fraudulent—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3.

There was a jote in the name of Mahomed Ali Miah. After his death the jote was inherited by the Plaintiff, her sister and her brother Sadu Mia. The latter died leaving a daughter Jamila, Defendant No. 5. Plaintiff purchased her sister's share and became malik of 12 annas and Jamila 4 annas of the jote. At the Survey and Settlement of Chakla Roshnabad, the Plaintiff was recorded as co-tenant in possession. In 1898, the Maharaja of Hill Tippera, the landlord, brought the jote to sale for arrears of rent, and purchased it himself. That sale was set aside under sec. 174 of the Bengal Tenancy Act. In 1902, the Maharaja again sued Jamila (who was alone in arrears) for arrears of rent. In execution of the decree Defendant No. 1 purchased the jote on 7th March 1903. Delivery of possession was ordered on 16th June 1903. The Plaintiff brought this suit for declaration of title and *khas* possession of 12 annas share on 28th June 1910. The first Court held that the title was with the Plaintiff and the suit was not barred by limitation. On appeal it was held that Jamila was a co-tenant with the Plaintiff as proved by the *khatian* and judgment in sec. 104 case. It was observed :—"There can be no doubt that the auction sale was brought about by the landlord with the deliberate object of depriving the Plaintiff" of her share, and in this view it was held that the Defendant No. 1 was in collusion with the landlord and the suit was, therefore, barred by limitation under Art. 3, Sch. III of the Bengal Tenancy Act.

Held, that in view of the finding of fact in the judgment of the lower Appellate Court that there could be no doubt that the auction sale was brought about by the landlord with the deliberate object of depriving the Plaintiff, the article applied.

Amiruddi v. *Ulfat* (13 C. W. N. 108) and *Rudra Narain* v. *Natabar* (18 C. W. N. 353 at p. 353) followed.

17 C. W. N. 817 dissented from.

Babu Hit Lal Guha for the Appellant.

Maulvi A. K Fuzlul Huq for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION.—Before COXE AND BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE No. 3742 OF 1912. RAJA ULLA MONDAL v. AMANAT SARDAR and others. 21st May 1914.

Bengal Tenancy Act, sec. 153—Suit for rent—amount of rent disputed—Suit dismissed—Second appeal if lies.

In this case the Plaintiff brought the suit for arrears of rent alleging the rent to be Rs. 16 per year for an area of 6 bighas. The Defendants tenants admitted the relationship of landlord and tenant, but alleged that the rent was Rs. 3 per year for an area of 3 bighas only. The Munsif gave a decree to the Plaintiff at the rate of Rs. 9 per year. The District Judge at Alipore dismissed the suit on the ground that the Plaintiff failed to prove his case. A preliminary objection was taken that no second appeal lay under sec. 153, B. T. Act. The Vakil for the Appellant urged that in that case it might be treated as an application under sec. 115, C. P. Code.

Held, that no second appeal lay, as the suit having been dismissed no rate of rent was determined and even under sec. 115, there was no ground for interference.

Babu Ramatran Chatterjee for the Appellant.

Babu Karunamoy Ghose for the Respondent.

K. M. G.

PROBHAT CHANDRO CHATTERJEE *v.* PROSSANNO KUMAR SEN.

On the 24th October 1913, the Magistrate who was trying the proceeding under sec. 145, Cr. P. C., made his final order declaring the second party to be entitled to possession of the disputed land. The 1st party moved the High Court and obtained a rule to show cause why the order of the Magistrate under sec. 145, Cr. P. C., should not be set aside as made without jurisdiction inasmuch as there was a subsisting order under sec. 522, Cr. P. C., which rendered any order under sec. 145 *ultra vires.*

Mr. Bagram and *Babu Monmotho Nath Mukerjee* for the Petitioner.

Mr. Caspersz and *Mr. A. K. Fazlul Haq* and *Babu Probodh Chandra Roy* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the District Magistrate of Faridpur and the Opposite Party to show cause why the order under sec. 145 should not be set aside as made without jurisdiction, inasmuch as there was a subsisting order under sec. 522 which rendered any order under sec. 145 *ultra vires.*

What we understood by the subsisting order under sec. 522 was the order by which the Criminal Court had as a matter of fact restored possession to the person who had been ejected from the property by criminal violence. But having heard from the learned Counsel on both sides the actual facts in connection with this case, we find that possession under sec. 522 was never as a fact delivered to the Petitioner and that there was no bar to any proceeding under sec. 145, which the Magistrate whose concern under that section is only with the peace of his district was entitled to take. It is in vain to say that the Magistrate has no jurisdiction to stay his own order under sec. 522 or that the effect of the conviction being set aside by the High Court does not necessarily do away with the order under sec. 522 and a specific order must be passed by the Appellate Court setting it aside. All that is perfectly true as a proposition of law ; but here as in all questions of possession we have to deal with what is purely a question of fact, and the facts being as they are we find that the order purporting to have been passed under sec. 522 on the 22nd February 1913 was infructuous and was never carried out, and, it was therefore no bar to the jurisdiction of the Criminal Court under sec. 145. To hold otherwise would be to take grave risks of continual breaches of the peace in connection with matters which had been dealt with by judicial orders which had never been carried out. The mere fact that an order has been obtained cannot possibly oust the jurisdiction of another Court which has to deal with the preservation of the peace in face of the fact that the previous order has never been carried out.

The Rule must therefore be discharged.

Rule discharged.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

THE LORD CHANCELLOR.
LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 4 and 5, May.
Judgment, 25, May.

MRS. ANNIE BESANT,
Appellant,
v.
G. NARAYANIAH and others,
Respondents.

Guardians and Wards Act (VIII of 1890), secs. 7, 9, 19, 52—Indian Majority Act (IX of

MRS. ANNIE BESANT *v.* G. NARAYANIAH.

1875), sec. 3—Letters Patent, Madras High Court, 1865, cl. 13—Jurisdiction of District Court and of the High Court in respect of infants, limitations as to—Custody of infants, application by father for restoration and delivery of, if by suit or application—Infants ordinarily resident within jurisdiction, meaning of—Guardian and ward—Hindu father, if may appoint another as guardian of his sons—Authority so given, revocability of—Infants, when to be represented in an application for delivery of custody of their person—High Courts in India if may order person within jurisdiction to take possession of infants residing in England at the risk of habeas corpus—*Mandatory injunction—Proper order to make in such cases—Indian Courts and English Courts, conflict of jurisdiction—Common law powers of Chartered High Courts and of District Courts over infants—Indian High Court, power of, to declare infant Ward of Court, for extending minority—Father, if may be appointed guardian—High Court's powers when case transferred from District Court—Issue not raised if can be decided on evidence on other issues.*

As in England, so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hand. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation.

LYONS *v.* BLENKIN (1) *followed.*

Where the Appellant had offered to take charge of the Respondent's two sons and defray the cost of their education at the University of Oxford and the Respondent thought it desirable to take advantage of the offer of giving his sons Western education, notwithstanding the fact that this would entail a loss of caste, and by a letter purported to appoint her (the Appellant) the guardian of his sons and to act as such and the Appellant thereafter left for England with the boys and made arrangements there for their tuition to enter the University of Oxford and defrayed the expenses of their maintenance and education and the father acquiesced in the sons being taken to England in Appellant's custody, but about six months later demanded of the Appellant the restoration of his sons, and on the refusal of the Appellant so to do, instituted a suit in a District Court of Madras for a declaration that he was entitled to the guardianship and custody of his sons and that the Appellant was not so entitled and for an order on the Appellant to hand over such sons to the Respondent or such other person as to the Court might seem fit :

Held—*That the District Court had no jurisdiction over infants except such as is conferred by the Guardians and Wards Act.*

That the jurisdiction of the District Court is limited by sec. 9 of the Guardians and Wards Act of 1890 to infants ordinarily resident within the district and that it was impossible to hold that infants who had months previously left India with a view to be educated in England were ordinarily resident in the district.

(1) Jac. 245 (1821).

MRS. ANNIE BESANT *v.* G. NARAYANIAH.

That a suit inter partes *is not the form of procedure prescribed by the Guardians and Wards Act (VIII of 1890) for proceedings in a District Court touching the guardianship of infants.*

Semble.—*That the powers of the Madras High Court to which the suit was subsequently transferred under cl. 13 of the Letters Patent of 1865 relating to the case would seem to be confined to powers which but for the transfer might have been exercised by the District Court.*

Where after the suit had been so transferred to the High Court, the Judge on the Original Side of the High Court declared the infants (one of whom was about to attain the age of majority, viz., *18 years) to be Wards of the Court and then under sec. 7 of the latter Act declared that the Respondent was their guardian so as thereby to prolong the minorities of the boys until they attained respectively the age of 21 under sec. 3 of the Indian Majority Act :*

Held—*That the latter order was not competent to the District Court in the suit in question. Nor was it competent to the High Court, whatever might be its jurisdiction to declare the infants Wards of Court, having regard to the fact that the infants were not before the Court and their interests were not adequately represented before the Judge. Further no order declaring a guardian could, by reason of sec. 19 of the Guardians and Wards Act, be made during the Respondent's life-time, unless in the opinion of the Court he was unfit to be their guardian, which was not the case here.*

That although the Respondent remained the guardian of his sons, notwithstanding his letter authorising the Appellant to act as their guardian, and the authority given by him to the Defendant was always revocable, the question was whether in the events which had happened he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education and was at liberty to revoke the authority in the interest of the minors, and this question had to be determined having regard to the interests and welfare of the minors, bearing in mind their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants and in their presence.

That the question whether or not it would be to the interest of the minors to deliver them over to their father could not be properly decided without framing a definite issue to that effect and upon evidence admitted as relevant on other issues.

Such an issue can be properly determined only when the infants are properly represented and their wishes ascertained.

That the relief asked for being a mandatory order directing the Appellant to take possession of the person of the infants in England, and bring them to India, and hand them over to their father, and regard being had to the age of the infants, any attempt on the part of the Appellant to comply with this order, would, if the infants had refused to return to India, have been contrary to the law of England and would have at once exposed the Appellant to proceedings on a writ of habeas corpus *in England. No Court ought to make an order which might lead to such consequences.*

That the utmost that a Court of Competent Jurisdiction in India could do under the circumstances of this case was to order the Appellant to concur with the Respondent, as the infant's guardian, in taking

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proceedings in England to regain the custody and control of his sons.

Leave having been given by the Judicial Committee to the infants to intervene in this appeal and they having expressed their unwillingness to return to India or abandon their chance of obtaining a University education in England, the order of the Madras High Court directing the Appellant to take them back to India could not be lawfully carried out without the consent of the boys or without an order from the Court exercising the jurisdiction of the Crown over infants in England.

The material allegations upon which the suit was brought were as follows :—

The Defendant was the President of the Theosophical Society of which the Plaintiff was a member from 1882. About the end of 1908, the Plaintiff was appointed Assistant Corresponding Secretary to the Esoteric Section of the Society, and he and his family took up their residence at the head-quarters of the Society, Adyar, in a house which he occupied rent-free. In September 1909, he removed his two minor sons Krishnamurti and Nityananda from school, and they received gratuitous instruction at Adyar from one Mr. C. W. Leadbeater and others. The boys were then aged about 14 and 11. The Defendant became acquainted with them in December 1909. On the 6th March 1910, the Plaintiff signed a letter (Ex. A) by which he constituted the Defendant the guardian of his minor sons. In March 1911, the Defendant took the boys to Benares and then to England. Between these dates, the Plaintiff alleged, he became acquainted with facts which led him on 31st December 1911 to ask the Defendant (who meanwhile had returned from England with the boys in October 1911) at Benares (where the boys had been taken by Mr. Leadbeater from Adyar in December 1911) that they should be separated from Mr. Leadbeater. The Defendant having refused Plaintiff's request, the Plaintiff returned to Adyar in January 1912, and as the result of his complaints to various persons, an interview took place between the Plaintiff and the Defendant in the presence of several other members of the Society, at which the Plaintiff agreed that he had no objection to the boys being taken to England, the Defendant having assured him that they had been separated from Mr. Leadbeater who had left India on 13th January 1912. On 26th January 1912, the Defendant left Adyar with the boys for Benares from where they were taken by her to England after short stays in Sicily and Italy, where, it was alleged, Mr. Leadbeater had met them.

On 7th February 1912, the Plaintiff was dismissed by the Defendant from his office of Secretary, and on 19th July 1912 the Plaintiff wrote to the Defendant a letter Ex. AA 6, in which he purported to cancel the letter Ex. A and asked her to hand over to her his two sons. In October 1912, the Defendant returned to Adyar leaving the boys in England, and the Plaintiff instituted the present suit in the District Court of Chingleput, praying for declarations (1) that he was entitled to the guardianship and custody of his two minor sons, (2) that the Defendant Mrs. Besant was not entitled to and was unfit for the charge and guardianship of them and for a direction to her to hand them over to him or to such other person as might be appointed.

After the Defendant had filed her written statement, the case was transferred to the Original Side of the High Court under

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cl. 13 of the Letters Patent. An amended plaint and written statement were afterwards filed, the relief prayed in the former however remaining the same. The suit was tried and disposed of by Bakewell, J., who declared the minors wards of Court and passed a decree declaring the Plaintiff to be the guardian of the minors and directing that the Defendant should hand over custody of them to the Plaintiff in that capacity.

The Defendant appealed. The Appellate Court delivered two judgments, one on the question of jurisdiction dated the 17th September 1913 and another on the merits on the 13th October 1913 dismissing the appeal with costs.

In the course of his judgment on the preliminary question of jurisdiction, White, C. J., observed as follows :—

"It was argued that the Guardians and Wards Act being a Code, all common law remedies by suit were superseded by that Act. It was also argued that the learned Judge could only exercise jurisdiction in the suit as a tribunal acting in the place of the Chingleput Court and that if the proceedings by suit in the Chingleput Court were defective, that defect was inherent in the jurisdiction, which the learned Judge purported to exercise in the suit, after it had been transferred to this Court. The Defendant did not contend that, assuming this Court had jurisdiction independent of the jurisdiction exerciseable under the Guardians and Wards Act, this Court would have been precluded from exercising that jurisdiction if the suit had been instituted here, though she did not admit that even in those circumstances there would have been jurisdiction in this Court. As regards this question, sec. 3 of the Guardians and Wards Act expressly provides that nothing in that Act shall be construed to take away any power possessed by any High Court established under the High Courts Act. So far as I know, there is no case in which it has been suggested that the effect of the Act is to cut down the jurisdiction of this Court when proceedings are instituted here and guardians have been appointed by Indian High Courts under their general powers irrespective of the Act. See for instance *Re Jiram Luxmon* (2). The Guardians and Wards Act is an Act passed in 1890 (VIII of 1890) for the consolidation and amendment of the law relating to guardians and wards. By that Act the earlier regulations and enactments were repealed. There is authority for the Defendant's contention that as regards suits instituted and tried in the subordinate Courts, all common law remedies were superseded by the Act. The Allahabad High Court in *Sham Lal* v. *Bindo* (3), a case decided since the passing of the Act of 1890, took this view. The judgment, however, is based mainly on the *argumentum ad inconvenienti*, and there is considerable force in Mr. Ramasami Iyer's suggestion that the suggested anomalies were not new, but had existed since the Act of 1861. This would also appear to be the view taken by the Punjab Chief Court (32 P. R. 49). See the case referred to by Chandavarkar, J., in his judgment in *Sharifa* v. *Munekhan* (4).' The Bombay High Court on the other hand in *Sharifa* v. *Munekhan* (4), also decided since 1890, held that the right to proceed by suit was preserved. The question does not seem to have been considered by this Court as regards the Act of 1890, but in a case

(2) I. L. R. 16 Bom. 634 (1892).
(3) I. L. R. 26 All. 594 (1904).
(4) I. L. R. 25 Bom. 574 at p. 580 (1901).

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decided under the Act of 1861, this Court held that that Act did not debar a District Munsif's Court from entertaining a suit by a Hindu father to recover the possession of his minor sons alleged to be illegally detained. See *Krishna* v. *Reade* (5). Mr. (Sir John) Trevelyan in his Law relating to Minors (Ed. IV, p. 99), with reference to the jurisdiction of District Courts in matters relating to the appointment of guardians observes: 'There being nothing in the Guardians and Wards Act or in any other enactment to exclude their jurisdiction, the Courts in the districts can appoint guardians in suits brought for that purpose, but in consequence of the existence of a special procedure such suits have fallen into disuse.' It was argued that the decision with reference to the Act of 1861, such as the Madras case to which I have referred, could not be relied on in support of the contention that the common law rights to proceed by suit survived the Act of 1890, since the earlier enactment was an enabling and not a consolidating Act and contained no indication of the intentions of the legislature to supersede the common law right of action. There would be more force in this argument, if indications were to be found in the Act of 1890, that it was the intention of the legislature that all right to take proceedings otherwise than under the Act, should be superseded. There is certainly no express provision in the later Act that the legislature intended to put an end to the common law right of action, and I am not prepared to infer from the general scope and tenor of the Act that this was the intention. Such indications, as there are within the four corners of the enactment, in my opinion, rather point in the opposite direction. We find in sec. 52, the section which amends the Indian Majority Act of 1875, the words '*Any* Court of Justice' not 'the Court exercising jurisdiction under the Guardians and Wards Act,' though perhaps too much stress should not be laid on this, since in a section amending the Indian Majority Act (where the words 'any Court of Justice' occur), the words of the enactment which is amended would as far as possible be followed. Again, sec. 48 of the Act of 1890 provides that an order under the Act is final and shall not be contested by suit. Nothing is said as to the right to sue in the first instance being taken away or affected by the Act. I think, the question is governed by the general rule that a special remedy under a special statute does not take away the common law right. The rule is thus stated in *Ramayyar* v. *Vedachalla* (6), which is cited in *Zemindar of Ettayapuram* v. *Sankarappa Reddiar* (7), 'Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to, but where a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute.'

"I am of opinion that the Act of 1890 did not take away any common law or equitable jurisdiction which was vested in a District Court at the time the Act came into force. I think, this objection to the jurisdiction fails.

"I am also of opinion that the jurisdiction of the High Court in this suit is the same as if the suit had been originally

(5) I. L. R. 9 Mad. 31 (1885).

(6) I. L. R. 14 Mad. 441 (1890).

(7) I. L. R. 27 Mad. 483 at p. 493 (1903).

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instituted in the High Court and that it is not restricted to such jurisdiction as could have been exercised by the District Court, if the suit had not been called up by the High Court. Cl. 20 of the Letters Patent no doubt provides that the law or equity and rule of good conscience which is to be applied to the High Court when exercising its Extraordinary Original Civil Jurisdiction is to be the law or equity or rule of good conscience which would have been applied by the local Court. But this provision, in my opinion, does not take away or cut down any independent jurisdiction which may be vested in the High Court. In the despatch of the Secretary of State dated 14th May 1862, which accompanied the Letters Patent of that year, it is stated that by cl. 13 the High Court is empowered to call for and to try as a Court of First Instance any suit which the law requires to be instituted before some other tribunal, and that by the exercise of this power the High Court will be enabled to obviate all reasonable ground of complaint when it seems that any hardship or injustice is likely to result from the compulsory institution in a Zilla Court of a suit which, but for the change of system, might have been instituted in the Supreme Court. This is inconsistent with the suggestion that the Extraordinary Original Jurisdiction of this Court is more restricted than its Ordinary Original Jurisdiction. I see no reason for holding that this Court when trying a suit as a Court of Extraordinary Original Jurisdiction should be precluded from exercising any jurisdiction which may be vested in it by law as a Court of Original Civil Jurisdiction. I think, this ground of objection also fails.

"The objection to the jurisdiction which I now propose to consider is taken in the twelfth ground of appeal. This raises the question whether the learned Judge had 'power and authority' under cl. 17 of the Letters Patent to appoint the father the guardian of the persons of the minors and to direct the handing over of the minors by the Defendant to him notwithstanding the fact that the minors were outside the Presidency of Madras when the suit was instituted and when the judgment was pronounced. Jurisdiction as regards infants was expressly conferred on the Supreme Court of Madras by cl 32 of the Letters Patent of 1800 which created the Supreme Court. This clause authorises the Supreme Court to appoint guardians and keepers for infants and their estates according to the order and course observed in that part of Great Britain called England. The language of this clause is quite general and is not qualified by any limitations as to persons or place such as we find in other clauses of these Letters Patent. (See for instance cls. 4, 21, 22, 31, and 41.) The High Court of Judicature at Madras was constituted by the Letters Patent of 1862 issued under the powers conferred by the Indian High Courts Act, 1861. By sec. 8 of that Act on the establishment of the High Court, the Supreme Court and the Court of Sudder Adaulat and Foujdari Adaulat were abolished, and by sec. 9 the jurisdiction of the abolished Courts was, subject to certain limitations, vested in the High Court. In addition to the general vesting of jurisdiction by this section, cl. 16 of the Letters Patent of 1862 expressly conferred upon the High Court 'the like power and authority with respect to the persons and estates of infants, idiots and lunatics, whether within or without the Presidency of Madras as that which is

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now vested in the said Supreme Court of Madras.' Whatever may have been the purpose for which the words 'whether within or without the Presidency of Madras' were introduced into this clause, it seems clear that it was the intention of the framers of the Letters Patent to confer in express terms upon the High Court, as regards the persons and estates of infants, the same jurisdiction as had up to that time been vested in the Supreme Court. The words 'whether within or without the Presidency of Madras' seem to me to be inappropriate, or at any rate unnecessary both in cl. 16 which relates to jurisdiction as to infants and lunatics, and in cl. 17 which relates to the insolvency jurisdiction of the High Court.

"In cl. 13, the clause which gave Extraordinary Civil Jurisdiction to the High Court, the words are necessary in order to include any Courts subject to the superintendence of the High Court which might be situated without the Presidency. In the Letters Patent now in force, the Letters Patent of 1865, we find the words 'whether within or without the Presidency of Madras' retained in cl. 13, whilst in cls. 17 and 18, which correspond to cls. 16 and 17 respectively of the Letters Patent of 1862, for these words the words 'within the Presidency of Madras' were substituted. In the despatch of the Secretary of State to which I have already referred it is stated that the reason for the introduction of the words, 'whether within or without' was to make it clear that the Charter was meant to apply to certain extra-local jurisdictions. It may be that the explanation for the omission of the words 'or without' in cls. 17 and 18 of the Letters Patent of 1865 is to be found in sec. 3 of the Act of 1865 (28 Vict., c. 15), which empowered the Governor-General to authorise any High Court to exercise the powers conferred by the Letters Patent in a place not within the limits of the Presidency for which the High Court was established, since the effect of this enactment may have rendered the words 'or without' in cls. 17 and 18 unnecessary, though they would still be necessary for the purposes of the Extraordinary Original Jurisdiction conferred by cl. 13. However this may be, it seems clear that the words 'within the Presidency of Madras' were used for the purposes of territorial limitation, and that they did not qualify or restrict the powers of the High Court with regard to the guardianship of minors. The jurisdiction in connection with the estates and persons of minors is, in my opinion, the jurisdiction which was exerciseable by the Lord Chancellor in England acting for the Sovereign as *parens patriæ* when the Supreme Court in Madras was instituted. The learned Judge in dealing with this question of jurisdiction referred to the fact that the minors were domiciled in British India. I do not think, when he referred to the domicile of the minors, that he meant to lay it down that an Indian domicile on the part of the minors was necessary to give this Court jurisdiction. Cl. 17 says nothing about the domicile of minors. But it seems to me that the domicile of the minors, or the fact that they are Indians, may be factors to be taken into consideration when the Court is determining whether in a given case it will exercise jurisdiction or decline to do so. If the domicile and residence of the father within the jurisdiction of the Court of Chancery in England would have been sufficient to give jurisdiction to the Court in England, I think the same facts *mutatis mutandis* would be sufficient

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to give jurisdiction here. Whether the Court either in England or here should exercise the jurisdiction on the strength of these facts alone is a different matter. In determining whether the Court will exercise its jurisdiction, and in what manner it will exercise it, many factors may have to be taken into consideration, amongst others, as it seems to me, the question of domicile.

"The Defendant also contended that the decree was bad and must be taken to have been made without jurisdiction, because it must necessarily be 'ineffective.' She relied on the proposition in the introduction to Professor Dicey's work, the 'Conflict of Laws,' which is stated as general principle No. III (second edition, p. 40). 'The Sovereign of a country acting through the Courts thereof has jurisdiction over any matter with regard to which he can give an effective judgment, and has no jurisdiction over any matter with regard to which he cannot give an effective judgment.' Professor Dicey says (pp. 41 and 42) that a judgment which is "ineffective" means 'a decree which the Sovereign under whose authority it is delivered has not in fact the power to enforce against the person bound by it, and which, therefore, the Sovereign cannot, even if he choose, give his Court the means of enforcing.' It may be a question whether this principle has any application, whereas in the present case the Courts in England and the Courts in this country act through the same Sovereign. At any rate there can be little doubt that the Sovereign acting through his Court in England has the means of enforcing this judgment. Whether the Court in England would think fit to do so in the circumstances of this case is, of course, another matter. The rule is thus stated by Professor Dicey: 'A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian) has no direct authority as guardian in England, but the Court recognises the existence of a foreign guardianship, and may, in its discretion, give effect to a foreign guardian's authority over his ward.' (Dicey's Conflict of Laws, second edition, Rule 133, p. 475.) It does not follow that because the decree gives the father as guardian no authority, in England, assuming it does not, the decree is 'ineffective.' In the more recent English cases the Courts in England have recognised the foreign guardian. 'The position, however, in England of foreign guardians is a subject on which it is difficult to lay down precise rules, both because, in all matters of guardianship the High Court acts mainly on its discretion and with reference to the particular circumstance of each case, and because the later decisions involve a recognition of foreign guardianship not in reality consistent with the doctrine of the earlier cases that the powers of guardians are strictly local.' (Dicey's Conflict of Laws, 2nd edition, p. 478.) I am not prepared to hold that the judgment in this case is ineffective and therefore bad.

"The contention that the Court in England would say that the decree which it was asked to enforce had not been made by a Court of competent jurisdiction of course begs the question. It was argued that the Court of Chancery has wider powers than any Court acting under statutory powers. But in the present case the statutory power as regards the appointment of guardians for infants is given with express reference to "the

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order and course observed in that part of Great Britain called England" (see cl. 32 of the Letters Patent of 1800).

"The test seems to me, would the fact that an infant was resident out of England in itself deprive the Courts in England of power on the application of a father, domiciled and resident in England, to appoint a guardian of the person of the non-resident infant? The answer is surely 'No.' As regards the English cases in *Johnstone* v. *Beattie* (8), a case which came before the House of Lords in 1843, it was held that the rights of a Scotch 'tutor' could not be recognized by the Court in England, with reference to a minor residing in England. It was also held that the Court in England had jurisdiction to appoint guardians for the infant, although her domicile and all her property were situated in Scotland. In *Hope* v. *Hope* (9), a case which came before Lord Cranworth in 1854, the Lord Chancellor laid it down that the Court of Chancery had jurisdiction over the custody of the children of an English subject though such children were born and at the time the jurisdiction was invoked were resident abroad. In this case the children were born out of the jurisdiction, the mother was resident out of the jurisdiction and an *interim* order had been made by the French Court entrusting to her custody of the children. In the case before us, the children were born within the Presidency of Madras. The Appellant has not contended that she does not reside within the Presidency and no order has been made by the Court in England with which the order of Bakewell, J., could conflict. The fact that the Defendant must be deemed to be resident within the jurisdiction seems to me to be a matter of importance. In the *Hope* case (9), the Lord Chancellor said in his final judgment (p. 544):—'If Mrs. Hope had not been abroad, I should have made a short order directing compliance within a limited time, and in default that she should stand committed.' On the facts of the *Hope* case (9) the Lord Chancellor does not seem to have entertained the least doubt as to his jurisdiction, though in framing his orders he took the greatest care to treat the French tribunal with all respect, and to avoid the possibility of a conflict between the French and English Courts. The final order which the Lord Chanceller made was that within a week the mother should deliver up the children to their father or otherwise concur with him in taking such steps as might be necessary for authorising them to be delivered up to him according to the laws of France. Whether anything was done in pursuance of this order we do not know. Assuming nothing was done this does not affect the question of jurisdiction. The Lord Chancellor was clearly of opinion that he ought to make the order and that the case was not one of the class of cases to which he referred in his first judgment (p. 542) when an order would do no good, but would involve 'a sort of scandal' on the Court by reason of an order being made which the Court could not enforce. Even in this class of cases the Lord Chancellor apparently did not doubt the jurisdiction, but only the desirability of exercising it.

"In *In re Willoughby* (10), the Court following *Hope* v. *Hope* (9) on the applica-

(8) 10 Cl. and F. 42 (1843).

(9) 43 Eng. Rep. 534: 4 DeG. M. & G. 328 (1854).

(10) 30 Ch. D. 324 (1885).

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tion of the infant's next friend, the father (a natural born British subject) being dead, appointed a guardian of an infant born and resident in France, the mother, a French woman, being entitled by the law of France to the status of natural guardian of the infant. The Court of Appeal, affirming Kay, J., were of opinion that the jurisdiction existed, and in the circumstances ought to be exercised. Other English cases were cited to us, but I do not propose to discuss them, as the two cases to which I referred are the only cases, so far as I know, which seem to me to be directly in point. Some Indian cases were cited in the course of the argument. I only refer to those cases where the question of the jurisdiction conferred by the Letters Patent was considered. In *In re the Estate of H. G. Meakin* (11), a mother residing in Poona was under the powers conferred by the Letters Patent appointed guardian of a child who was resident in England at the time the order was made. The making of the order, however, was not opposed. In *In the matter of Srish Chunder Singh* (12), on an application under cl. 17 of the Letters Patent, Sale, J., refused to appoint a guardian of the person and property of an infant who was not a British subject and who was outside the limits of the Ordinary Civil Jurisdiction of the Calcutta High Court, there being testamentary guardians and no application having been made to remove them. The fact that the infant was not a European British subject does not seem material to the question of jurisdiction. The learned Judge would seem to have relied on the fact that there were testamentary guardians and also on the fact that under the Guardians and Wards Act the application should have been made to the Court in whose jurisdiction the minor resided. So far as I know, there is no decision with the exception of the case to which I have just referred that an Indian High Court has no jurisdiction under cl. 17 of the Letters Patent, where the infant is outside the jurisdiction when the Court is asked to exercise its 'power and authority.'

"As regards the objection that the minors were not represented, in my opinion neither Or. XXXII, r. 5, Civil Procedure Code, nor the principle of law or equity on which the rule is based applies to the present suit. The minors are not parties to the suit, and as from the very nature of the suit there must be the fullest and most careful consideration of their interest before any order is made, it is not necessary that they should be separately represented in order that their interests may be protected.

"I am of opinion that in this case Bakewell, J., had power to appoint the father the guardian of the minors and that the power of the Court to appoint a guardian carries with it a power to make any order which may be necessary to enforce the authority of the guardian.

"I express no opinion as to whether, apart from the power and authority given to the Court by the Letters Patent, this Court would have jurisdiction under the Code of Civil Procedure and the general law to make the decree which is now under appeal.

"In my opinion the objections to the jurisdiction fail."

Oldfield, J., in dealing with the same question observed :—

"The first ground of appeal argued is that these proceedings were taken in the

(11) I. L. R. 21 Bom. 137 (1896).
(12) I. L. R. 21 Cal. 206 (1893).

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form of an ordinary suit, although the relief claimed could be asked for only by petition under a special Act, the Guardians and Wards Act (VIII of 1890), if the terms thereof authorised its grant and the procedure therein prescribed were followed. The objection is substantial, because sec. 9 of the Act requires that an application for the personal guardianship of a minor shall be made to the District Court within the limits of whose jurisdiction he is ordinarily resident, and it is at least doubtful whether this requirement was complied with in the present case when the minors had left the jurisdiction about nine months previously. Secs. 10 and 11 moreover prescribe that certain information shall be given in the petition, which was not given in the present plaint, and that certain notices shall be served. It is not disputed that the relief now given by the learned Judge could have been claimed under the Act. It is argued that it could have been claimed only under it, and that therefore the acceptance of the plaint by the Chingleput District Court and all subsequent proceedings were without jurisdiction. A defect in jurisdiction such as that alleged can be relied on at any time and could not have been cured by the Defendant's waiver of her objection to it; and it is therefore unnecessary to refer to the course of her pleading in this connection. It has been suggested that in any case the plaint can be treated as a petition and the proceedings as proceedings under the Act, the minors having in fact been ordinarily resident within the Chingleput jurisdiction. But, if there were no legal objection to that course and the necessary finding as to residence could be reached, there is still a possibility that the Defendant would suffer prejudice in respect of the merits of her case which debars this Court from such use of its discretion. It is therefore necessary to decide whether the existence of the special Act makes a suit unsustainable under the common law.

"There is no doubt that the provision of a simple and summary procedure under the Act has made suits rare, if it has not brought them into total disuse; and for that reason, whether or no the right of suits still exists, there are not likely to be many decisions regarding it. There is no Madras case. For, *Thiruvengadamier* v. *Periasami Tevary* (13) which was originally relied on turned out on inspection of the record to relate to a petition under the Act. In the other provinces conflicting views have been taken as appears from the references given in *Shamlal* v. *Bindo* (3), the High Court of Allahabad and the Chief Court of the Punjab being against and the Calcutta and Bombay High Courts in favour of the survival of the common law jurisdiction. The judgments in all these cases are, however, inconclusive, for the anomaly foreseen in *Shamlal* v. *Bindo* (3), as a consequence of the conflict between the decisions of two Courts, could be avoided as easily in this as in other cases by the use of the Court's power to join necessary parties at the instance of the person who was a party to both proceedings. *In the matter of the Petition of Kashi Chunder Sen* (14) was a proceeding under the Act, the question being whether its scope had been enlarged illegitimately; and the case is important only with reference to certain observations in the judgment of Broughton, J., on one aspect of the matter to which I shall return. In another case not referred to in

(3) I. L. R. 26 All. 594 (1904).
(13) 9 M. L. J. 24.
(14) I. L. R. 8 Cal. 266 (1881).

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Shamlal v. *Bindo* (3), *In the matter of Srish Chunder Singh* (12), the question came before a single Judge on application primarily under the Letters Patent but also under the Act. No order in fact was made and there was no question of the existence of a concurrent right to sue. The Bombay case, *Sharifa* v. *Munekan* (4), ended in a dismissal on the merits. Perhaps on that account the judgments deal with the question of jurisdiction, one of them only by reference to an unreported case of the same High Court, the other by reference to Calcutta cases.

"In these circumstancs, the Defendant's contention must be dealt with on its merits. It is firstly, that the provisions of the Act and their wording abolish existing remedies under the statute and Common Law expressly or by implication. The Statute Law of 1890 consisted in Madras Regulation V of 1804 (sec. 20) and X of 1831 and the Indian Acts XIV of 1858 and IX of 1861. The three first gave more or less general authority to Courts to appoint guardians and the last empowered District Judges to do so by summary process, at the same time expressly saving the validity of appointments made in suits without restriction as to the grade of the Courts making them. None treated of the rights or liabilities of the guardian or minor. It is clear and it was recognised in *Krishna* v. *Reade* (5) in which the sustainability of a suit in a District Munsif's Court was upheld, that a comprehensive remedy was available at Common Law, and in fact it was only as regards two matters, the appointment of a guardian and the procedure by which he could obtain custody of his ward, that the statutes afforded any guidance whatever. The explicit repeal of the statutes by Act VIII of 1890 therefore entailed very little. In the language of the Act there is nothing which in my opinion favours either Defendant or the Plaintiff. There is no reference to remedies, rights or duties under the Common Law or their abolition. There is no doubt no reference to guardians appointed under it, though one might perhaps have been expected in sec. 26 (1), which refers to guardians appointed or declared by the Court or appointed by will or other instrument. The Plaintiff's suggestion that guardianships obtained by suits are included in this and other sections, in those declared by the Court, fails in view of the definition of Court in sec. 4 (5); and it is simpler to assume that the duties of guardians not appointed under the Act was left to be regulated by the Courts which appointed them. Sec. 52 refers to appointments or declarations made by any Court of Justice, and may be a recognition of appointments not made under the Act or by the District or High Court. But it may be intended merely to cover those made by other Courts before the Act was passed. Sec. 7 provides a procedure for the appointment of a guardian, the use of which is restricted to District Courts, but its language in no way excludes the existence of an alternative or is inconsistent with its merely enabling character. There is, it must be held, nothing in the Act itself which supports or negatives Defendant's contention.

"She relies also on the more general argument that Act VIII of 1890 abolished existing jurisdiction and remedies, inasmuch as it is a codifying enactment.

(3) I. L. R. 26 All. 594 (1904).
(4) I. L. R. 25 Bom. 574 (1901).
(5) I. L. R. 9 Mad. 31 (1885).
(12) I. L. R. 21 Cal. 206 (1893).

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That it is one must be conceded. It is statedly intended to consolidate and amend the existing law, and that formula is as explicit as those used in other enactments usually recognised as codes. It repealed the existing statute law exhaustively. It reproduced it and the existing common law so comprehensively that the learned vakil for the Plaintiff has been able to point three topics only as omitted from its purview; and their importance is insignificant or the necessity for their inclusion doubtful. But though Act VIII of 1890 constitutes a code, the consequence alleged by the Defendant does not follow. No doubt 'when a statute gives a new right and prescribes a special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to.' But this statement of the law is incomplete, unless it is remembered that 'when a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative, unless an intention to the contrary appears from some other part of the statute.' The rule is given in those terms in *Ramayyar* v. *Vedachalla* (6) and *Zamindar of Ettyapuram* v. *Sankarappa* (7), and is moreover based on English authority. It is not material that in *Ramchandra* v. *The Secretary of State* (15), only the first portion of it was referred to. For that (it would appear) was owing to the assumption (made rightly or wrongly) that new rights alone were then in question; and this is borne out by the character of the English cases cited, the rights in question in them having been created by statute. Then the rule, thus ascertained as a whole, is useless to the Defendant. For, as was observed above, a common law jurisdiction existed, and the Act is only a re-affirmation of the powers exerciseable and the duties enforceable under it. The one exception among its provisions to this statement is in sec. 58, which postpones the date of majority in cases in which a guardian has been appointed. But its application is expressly extended to all such cases, and is not limited to those in which there has been an appointment by a Court as defined in sec. 4 (5) of the Act. Although therefore the Act is a Code, it cannot be held to bar remedies or to close jurisdiction open at its date; and though they may have fallen into disuse in the mofussil in this Presidency, that cannot affect the Plaintiff's right to use them, when it has not been abrogated in any legal way. This objection to the jurisdiction therefore fails.

"The first of Defendant's more general objections to it is that no trial could be held when the minors were not impleaded separately, or represented by a guardian *ad litem* in accordance with Or. XXXII, r. 5 (2), Code of Civil Procedure. This rule reproduces sec. 444 of the Code in force when *Krishna* v. *Reade* (5) and the Calcutta and Bombay cases above referred to were decided, and I observe that the minors concerned were not made parties in them, and that the minor is not among the persons to whom notice must go in proceedings under Act VIII of 1890. But the short answer to this objection is that whatever its weight may be held to be, if it is urged by the minors as ground for discharging the order against them, it has not been shown how the Defendant, who did not take it before the learned Judge, can take it here.

"In order to meet the statement of De-

(6) I. L. R. 14 Mad. 441 (1890).
(7) I. L. R. 27 Mad. 483 (1903).
(15) I. L. R. 12 Mad. 105 (1888).

(5) I. L. R. 9 Mad. 31 (1885).

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fendant's last and most important objection to the jurisdiction, it is necessary to refer to the learned Judge's own statements regarding it. In the order of the 22nd April 1913, he said, 'with regard to the jurisdiction of this Court under cl. 13 of the Letters Patent, the power thereby conferred appears to be analogous to that of the High Court of England to remove actions from inferior Courts by writ of *certiorari*, and I think that this Court has the same powers in the trial of a suit removed from the District Court as in the suit instituted here.' Now if only cl. 13 is in question, it is clear that the learned Judge's powers were under cl. 20 only, those of the District Court of Chingleput, from which the suit was transferred. But in para. 15 of his judgment he said, 'with regard to jurisdiction Plaintiff's children are subjects of the King-Emperor, domiciled in British India, and are only temporarily resident in England where they were taken by Defendant for purposes of education. The Defendant has also, in my opinion, broken the understanding, by which she was allowed to take them beyond the jurisdiction. In these circumstances I am clear that this Court has jurisdiction to pass orders as to the custody of the children, and is bound to enforce such orders by all means in its power.' It is not clear how far Defendant ever abandoned her intention of contesting the issues relating to jurisdiction, but the learned Judge has dealt with them shortly, because as he said, he understood her to do so. Probably on this account he has not stated explicitly the nature of the jurisdiction he professed to be exercising, but has only referred to various foundations for it, the nationality and domicile of the minors and Defendant's conduct as constituting a cause of action. The Defendant has argued that these foundations are useless, that no other is available, and that the minors being resident outside British India, if a suit could be brought at all, neither the District Court of Chingleput nor the learned Judge was entitled to entertain it. She has maintained this directly and also with reference to the principle of effectiveness.

"It is in my opinion unnecessary to consider at any length one answer to this argument that the learned Judge could pass the decree under appeal in the exercise of the powers conferred by cl. 17, Letters Patent, because his action can, I think, be justified, without reference to it. I therefore do not deal with the very careful discussion of the history of the clause which has taken place. I observe only that the powers conferred by cl. 17 are those exercised by the defunct Supreme Court, that is, those which would be exercised by the Court of Chancery in England, and that whilst those powers have been exercised in cases referred to before us, and can be exercised without any special invocation by petition or otherwise, the foundation for that exercise (so far as has been shown) has always been, and presumably must be, some proceeding pending before the Court in the legal use of its powers. This is material, because in the present case the legality of the proceedings and of their institution in the Chingleput District Court is denied, and the transfer under cl. 13, Letters Patent, to this Court cannot be treated as validating them. *Ledgard* v. *Bull* (16), cl. 17, therefore can be relied on only to supplement powers which the learned Judge must be shown to have had already under cls. 13 and 20, and with reference to the nature of the relief he

(16) I. L. R. 9 All. 191 (1886).

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could give, and only in case there was already a legally instituted proceeding before him, that is, in case the Chingleput District Court had jurisdiction.

"To return to the foundations for his jurisdiction, to which the learned Judge referred, there are no doubt some expressions used in English cases, to be cited later, which imply that nationality and domicile weighed with the Court of Chancery in the circumstances under consideration. But it is doubtful whether in them the jurisdiction was founded on the nationality or domicile of the minors alone; and I desire, if possible, to justify the learned Judge's action on grounds unconnected with the exercise of the special powers of that Court. The Defendant denied that she had been guilty of the breach of any agreement within or outside the jurisdiction. But neither the agreement in question, that of 19th January 1912, nor its breach is the whole or a major part of the subject-matter of the suit; and therefore, though the agreement could ordinarily be sued on in Chingleput District, where it was made, it is unnecessary to pursue this further. The questions are whether any other legal justification for the institution of the suit at Chingleput is available and whether the non-residence of the minors is material.

"The law as to the suits, of which in general Indian Courts are empowered to take cognizance, is stated primarily in sec. 9, Code of Civil Procedure. They have jurisdiction to try all suits of a civil nature, the meaning of the last two words being restricted in a manner not at present material, by an explanation. This general statement is further qualified by reference (1) to the provisions of the Code itself, (2) to any express or implied bar. The latter exception no doubt covers suits excluded expressly or impliedly from the jurisdiction by other enactments. The question is to what extent it also recognises the exclusion of suits under the provisions of unwritten, including private international, law, if such excluding provisions exist. The alternative is with reference to the first qualification above referred to. That the only further test of jurisdiction is supplied by secs. 15 to 20 which prescribe the Court entitled to try each class of suit with reference to territorial considerations. If these sections can be treated as establishing a general criterion applicable in cases of competition not only between Courts in British India, but also between them and Foreign Courts, the jurisdiction of the Chingleput District Court is clear, since the case is covered by sec. 20 (*a*) relating to the Defendant's residence, not the locality of the cause of action. The suit is not one referred to in any of the earlier sections. The rules stated in the various portions of sec. 20 are alternative. The Defendant gave her residence in her written statement as alternately Adyar in Chingleput District, Benares and England, and as she was served at Adyar it is not necessary to go through authorities to show that for the purposes of the section she must be held to have been resident there. These sections have been treated as affording the criterion above referred to as between Indian and Foreign Courts in a number of decisions and there are indications that they were intended to do so in the general absence of any restrictions on their operation and in the explanation to sec. 16, which imposes a restriction material in the present connection and so far as it affects the proviso to the section, constituting a deliberate departure from the private international law

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recognised by English Courts and stated in *Pen* v. *Baltimore* (17).

"In *Annamalai Chetty* v. *Murugusa Chetty* (18) it was however observed by their Lordships of the Privy Council, 'in both Courts in India it was apparently assumed that the question of jurisdiction turned on sec. 17 (now sec. 20) of the Code of Civil Procedure and that though the Defendant was a foreigner and although the cause of action arose in a foreign country and although the Defendant did not personally reside within the local limits of the jurisdiction of any Court in British India . . . . yet he could be sued' in a British Indian Court; and it was said that this assumption required more attention than it had received. It is true that in the same judgment their Lordships expressly approved the decision in *Girdhar Damodar* v. *Kassigar Hiragar* (19). In it one learned Judge said that the Court was not concerned with questions of International Law and had only to determine whether the Defendant was a person against whom the legislature had permitted a suit to be filed in which a decree could be passed and executed against his person and property within the jurisdiction. The other in the portion of his judgment at page 666 to which reference is made in the foot-note to the Madras case, quoted *Companhia de Mozambique* v. *British South Africa Company* (20) to the effect that the question whether the Courts of a nation will or will not entertain jurisdiction of any dispute is to be decided by the municipal law of the nation itself thus far concurring in his colleague's adoption of that law as supplying the test required. But he continued the quotation, and it is to this and his connected observations that I understand the judgment of the Privy Council to refer. 'If there is a proper inference to the same effect as that of express legislation the result is the same. But there are certain rules which have by universal consent indicated the circumstances from which the inference may legitimately be drawn.' It was with such inference and the question whether the circumstances supported it that the Privy Council and the learned Judges of the Bombay High Court were concerned in the cases under discussion, since in both the phrases 'carries on business' was under interpretation. But no such inference is under discussion or need be drawn in the present case in which reference only to the Defendant's residence and sec. 20 (*a*) is necessary and the facts required for its application are not in doubt. Here, therefore, there is no reason for resort to the principles of Private International Law.

"Nor does the fact that the minors are not at present resident within the Chingleput jurisdiction afford such reason. It has been pointed out that the various portions of sec. 20 are alternative, and there is therefore no reason for considering the place where the cause of action arose, or the minors' whereabouts as determining it. I shall refer later to the validity of the learned Judges' decision against the minors themselves and the possible consequences of the Plaintiff's failure to implead them. In the present connection it is sufficient that this is an action *in personam*, and that to quote the rule as stated at p. 361, Dicey's Conflict of Laws, 2nd Edition, 'the Courts of a foreign country have jurisdiction where at the time of the commencement of the action the Defendant was resident (or present) in such country so as to have the

(17) 1 Vesey Sen 444 (1750).
(18) I. L. R. 26 Mad. 544 (1903).
(19) I. L. R. 17 Bom. 662 (1893).
(20) [1892] 2 Q. B. 358.

benefit and be under the protection of its laws.' I deal below with the argument from the doctrine of effectiveness. But for the present purpose the principle just referred to is sufficient, and there is nothing in the words cited or in any other authority adduced to derogate from its effect or to show that the absence from the jurisdiction of the object of the claim, be it minors or chattels, is sufficient in itself to deprive the Court of jurisdiction otherwise obtained.

"Lastly, the doctrine of effectiveness as enunciated at p. 40, Dicey's Conflict of Laws, 2nd Edition, has been invoked. It is stated there as follows: 'The Sovereign of a Country acting through the Courts thereof has jurisdiction over any matter with regard to which he can give an effective judgment,' and the Defendant would define effectiveness shortly as 'the power of the Court to carry out its own decrees without resort to any other force than that of its Sovereign.' It is urged that the learned Judge has no power to carry out his decree without resort to the force of a Sovereign, other than the Government of India, and that he therefore could not pass it. This, however, assumes as I understand it that the doctrine must be applied not only to cases in which the whole relief claimed would be beyond the powers of the decreeing Court to enforce, but also to those in which only a part of it would be so. That assumption is not supported by authority. The distinction drawn between judgments wholly and partially enforceable by the decreeing Court is material, because the judgment before us would appear to be of the latter description.

"So far as appears from the work cited, the majority of the cases in which the doctrine has been applied related to claims to immoveable property. But it has been held that it did not prevent the Court from granting relief on claims to the specific performance of contracts or to equities connected with such property in so far as such relief could be given *in personam* by action against the Defendant within the jurisdiction. No doubt the Defendant attempted to distinguish such cases as *Pen* v. *Baltimore* (17) on the ground that only the execution of a conveyance which the Court itself could execute on behalf of a recalcitrant Defendant, was in question. But that is not the ground taken in the judgment, and such an explanation would be useless in other cases such as those enumerated at p. 47, Lewin on Trust, 9th Edition, in which the Court interfered to direct an account of rents and profits to order foreclosure of a mortgage to relieve against the fraudulent conveyance of an estate and to prevent a Defendant by injunction from taking possession. As appears from *Pen* v. *Baltimore* (4) and other decisions, the Court's jurisdiction is not negatived, because the remedy within its power does not enable it to make a comprehensive disposal of the matter in dispute. It is sufficient that assistance can be given to the Plaintiff as regards one stage in the working out of his rights, in the case mentioned the obtaining of a conveyance, and the fact that as to the further stage in that case, the Plaintiff's maintenance in quiet enjoyment, nothing can be done, does not debar him from suing or the Courts from granting the relief within its competence.

"It was for relief of this kind which might or might not turn out to be finally sufficient, that Plaintiff asked in the present suit. He prayed for a declaration

(17) 1 Vesey Sen 444 (1750).

and injunction in the terms already stated. No doubt he chose to do so without making the minors parties, and it may be a question how far he will be able even in India, in case they return there, to execute his decree against their persons. And in England he no doubt will not be able to execute or sue on his decree in the ordinary sense. But 'a foreign guardian has, unless interfered with by the Court, control over the person of his ward while in England.' (Dicey, p. 478.) And the Plaintiff may fairly have been willing to trust to his son's recognition of his rights as father and appointed guardian, after they have been freed from other influences in England or in India, in case of their return. It is however more important that the decree asked for might have been or may be still regarded as likely to be effective in two other ways as the basis either of proceedings in execution here against the Defendant personally under Or. XXI, r. 13, or of proceedings in England.

"It is especially in connection with the former that the Defendant's attitude before the learned Judge becomes important. The minors were in England, but she was served and was within the Chingleput jurisdiction. *Primâ facie*, therefore, she was available for the imprisonment, and her property for the attachment by which under Or. XXI, r. 32, a decree such as that of the learned Judge granting an injunction would be enforceable, and until after the date of the decree there was nothing before the learned Judge to suggest that the injunction would be ineffective owing to the Defendant's inability to comply with it. He was therefore entitled to assume that his decree would to this extent be effective and his urisdiction good. He no doubt subjected the Defendant to a mandatory injunction to hand over custody of the minors, and if her ability to do so had been denied in her written statement that injunction would perhaps have been framed in negative terms, forbidding her to interfere with their return, or the Plaintiff's efforts to regain them. But it was given in the terms asked for in the plaint, and Defendant did not demur to them. It is only in this Court that she has alleged that the minors, who are aged eighteen and fifteen, refuse to return, and that though she has ceased to supply them with funds and has deposited money for their passages to India, she cannot coerce them further. I assume her good faith, but all this was first disclosed after, and was not hinted at before, the judgment under appeal. It is not in my opinion open to Defendant to contend in appeal that the learned Judge's powers were ineffective *ab initio*, because of possibilities as to which she was silent, until the exercise of those powers had been decreed.

"Lastly, the judgment will be effective, in so far as it can be used as a basis for proceeding in any Court in England or elsewhere outside British India, within whose jurisdiction the minors may be. I have hitherto refrained from reference to English cases as to guardianship because they were decided by the Court of Chancery, and it was necessary to exclude the special characteristics of its jurisdiction from consideration. There can however be no objection to reliance on them in the present connection when the doctrine of effectiveness under discussion must be supported as of international validity and reciprocity, and equal status as between the Courts concerned must be assumed. This is in fact recognised expressly in the judgment of Cotton, L.J., in *In*

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re Willoughby (21). And it will in any case be safe to refer to these decisions if it is remembered that the English High Courts' mode of dealing with foreign judgments is a better test of the doctrine maintained by it than are the rules by which it has defined the boundaries of its own authority. Though the reference to them is primarily intended to support the position that the decree creating a guardianship is effective in so far as it can be the basis of proceedings in foreign countries, it will be seen that some of the decisions are also in Plaintiff's favour as negativing the necessity for the residence of the minors within the jurisdiction.

"In *Johnstone* v. *Beattie* (8) it was no doubt held that 'the right and duties of a foreign tutor and curator cannot be recognised by the Courts of this country with reference to a child residing in it. The result is that such foreign tutor and curator can have no rights as such in this country.' And in *Dawson* v. *Jay* (22) the Court appointed an English guardian for an English minor in England, refusing custody to a guardian appointed in America. But other cases are less uncompromising. In *Nugent* v. *Vetzera* (23) the Court no doubt maintained the guardians appointed in England. But it was careful to reserve to the foreign guardian the right to exclusive custody of his wards to which he was entitled by the order of the Court of his own country, and the right to that custody was the immediate matter in dispute. It is material, with regard to the argument above referred to, from the non-residence of the minors that no question appears to have been raised in this case as to the jurisdiction of the foreign Court to appoint Vetzera as guardian, although it appears from the statement of facts that the minors were at the date of his appointment outside its jurisdiction for the purpose of education, like the minors in the case before us, so also in the next two cases *Hope* v. *Hope* (9) and *In re Willoughby* (21) the minors and the opposing party (in whose custody they were) being in France, and though there has been a formal settlement of property in the former case the Lord Chancellor expressly declined to base his decision appointing a guardian on it.

"To return from this digression as to non-residence to the bearing of these two cases on the doctrine of effectiveness, in neither of them was there any person within the jurisdiction against whom the Court could have expected to enforce its order, and they are therefore strong authorities, since only the possibility of the English appointment being utilised in a foreign Court could have been in question. It must be conceded that in each of them the foreign Court had stayed its hand in order that the decision of the English Court might be known and that a conflict between the Courts of the two countries was improbable. But the right of the English Court to interfere was contested strenuously and considered fully. In these circumstances it was said in *Hope v. Hope* (9) that there was not a want of jurisdiction, but only a want of the power of enforcing it, and in *In re Willoughby* (8) to make a quotation which represents the tenor of both decisions fairly. 'It may well be that the French Court may give effect (though I do not say they ought to give effect) to our order and make it operative by giving to the persons, whom

(8) 10 Cl. and F. 42 (1843).
(21) 30 Ch. D. 324 (1885).
(22) III. DeG. M and G. 764 (1854).
(23) L. R. 2 Eq. 704 (1866).

(9) 48 Eng. Rep. 534: 4 DeG. M. and G. 328 (1854).
(21) 30 Ch. D p 324 (1885).

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the Court here thinks ought to be appointed guardian, power in France to deal with the infant, or it may, if it thinks fit, appoint those persons guardians. It will be entirely a question for the French Courts. If, on the other hand, the French Court thinks that other persons ought to be appointed guardians, that is a matter with which we in no way interfere.' All this *mutatis mutandis* might be said in the present case, and it is sufficient to show that no ineffectiveness was to be apprehended in the decree to be passed which could have deprived the learned Judge of jurisdiction. No doubt the English or other Court which, before the Plaintiff may attempt to use his decree, will have other and valuable foundations for any decision it may reach, the increased age of the minors and perhaps a *vive voce* expression of their preference, an advantage of which the learned Judge was deprived. But authority justifies the belief that the learned Judge's decision also will have weight with the English Court, and if not indispensable to the Plaintiff will be of material assistance to him. In that direction, as well as in those already indicated, it will therefore be effective. The objection to it, based on its alleged ineffective character, accordingly fails."

In the final judgment which was delivered by the Chief Justice he dealt with the question of the right of a father to the control and custody of his minor children and certain other questions of law which arose in the case in the following terms:—

"I propose first to state what appears to me to be the law as to the rights of a father to the control and custody of his minor children. I do not think it has been suggested that the exposition of the law relating to this matter contained in the judgment of Vice-Chancellor Kindersley in *In re Curtis* (24) is not still the law of England. It is there laid down that the Court of Chancery cannot decide upon the custody of infants simply with reference to what is most for their benefit and cannot interfere with the rights of a father unless he so conducts himself as to render it essential to the safety and welfare of the children in some serious and important respect, either physically, intellectually or morally, that they should be removed from his custody. The Vice-Chancellor in his judgment cited the case of *Re Fynn* (25) in which Lord Justice Knight Bruce made the following observations: 'Of the present case I may say that were I at liberty, as I am not, to act on the view which out of Court I should as a private person take of the course likely to be most beneficial for the infants, I should have no doubt whatever upon the question of interfering with the father's power. Without any hesitation I should do so, to what extent and in what manner I do not say. But there may and must be many cases of conduct, many cases of family differences, family difficulties and family misfortunes, in which, though interposition would be for the interest and advantage of minor children, Courts of Justice have not the means of interfering usefully, or, if they have the means, ought not to interfere. . . . "A man may be in narrow circumstances, he may be negligent, injudicious and faulty as the father of minors, he may be a person from whom the discreet, the intelligent, and the well disposed, exercising a private judgment, would wish his children to be, for their sakes

(24) 28 L. J. Ch. 458 (1858).
(25) 2 DeG. and S. 457 (1848).

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and his own, removed ; he may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into between them, the Court must be satisfied not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect that his rights should be treated as lost or suspended, should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not 'much too strong.' The Defendant suggested that the law as laid down in *In re Curtis* (24) was altered by the Guardianship of Infants Act, 1886 (49 and 50 Vict., c. 27). No doubt this enactment altered the law, but its provisions as it seems to me do not touch the general principles to which Kindersley, V. C., referred. The cases in which the Courts have refused to deliver over a child when it has arrived at years of discretion to its father on a writ of *habeas corpus* are not in conflict with the rule of law that a father is entitled by the law of England to the custody of his children till they attain the age of 21. In dealing with these *habeas corpus* cases, Cotton, L. J., in his judgment in *In re Agar Ellis* (26) says: 'But there are cases where undoubtedly the Court declined to interfere on *habeas corpus* in order to hand the child over to the father or to interfere with it when it was of the age of discretion, the age of sixteen in the case of girls, and the age of fourteen in case of boys. For what reason is that? When an infant is so young as not to be able in the eyes of the law to exercise a discretion, then unless that infant is in the proper custody, that is to say, the legal custody, and the very object of suing out a *habeas corpus* is to have it ascertained whether the person who is sought to be brought up is under duress or imprisonment, but nobody can be placed in the position of being under duress or imprisonment if he expresses a wish to remain where he is at the time the writ is issued, that is to say provided the person is competent to express such a wish ; and, if he does, it is the duty of the law to regard it.'

"In *In re Agar Ellis* (26) the minor was a girl of over 16. In that case it was held that the Court will not interfere with the authority of the father as regards the control and education of his children until they attain the age of 21, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of Court, out of jurisdiction without the consent of the Court. The Defendant pointed out that in the *Agar Ellis* case (3) the children were in the custody of the father when proceedings were instituted by the mother. This no doubt is so, but for the moment I am only dealing with the principles of law which govern this question, and I would give him greater rights than if they were not. In regard to the question of the benefit of the infant, Bowen, L. J., in the same case said at page 337, 'then we must regard the benefit of the infant, but then it must be remembered

(24) 28 L. J. Ch. 458 (1858).
(26) 24 Ch. D. 317 at p. 331 (1883).

(26) 24 Ch. D. 317 (1883).

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that if the words 'benefit of the infant' are used in any but the accurate sense, it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant, having regard to the natural law, which points out that the father knows far better as a rule what is good for his children than a Court of Justice can. . . . . Except in cases of immorality, or where he (the father) is clearly not exercising a discretion at all, but a wicked or cruel caprice, or where he is endeavouring to withdraw from the protection of the Court, which is entrusted with such protection by law, the custody of the infant, as a rule, this Court does not and cannot interfere, because it cannot do so successfully, or I should rather say because it cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and also to general social life. . . . . . . As soon as it becomes obvious that the rights of the family are being abused to the detriment of the interests of the infant, then the father shows that he is no longer the natural guardian—that he has become an unnatural guardian—that he has perverted the ties of nature for the purpose of injustice and cruelty. When that case arrives the Court will not stay its hand; but until that case arrives it is not a mere disagreement with the view taken by the father of his rights and the interest of his infant that can justify the Court interfering.' Mr. Simpson, in his book on the Law of Infant, on page 131, third edition, suggests that the law as laid down in *In re Agar Ellis* (26) 'seems to be too narrow a statement of the law as at present administered,' and the learned author refers to the judgment of Fitz-Gibbon, L J., in *In re O'Hara* (27). The strongest passage in the judgment of the Lord Chief Justice which could be relied upon as supporting the suggestion that the judgment in *In re Agar Ellis* (26) is too narrow a statement of the law is the following :—'It appears to me that misconduct or unmindfulness of parental duty, or inability to provide for the welfare of the child, must be shown before the natural right can be displaced. Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities in the rank and position to which the child by birth belongs, *i.e.*, the rank and position of the parent, the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of Society, and to hold, in the words of Lord Esher that 'the best place for a child is with its parent.' Of course I do not speak of exceptional cases, where special disturbing elements exist which involve the risk of moral or material injury to the child, such as the disturbance of religious convictions or of settled affections, or the endurance of hardship or destitution with a parent as contrasted with solid advantages offered elsewhere. The Court acting as a wise parent is not bound to sacrifice the child's welfare to the *fetish* of parental authority by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessaries of life.' With all respect to the learned author, to my mind there is nothing in this passage which

(26) 24 Ch. D. 317 (1883).

(26) 24 Ch D. 317 (1883).
(27) 2 Ir. R. 232 (1909).

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indicates that learned Lord Justice intended in any way to dissent from the principle laid down in *In re Agar Ellis* (26). In *Thomasset* v. *Thomasset* (28), Lindley, L. J., said that 'independently of writs of *habeas corpus* the Court of Chancery exercised the power of the Crown as *parens patriæ* over infants, and in exercise of this jurisdiction the power of the Court has always been much more extensive than that possessed by Courts of Common Law under a writ of *habeas corpus*.' The Lord Justice then refers to a case of *Todd* v. *Lynes* (29) where a father obtained an order for the delivery to him of the custody of his son, a young man of 17, who had been persuaded by the Defendant to leave his father and enter a monastery under the charge of the Defendant. As is pointed out in *Thomasset* v. *Thomasset* (28), what the wishes of the boy were does not appear.

"In *Reg* v. *Gyngall* (30), Lord Esher, M. R, pointed out the distinction between the Common Law jurisdiction under which the Common Law Courts used to deal with these matters by '*habeas corpus*' (I take it that the learned Judge did not mean this was the only way in which the Common Law jurisdiction could be exercised) and the Chancery jurisdiction. 'At Common Law,' the Master of Rolls said, 'the parent had as against other persons generally an absolute right to the custody of the child unless he or she had forfeited it by certain acts of misconduct.' The Chancery jurisdiction was a paternal jurisdiction 'in virtue of which the Chancery Court was put to act on behalf of the Crown as being the guardian of all infants.' I do not think the Master of Rolls meant to suggest that in the exercise of this jurisdiction the natural rights of the parent were not considered. All that was laid down was that a Court of Chancery could supersede the natural rights of a parent if the welfare of the infant demanded it. In *Reg* v. *Gyngall* (30), the Master of Rolls cited with approval the passage from the judgment of Knight Bruce, V. C., in *In re Flynn* (25) to which I have referred. I may also refer to *Re McGrath* (31), a case in the Chancery Division decided a year before *Reg.* v. *Gyngall* (30).

"As regards the Indian cases, the High Court would seem to have acted in accordance with the principles of the decision in *In re Agar Ellis* (26), see *Krishna* v. *Reade* (5) and *Pollard* v. *House* (32). Certain Indian authorities were cited by the Defendant. In *In the matter of Saithri* (33), the application was for an order in the nature of a *habeas corpus*. On the facts of that case the Court was not satisfied that the application by the mother was '*bonâ fide*,' the mother being a servant earning 8 annas a month and having no home of her own; and was of opinion that the mother had precluded herself by her conduct for eight years from demanding that the child should be given up to her and further that to do so would be most detrimental to the welfare of the child. *In Sarat Chandra Chakarbati* v. *Forman* (34), the application for

(26) 24 Ch. D. 317 (1883).
(28) [1894] P. 295.
(29) Unreported. *Vide* Simpson's Law of Infants, p. 127.
(30) [1893] 2 Q. B. 232.

(5) I. L. R. 9 Mad. 31 (1885).
(25) 2 DeG. and S. 457 (1848).
(26) 24 Ch. D. 317 (1883).
(30) [1893] 2 Q. B. 232.
(31) [1893] 1 Ch. 143.
(32) I. L. R. 33 Mad. 288 (1910).
(33) I. L. R. 16 Bom. 307 (1891)
(34) I. L. R. 12 All. 213 (1889).

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the custody of the minor was made not by his father but by his brother. The report says that the father had 'gone to Benares to end his days there' (p. 219). I am unable to assume from this, as the Defendant invited us to assume, that the natural rights of the father had devolved upon the elder brother. In view of what I conceive to be the law, I feel considerable doubt as to whether I should be prepared to follow the decision of the Allahabad High Court in *Bindo* v. *Shamlal* (35), and of this Court in *Muthuveerappa Chetty* v. *Lingammah* (36). In *Mokoond Lal Singh* v. *Nobodip Chandra Singha* (37), the Court decided on the facts of that case that the *primâ facie* right of the father was displaced. See also *In the matter of Joshy Assam* (38). In the case of *Re Gulbai and Lilbai* (39), where it was held that the interest, well-being and happiness of the minors ought to be the paramount consideration of the Court, both the parents were dead. It was suggested by the Defendant, though I do not think the contention was very seriously pressed, that the law of England was more favourable to the natural rights of the father than the Hindu Law. I do not think, this has been suggested in any of the Indian cases and I am not prepared to accede to it. In *Muthuveerappa Chetty* v. *Lingammah* (36), the learned Judges no doubt say that the texts of Hindu Law do not recognise any absolute rights of guardian in any one, but neither does the law of England.

"So far I have dealt with the general question of the natural rights of the father. In this case, however, we have what purports to be an express delegation of the father's rights by Ex. A, the letter of the 6th March 1910, and what purports to be an express revocation of that delegation by Ex. AA6, the letter of the 11th July 1912. It does not seem to be material whether the letter Ex. A is to be regarded as a waiver or an express delegation of the Plaintiff's paternal rights. If it is to be regarded as a waiver, it does not in itself operate so as to preclude the father from reasserting his rights. If it is to be regarded as an express delegation, I think the delegation is *primâ facie* revocable, though there may be circumstances which would lead a Court to hold that the delegation ought not to be revoked. In *In re Agar Ellis* (26), Cotton, L. J., said on p. 333: "the father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have, as where a father has allowed in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says, you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect, and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right. That

(35) I. L. R. 29 All. 210 (1906).
(36) [1911] Mad. W. N. 561.
(37) I. L. R. 25 Cal. 881 (1898).
(38) I. L. R. 23 Cal. 290 (1895).
(39) I. L. R. 32 Bom. 50 (1907).

(26) 24 Ch. D. 317 (1883).

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was the case in *Lyons* v. *Blenkin* (1), which has been cited.'

"There can be no question in this case that the agreement of March 1910 has been acted on. In *The Queen* v. *Barnardo* (40), Lord Esher said that if the parent revoked the agreement before it had been acted on, it would not be binding. Lord Justice Lindley, however, laid down the law in much more general terms. He said in page 315: 'notwithstanding such an agreement the parent would be the legal guardian of the child, and she is incapable of binding herself not to exercise her rights as such. She could, therefore, revoke the agreement at any moment, as could any other guardian in a similar case.' Mr. Justice Wallis in *Pollard* v. *House* (32) stated the law in much the same way. He said on page 292: 'This delegation of parental authority to the Plaintiff is revocable at any time, and it is the duty of the parents and guardians to revoke it if used to the detriment of the children.' This question is discussed by Mr. Simpson on p 135 and by Sir E. J. Trevelyan in his book on The Law of India relating to Minors, on p. 70. The latter states the law thus :—

"'A father may also lose his right to the guardianship of his children and to the control of their education, where he has permitted another person to maintain and educate them, and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their secular or religious education. The Court will not, when he has acquiesced for some time, permit him arbitrarily or capriciously to alter the mode of their maintenance and education or to take them from the custody in which he has allowed them to remain.' There are further observations on the subject on page 132. As the authorities were very elaborately discussed in the course of the arguments in this Appeal, I have thought it necessary to refer to them at some length. I am prepared, however, to accept and apply the succinct statement of the law which is to be found in Lord Halsbury's Laws of England, volume 17, p. 107: 'After a surrender by him' (the father) 'of the custody has actually taken place, he can recover the custody unless his doing so would be injurious to the interests of the child.'

"The Defendant contended with reference to my judgment on the question of jurisdiction that, inasmuch as the jurisdiction exercised by the learned Judge was the Equity Jurisdiction given by the Letters Patent, the Court would look solely to the welfare of the infants. I cannot accede to this. I do not think that the Courts in Equity have ever proposed to look solely to what appears to them to be the welfare of the infant, without regard to the natural rights of the father. The judgment of the Master of the Rolls in *R.* v. *Gyngall* (30) speaks of the 'suppression' of the natural rights. This seems to me to involve that the natural rights must be recognized and considered.

"There is one other question of law to which I desire to refer before I pass to the facts. The effect of the appointment of the father as guardian in this case was to extend the period of minority of the elder boy to the age of 21. At the time the order was made, the elder boy was nearly 18, the ordinary age of majority under the Indian Law. We were

(1) Jac. 245 (1821).
(32) I. L. R. 33 Mad. 288 (1910)
(40) 23 Q. B. D. 305 (1889).
(30) [1893] 2 Q. B. 232.

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referred by the Defendant to *In the matter of the Petition of Nazirun* (41), where it was held that an application for the certificate of guardianship under Act XL of 1858 which, if granted, would prolong the minority of the infant from 18 to 21, should not be granted when the alleged minor is admittedly on the point of attaining the age of 18, unless under particular circumstances, as where very great weakness of mind was proved, or where it was shown that there was some absolute necessity for making such order. The words '*absolute necessity*' are of too general a character to enable us to derive much assistance from this decision.

"The fact that a minor is nearly 18 when an order is asked for, which will have the effect of extending his minority, is no doubt a matter to be taken into consideration by any Court which is called upon to determine whether in all the circumstances of the case such an order shall be made."

Pending the appeal before the Judicial Committee, the minors, one of whom had already attained the age of 18 years, obtained the leave of the Board to intervene in the proceeding and were heard through counsel.

Mr. Younger, *K. C.*, *Sir Erle Richards*, *K. C.*, and *Mr. Turnbull* appeared for the Appellant.

Mr. Younger submitted that the High Court had no jurisdiction to make the decree. There was no jurisdiction in the District Court to make a decree. The High Court did not possess a greater jurisdiction than that of the District Court. Even if the High Court had greater jurisdiction, it should not have made the decree, as it was contrary to the principles laid down by Lord Eldon, that is, "that a Court of Chancery could not be asked to appoint a father the guardian of his own son." The Guardians and Wards Act, 1890, was a complete Code that abolished all previous enactments. It applied to the whole of British India. Under it the procedure was by petition and not by suit. The Defendant was within the jurisdiction of the District Court, but neither the father nor the sons were within that jurisdiction. Under sec. 9 of that Act the jurisdiction of the District Court was confined to infants ordinarily resident in the District. The minors were not so residing at the time of the suit, and that Act therefore did not apply. Reference was made to the following authorities as to whether the Guardians and Wards Act was a complete Code or not: *Shamlal* v. *Bindo* (3), 32 Punjab Records, p. 49, *Sharifa* v. *Munekhan* (4), *Krishna* v. *Reade* (5). In any case, the real interests of the minors ought to have been considered by the Courts. The elder boy had become major and he could not be compelled to leave England by the Appellant. Indeed both the boys refused to go to their father and the Appellant had no power over them. On the contrary, if the Appellant persisted in doing anything to compel the boys, in order to hand them over to their father, she would expose herself to *habeas corpus* proceedings in England. The Appellant objects to the mandatory order. Reference was made to the following: *Hope* v. *Hope* (9), *In re Willoughby* (10). The boys were

(41) I. L. R. 6 Cal. 19 (1880).

(3) I L. R. 26 All. 594 (1904).
(4) I. L. R. 25 Bom. 574 (1901).
(5) I. L. R. 9 Mad. 31 (1885).
(9) 43 Eng. Rep. 534: 4 DeG. M. and G. 328 (1854).
(10) 30 Ch. D. 324 (1885).

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not made parties to the suit, although they were most affected by the decree, inasmuch as it took away the majority of the one and extended the minority of the other. To an application under the Guardians and Wards Act, 1890, the minors are necessary parties. It was not in their interests to go back to India and lose the benefit of education in this country. The Court of Chancery was the only Court which was competent to make an order regarding the persons of minors residing in England. The Plaintiff might apply to that Court, but the decree of the High Court could not be supported.

The Lord Advocate of Scotland, *Mr. Robert Munro* (with him *Mr. W. R. Sheldon* and *Mr. W. Turnbull*), who appeared for the boys, stated that the boys were passionately desirous of staying in England and extremely averse to going back to India.

Mr. Kenworthy Brown for the Respondent submitted that the High Court had jurisdiction to make the order. The Plaintiff had a right of suit under the Code of Civil Procedure, and the suit was properly instituted in the Court of the District Judge which had jurisdiction over the Defendant. The question at issue was, who was the guardian of the boys, the Plaintiff or the Defendant? After the institution of the suit it was properly transferred to the High Court which had an independent jurisdiction of its own to make the decree binding on the Defendant. The proceedings in suit were not started under the provisions of the Guardians and Wards Act which was inapplicable to the present case. In any case, the suit was competent for obtaining the declaratory relief sought by the Plaintiff. The Guardians and Wards Act did not preclude an independent suit like the present.

[THE LORD CHANCELLOR said that as at present advised his view was that the proceedings in the Court below were altogether misconceived and brought in a wrong form, and for that reason ought to fail, without prejudice to any further proceedings which the father might take in proper form.]

Mr. Kenworthy Brown asked whether the difficulty was that the boys were not represented in the Court in India.

[THE LORD CHANCELLOR.—It is more than that. The boys not being represented, the issues were not properly framed, and the mind of the Court was not properly directed to the true question, but it was not the fault of the Court.]

Mr. Kenworthy Brown said, a great deal of attention was paid to the issue. If their Lordships had come to the conclusion that the proceedings in the Court below had been misconceived, he did not wish to occupy their attention further.

[THE LORD CHANCELLOR said, their Lordships had made up their minds as to the course which they would take. They would humbly advise His Majesty that the judgment of the Court below could not stand, for the reason—the only reason—they had discussed that day. Their Lordships would give their reasons at a future date.]

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—This is an Appeal from an order made by the High Court of Madras in its Appellate Jurisdiction on the 29th October 1913 confirming with a variation as to costs a decree of Mr. Justice Bakewell in a suit in which G. Narayaniah (the present Respondent) was Plaintiff, and Annie Besant (the present Appellant) was Defen-

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dant. The decree declared that J. Krishnamurti and J. Nityananda, the sons of the Plaintiff, were wards of Court and that the Plaintiff was guardian of their persons, and ordered the Defendant to hand over the custody of the wards to the Plaintiff as such guardian.

The facts which gave rise to the action were as follows :—The Plaintiff is a Hindu residing at Madras. He is a Brahmin, but is not well off, having an income of some 160*l.* per annum only. He was for many years a member of a society called the Theosophical Society, of which the Defendant was President, and was well acquainted with her. He had two sons, J. Krishnamurti and J. Nityananda, born respectively on the 11th May 1895 and 30th May 1898. Early in 1910 the Defendant offered to take charge of these sons and defray the expense of their maintenance and education in England and at the University of Oxford. The Plaintiff thought it desirable to take advantage of the opportunity thus afforded of giving his sons a Western education, notwithstanding it would entail a loss of caste. He accordingly accepted the Defendant's offer, and by a letter to the Defendant, dated the 6th March 1910, affected to appoint the Defendant to be guardian of their persons and authorised her to act as such from that time forward.

In their Lordships' opinion the principle on which the legal effect of such a letter falls to be determined do not admit of dispute.

There is no difference in this respect between English and Hindu law. As in this country, so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation. [*Lyons* v. *Blenkin* (1).]

Shortly after the Respondent accepted her offer, the Appellant took charge of the boys, and they have since been in her custody and she has defrayed the expense of their maintenance and education. In February 1912, they left India in her company, and after staying with her for some time in Sicily and Italy finally accompanied her to England, where she left them under the charge of Mrs. Jacob Bright, having made arrangements for their having a course of tuition such as would enable them to enter the University of Oxford.

Though the Respondent's confidence in the Appellant appears to have been shaken sometime previously for reasons to which it is unnecessary to refer, he assented to, or at any rate acquiesced in, the departure of his sons in her company for Europe. Nevertheless on the 11th July 1912 he wrote the Appellant a letter cancelling his previous letter of the 6th March 1910,

(1) Jac. 245 (1821).

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demanding that his sons should be restored to his custody and threatening proceedings if such demand were not complied with. The Appellant who had returned to India refused to comply with such demand, and the Respondent thereupon commenced a suit in the District Court of Chingleput, in the Madras Presidency, asking to have it declared, that he was entitled to the guardianship and custody of his sons, and that the Appellant was not entitled to, or in any case was unfit to be in charge and guardianship of such sons, and for an order on the Appellant to hand over such sons to the Respondent or such other person as to the Court might seem meet.

In their Lordships' opinion this suit was entirely misconceived. It was not, and indeed could not be disputed that the Plaintiff remained the guardian of his children notwithstanding that he had affected to substitute the Defendant as guardian in his place. The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of the 6th of March 1910 was in the nature of a revocable authority. The real question was whether in the events, which had happened, the Plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence. The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the 9th section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput. Further, a suit *inter partes* is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants. It is true that the suit was subsequently transferred to the High Court under cl. 13 of Letters Patent, 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court.

Again, the relief asked for was a mandatory order directing the Defendant to take possession of the persons of the infants in England, bring them to India, and hand them over to their father. Considering the age of the infants any attempt on the part of the Defendant to comply with this order, would, if the infants had refused to return to India, have been contrary, and would have at once exposed the Defendant to proceedings in this country, to the law of this country on writ of *habeas corpus*. No Court ought to make an order which might lead to these consequences. The most which a Court of Competent Jurisdiction in India could do under circumstances such as existed in the present case, was to order the Defendant to concur with the Plaintiff as the infants' guardian in taking proceedings in this country to regain the custody and control of his sons.

The difficulties and anomalies of the procedure adopted by the Plaintiff are

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well illustrated by the history of the proceedings. After the transfer to the High Court, issues were settled in the ordinary manner. There was no issue as to whether it was or was not desirable, in the interests of the infants, that they should give up all idea of a Western University education, and return to India. It was urged that the High Court did in fact consider their interests. If it did so, it must have been upon evidence admitted as relevant on other issues, and it is by no means apparent that, had a proper issue on the point been directed, further evidence would not have been available. At any rate on such an issue, the necessity of the infants being properly represented before the Court, and of ascertaining what they themselves desired, could hardly have been overlooked.

At the trial of the action some difficulty appears to have been felt by reason of the facts (1) that the suit was not such as to make the infants wards of Court, and (2) that the elder infant would within a very short time attain his majority according to Hindu law. The Trial Judge sought to overcome those difficulties (1) by declaring the infants wards of Court, and (2) by taking advantage of sec. 3 of the Indian Majority Act, 1875, as amended by sec. 52 of the Guardians and Wards Act, 1890, and declaring under sec. 7 of the latter Act that the Plaintiff was their guardian so as to prolong their minorities until they attained respectively the age of 21 years. It was hardly contended that any such order was competent to the District Court in the suit in question. It is alleged, however, that when once the suit had been transferred to the High Court, the High Court had a general jurisdiction over infants which they could exercise at pleasure, and that the directions in question were properly given by virtue of such general jurisdiction. It is to be observed, however, that whatever may have been the jurisdiction of the High Court to declare the infants to be wards of Court, an order declaring a guardian could only be made if their interests required it, and, as appears above, they were not before the Court, nor were their interests adequately considered. And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the Respondent's life, unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case.

Since the appeal has been presented, the infants have obtained the leave of the Board to intervene therein and be heard by counsel. Counsel on their behalf have appeared before their Lordships' Board and stated that the infants do not desire to return to India or abandon their chance of obtaining an University education in this country. The order of the High Court directing the Defendant to take them back to India cannot be lawfully carried out without their consent or without an order from the Court exercising the jurisdiction of the Crown over infants in this country. It is and always was open to Respondent to apply to His Majesty's High Court of Justice in England for that purpose. If he does so, the interests of the infants will be considered, and care will be taken to ascertain their own wishes on all material points. Their Lordships do not consider it desirable to express any opinion of their own on questions with which only the High Court in England can deal satisfactorily. It is enough to say

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that the order made by the Trial Judge in India as varied by the High Court in its Appellate Jurisdiction cannot stand, and their Lordships will humbly advise His Majesty that the same ought to be discharged, and the suit dismissed with costs both here and in the Courts below, but without prejudice to any application the Respondent may think fit to make to the High Court in England touching the guardianship, custody, and maintenance of his children.

Solicitors : *Messrs. Lee and Pembertons* for the Appellant.

Solicitors : *Messrs. Calder, Woods and Pethick* for the Interveners.

Solicitors : *Mr. Douglas Grant* for the Respondent.

B. D. *Appeal allowed with costs.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1525 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
Heard, 17 and 26, November.
Judgment, 26, November.

HIRJI BALDEO, Petitioner,
v.
MANBHUM DISTRICT BOARD, Opposite Party.

District Board of Manbhum, bye-laws framed by—Bengal Local Self-Government Act [III (B. C.) of 1885], sec. 2 (2)—Encroachment, hanging verandah if is.

A hanging verandah would be an encroachment if it amounted to an unlawful gaining upon the right of user by the public. That right extends to all forms of traffic which have been usual or customary and also all that are reasonably similar or incidental thereto. The question whether a hanging verandah amounted to an encroachment would depend in each case upon the question whether in the particular circumstances it constituted an invasion of the public right of user as described above.

The public have a right of user not merely on the roadway, but also on the side lands attached to the road.

This was a Rule granted on the 15th September 1913 against an order of Mr. N. Martin, Sub-Deputy Magistrate of Dhanbad, dated the 22nd of May 1913, convicting the Petitioner under sec. 2 (2) of the District Board Bye-laws and sentencing him to pay a fine of Rs. 50, an appeal from which order was dismissed by T. Lubey, Esq., Deputy Commissioner of Purulia, on the 8th of July 1913.

The facts of the case will sufficiently appear from the judgment.

Babu Bepin Chandra Mullick for the Petitioner.

Babu Atulya Charan Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner has been convicted of a breach of a bye-law promulgated under sec. 139 of the Bengal Local Self-Government Act. The material portion of the bye-law is as follows :—"No person shall on any road by means of any building without the permission of the Chairman or other authority named in the bye-law make or cause any encroachment." This rule was issued upon the ground that the construction of a hanging verandah does not amount to an encroachment.

Upon a careful reading of the evidence in the case with the judgment of the Sub-Deputy Magistrate and the judgment of the District Magistrate in appeal, we are of opinion, however, that it was proved and found by both Courts that apart from the hanging verandahs, the Petitioner had dug foundations and erected a

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NOTES.

Father's remedy against deprival of custody of children.

The net result of the decision of the Privy Council in *Mrs. Annie Besant* v. *G. Narayaniah* reported at p. 1089 of the current volume appears to be that the proceeding by the father for recovery of the custody of his infant sons was materially defective inasmuch as the infants, one of whom was about to attain majority and the other was 14 years of age, were not made parties and their wishes were not consulted, as they should have been, since the principal issue in such a proceeding must be whether the change of custody would be for the benefit of the infants. Their Lordships also appear to hold that the infants who were not residents in India could not be made parties to a proceeding in India relating to their guardianship under the Guardians and Wards Act. The Defendant herself was however resident within the jurisdiction, and their Lordships are by no means to be understood as laying down that the Courts in Madras were not competent to grant to the Plaintiff appropriate reliefs against the Defendant, but they point out that the relief actually granted, *viz.*, a mandatory order directing the Defendant to take possession of the infants in England and bring them over to India and produce them in Court here, was one which should not have been passed by the High Court, considering that any attempt on the part of the Defendant to carry out the order, would, if the infants did not choose to acquiesce, lay her open to *habeas corpus* proceedings in England.

No exception can be taken to the above application of well-established principles of law bearing on the custody of infants to the facts of the present case. That the exercise of jurisdiction by the Court at Chingleput and by the Madras High Court in this case was irregular and misconceived cannot be questioned, specially where the High Court purported to declare the infants Wards of Court and appointed the father their guardian with no other end in view than that of extending the period of their minority. The judgment, however, raises grave doubts as to what, in a positive sense, the jurisdiction of the District Courts or of the High Courts in India is or should be in proceedings of this nature. It is to this aspect of the matter to which we would like to draw the attention of the public and the legislature. Their Lordships say clearly enough that proceedings in District Courts relating to the guardianship of infants lie exclusively under Act VIII of 1890. Questions relating to the guardianship of minors cannot therefore form the subject of suits in the ordinary Civil Courts in the Mofussil. It is also stated in the judgment equally clearly that a father by reason of sec. 19 of the Act is incompetent to institute proceedings under the Act for declaration of his rights of guardianship and for consequential reliefs under the Act.

What then is the father's remedy where his rights as guardian of his minor children, assuming that they are all residents within jurisdiction, are interfered with? Are we to infer that he can neither sue in the District Court, nor apply to it under Act VIII of 1890? If so, has he any right of action or application in any other Court in India? Can the High Court entertain his grievance, and, if so, under what jurisdiction and according to what procedure? We do not find any answer to these questions in the judgment of the Privy Council, and naturally so, as in the circumstances of the case, their Lordships were not required to decide them. Assuming that the High Court can entertain a father's complaint in the case mentioned, does that provide a suitable remedy for this class of cases, when they arise in the Mofussil? If the District Court can entertain an application by a stranger to declare a father unfit to be his children's guardian, there is nothing in

reason to exclude its jurisdiction to entertain a complaint by the father seeking to recover custody of his own children. If no application under the Guardians and Wards Act is competent, surely a suit would lie in the Court of the District Judge for a declaration of the father's rights and for such relief as may be necessary to work them out.

That is really the substance of the decisions of the High Courts in India to the effect that Act VIII of 1890 did not repeal the general jurisdiction of District Courts to entertain suits relating to the guardianship and custody of minors, and we should be sorry if the judgment of the Privy Council should be understood as definitely negativing that jurisdiction. If it has, then surely the legislature should step in and do away with this anomaly. The District Courts should undoubtedly have jurisdiction to entertain a father's suit or application for declaration of his rights as guardian and for recovery of custody of his minor children as against persons interfering with his rights. Such jurisdiction would of course have to be exercised in accordance with principles so lucidly explained in their Lordships' judgment. What we contend for is that a father whose rights of gurdianship over his minor children have been interfered with should not be left in doubt either as to the Court whose protection he is to invoke, or as to the procedure he is to adopt to vindicate his rights ; nor, if he is a resident in the Mofussil, should he be compelled in every case to come up with his plaint to the Original Side of the High Court for remedies which the local Courts are perfectly competent to give to persons other than the father.

CURRENT INDIAN CASES.

(CIVIL.)

Suit for damages against Secretary of State

ROSS *v.* SECRETARY OF STATE FOR INDIA, I. L. R. 37 Mad. 55.

The Plaintiff brought a suit to recover damages from the Secretary of State for India in Council in respect of two orders made by the Collector of Ganjam by one of which a local agent working under the Assam Labour and Emigration Act 1901 was suspended and the depôt maintained by him closed to recruiting, while by the other the local agent was dismissed and also for alleged defamation of the Plaintiff by the Governor of Madras in Council in the following order—"Government see no reason to doubt that there had been illegal recruitment in the agency tracts of the Ganjam district by sirdars working under the Assam Labour Supply Association and are of opinion that the conduct of Mr. Ross (the Plaintiff) in that matter has not been wholly above suspicion.'

Held—That as regards liability to be sued, the Secretary of State is in no position different from that of the old East India Company before the passing of the Government of India Act, 1858.

That the liabilities of the East India Company cannot have been any less than those of the Crown in England on a petition of right.

That this is not a case in which a petition of right would lie against the Crown at the instance of the Plaintiff.

That even if the suit had been brought against the members of the Madras Government at the date of the order and this Court had jurisdiction to entertain such a suit it must have failed on the ground that the publication having been made by such Government in the execution of its duty and without exceeding it is absolutely privileged.

Res judicata.

BAYYAN NAIDU *v.* SURYA NARAYANA, I. L. R. 37 Mad. 70

The rule of *res judicata* applies subject to the other provisions of the section not only to a suit tried before, but to an issue decided in a previous suit provided that the matter directly and substantially in issue in the latter suit was raised as a substantial and direct issue in the previous suit. The section requires that the matter or issue should have been heard and finally decided by such Court. It does not say that it should have been decided in explicit terms. It cannot be doubted that if an adjudication on a matter is necessarily involved in the decision in a prior suit, the section must be understood to lay down that it must be taken to have been heard and finally decided.

Reviews.

THE LAW OF PARTNERSHIP. *By J. A. Strahan, M. A., LL. B., Bar-at-Law and H. Oldham, B. A., LL. B, Bar-at-Law. Sweet and Maxwell, Ld, London. 1914. Price 10s.*

The law of partnership has been lucidly explained within the moderate dimensions of this book which does not extend beyond 226 pages of boldly and clearly printed matter. From the treatment of the subject, one would hardly suspect that it is a commentary on the English Partnership Act of 1890. The method followed by the English annotators is very different from that of Indian commentators of Codes. The cases are not crowded under the sections, but the essential elements of the sections have been analysed and explained by reference to the general principles governing them. These latter have been deduced from the leading decisions, and the authors have as a rule quoted from the judgments in explaining the law. The work gives one a reliable and yet succinct view of the law. The chapter on Partnership in the Indian Contract Act has been printed in the Appendix which will enhance its usefulness in India.

ELEMENTS OF THE LAW OF REAL PROPERTY (Adapted to the requirements of Indian Students). *By Baidyanath Banerjee, B.L. Rai M. C. Sarkar Bahadur & Sons, 75-1-1 Harrison Road, Calcutta, Publishers. 1914. Price Re. 1 8.*

Students of law in this country have to study

English Real Property, because the law of property obtaining in India, although it has not much in common with the English law, yet drives its roots deep into the same soil and derives some of its guiding principles from that law. For a proper apprehension of the Indian law of property (most of it codified), it is therefore necessary for the Indian law student to know at least the elements of the English law of Real Property. The real difficulty with him however is that he is not sure how much of it he must know for the purposes of the profession which he is going to adopt, and he generally solves it by acquiring that minimum which enables him to secure a pass at the examination. This may be unsatisfactory from the point of view of sound education, but from the practical point of view it is eminently reasonable and there is thus abundant justification for manuals like the one in hand, which is not an out-and-out cram book, and which succeeds in clearly enunciating the leading principles and also in illustrating them in a manner which appeals to the Indian student. We have no doubt, the little book will be duly appreciated by those for whom it is intended. Those of them however who are desirous of doing something more than merely getting through the examination would of course have nothing to do with this class of literature, if they should even allow their thirst for knowledge to be confined within the covers of that indispensable students' book, Williams on Real Property.

TAGORE LAW LECTURES, 1912. Codification in British India. *By Bijay Kisor Acharyya, B. A. (Cal.), LL. B. (Edin.). Calcutta. S. K. Banerji & Sons, Book-sellers & Publishers, 53 & 55, Harrison Road, Calcutta, 1914.*

This work is the result of immense industry and conscientious and painstaking research. The subject "Codification in British India" is, it must be conceded, not a very inviting one, and yet one endowed with the historical sense may make the apparently dry matter embedded in the Regulations and Acts (both repealed and unrepealed) of the British Indian Government tell an interesting tale fraught with very human interests. This historical sense the author displays to great advantage throughout the work. He has literally succeeded in bringing order and arrangement out of chaos, and his examination of the development of codification in India and of the various views from time to time held and expressed regarding it by persons in authority is highly suggestive and is likely to afford invaluable assistance to those in whose hand the orderly evolution of Indian Law for the time being rests. The progress of codification in India has been marked by great inequality, excessive interference verging indeed on paternalism in some aspects, and excessive, almost nervous, conservatism in others. The time has now come for pursuing a more comprehensive policy in matters of legislation, and Mr. Acharyya's work is a most opportune contribution to this end. We do not think it necessary to consider the work in detail. There is room for difference of opinion on many points on which the author has expressed an opinion—but that does not in the least make his own contribution to the subjects discussed less valuable. The subject has been dealt with by him under the following heads:—(1) History of codification in British India; (2) Necessity of codification in British India; (3) Influence of the condition of people on codification in British India; (4) How objections to codification have been met in India; (5) Genesis, principles, form and interpretation of Anglo Indian Codes; (6) Progress of codification in British India; (7) How far codification has touched Hindu and Mahomedan Law; (8) Feasibility of further codification; (9) Codification of customary law; (10) Codification of the personal laws of Hindus and Mahomedans. There is, we notice, a great deal of repetition which perhaps in many cases is unavoidable in the presentation of what must be regarded as a new subject—and which may not unlikely be avoided in later editions. Altogether, the book is a praiseworthy and in a large measure successful attempt to grapple with a new and somewhat difficult subject.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*Nocton* v. *Lord Ashburton.* Before THE LORD CHANCELLOR and LORDS DUNEDIN, ATKINSON, SHAW and PARMOOR. 19th June 1914.

Solicitor and client—Solicitor's liability in damages for improper advice—Action lies for breach of fiduciary relation—Intention to defraud unnecessary.

This was an action by Lord Ashburton against Mr. Nocton who was the solicitor of the Plaintiff, who claimed damages for loss caused by the improper advice of the Defendant. The solicitor advised his client to release certain property from a mortgage held by the client, and he acted on it. The result of the transaction was an abstraction from the Plaintiff's security of property worth from £20,000 to £30,000 without a particle of advantage to the Plaintiff and to the direct benefit of the Defendant.

The Court of Appeal held that the Plaintiff was entitled to damages on the ground of fraud. On the Defendant's appeal it was urged that the Defendant did not consciously intend to defraud his client. No fraud being proved, it was submitted that the only alternative was to treat the action as one of mere negligence at law uncon-

nected with misconduct. But that alternative was precluded by the way in which the case had been conducted.

Their Lordships repelled the contention, and dismissed the appeal. In the course of his judgment the Lord Chancellor said, he did not take the view that they were shut up within the dilemma they supposed. There was a third form of procedure to which the statement of claim approximated very closely, and that was the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appeared to have been an impression that the necessity which recent authorities had established of proving moral fraud in order to succeed in an action of deceit had narrowed the scope of that remedy. For the reasons which he was about to offer to their Lordships, he did not think that this was so. Under the authorities in *Derry* v. *Peek* (14 App. Cas. 337), *Angus* v. *Clifford*, [1891] 2 Ch., 449 and *Low* v. *Bouverie*, [(1891) 3 Ch., 82), it must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense would suffice for an action of deceit. That was so whether a Court of Law or a Court of Equity, in the exercise of concurrent jurisdiction, was dealing with the claim and in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud was referred to in the wider sense in which the books were full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it was a mistake to suppose that an actual intention to cheat must always be proved. A man might misconceive the extent of the obligation which a Court of Equity imposed on him. His fault was that he had violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct had in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchased the trust estate, the solicitor who made a bargain with his client that could not stand, had all for several centuries run the risk that the word fraudulent might be applied to them. What it really meant in this connexion was, not moral fraud in the ordinary sense, but breach of the sort of obligation which was enforced by a Court that from the beginning regarded itself as a Court of Conscience.

Where, as in the present case, a solicitor had had financial transactions with his client, and had handled his money to the extent of using it to pay off a mortgage made to himself or of getting the client to release from his mortgage a property over which the solicitor by such release had obtained further security for a mortgage of his own, a Court of Equity had always assumed jurisdiction to scrutinize his action.

Since the Judicature Act any branch of the Court might give both kinds of relief, and could treat what was alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of Sir George Jessel in *Cockburn* v. *Edwards* (18 Ch. D. 449) might, he thought, really be regarded as an illustration of the latter jurisdiction.

The conclusion at which he had arrived was that the action ought properly to have been treated as one in which the Plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty or for breach of contract to exercise due care and skill.

Mr. P. O. Lawrence, K. C., Mr. Peterson, K. C., and Mr. Manning for Mr. Nocton.

Sir Robert Finlay, K. C., Mr. C. E. E. Jenkins, K. C., and Mr. A. B. Terrell for Lord Ashburton.

B. D. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION.—Before FLETCHER AND RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 873 OF 1912. MOHESH CHANDRA GHOSE, APPELLANT v. BANKO BEHARI MUKERJEE and others, Respondents. 9th July 1914.

Civil Procedure Code, sec. 47—"Representative" of judgment-debtor, purchaser after sale, if—Suit to recover from, if lies.

In this case the Plaintiff brought the suit for possession of a 2 annas and odd share in certain lands purchased by him in 1906 at an auction sale held in execution of a decree for arrears of rent. After confirmation of the sale, but before any sale-certificate was taken by the decree-holder purchaser, the disputed property was purchased by the Defendant No. 2 in 1907. The suit was instituted in 1911. The suit was decreed in both the lower Courts. Objection was taken on the ground that the suit was not maintainable under sec. 47, Civ. Pro. Code. Cases in 18 C. W. N. 27[illegible] Cal. 709,34 were relied on.

Held, that the suit was maintainable, as the Defendant No. 2 who was the transferee from the judgment-debtor after the sale was not his representative as contemplated in sec. 47 C. P. C, and as the judgment-debtor did not appeal, the appeal was dismissed.

Babu Karunamoy Ghose for the Appellant.

Babu Satis Chandra Mukerjee for the Respondent.

K. M. G.

HIRJI BALDEO *v.* MANBHUM DISTRICT BOARD.

platform which actually encroached upon the surface of the road. The ground upon which the Rule was issued, therefore, fails.

The question whether a hanging verandah can in any circumstances be an encroachment, has however been argued before us. An encroachment is an unlawful gaining upon the right or possession of another man : *Easton* v. *Richmond* (1). In the case of a District Board road, the right to the soil ordinarily rests with the owner of the land adjoining the road. But the public have an extended right of user in the road for the protection and control of which the District Boards were created. A hanging verandah therefore would be an encroachment, if it amounted to an unlawful gaining upon the right of user by the public. That right extends to all forms of traffic which have been usual or customary and also all that are reasonably similar or incidental thereto : [*R.* v. *Mathias* (2)]. The question whether a hanging verandah amounts to an encroachment would depend in each case upon the question whether in the particular circumstances it constituted an invasion of the public right of user as described above.

We may add that the public have a right of user not merely on the roadway, but also on the side lands attached to the road.

We have thought it right to express our opinion in this matter, as the point was argued at length and with considerable ability on behalf of the Crown.

The result is that the Rule is discharged.

Rule discharged.

(1) L. R. 7 Q. B. 69, 73 (1871).

(2) 2 F. & F. 570 (1861)

PRIVY COUNCIL.

[APPEAL FROM CHIEF COURT OF LOWER BURMA.]

LORD SHAW.
LORD MOULTON.
MR. AMEER ALI.
1913,
Heard, 13 and 14, November.
1914,
Judgment,
25, February.

MA NHIN BWIN, Appellant,
v.
U. SHWE GONE, Respondent.

Burmese Buddhist Law—Succession—Daughters separated from father—Death of one—Preferential heir, father or sister—Dhammathats, *authority of*—Manu Kyay Dhammathat, *pre-eminence of—Patriarchal Society in Burma.*

When one of two daughters of a Burmese Buddhist, who had left their father's establishment and lived a life separate from and independent of their father, died, the surviving daughter was according to Burmese Buddhist law preferred to the father as her heir

Of the various Dhammathats *usually reckoned as 36 in number and which are all referred to as authoritative sources of law amongst the Burmese, but varying in the weight of their authority, that of the* Manugye *or* Manu Kyay Dhammathat *(which was issued by Royal authority in 1756) is and has been accepted by the British Government as the highest.*

The succession of brothers and sisters in preference to the parents of a deceased childless person being established beyond doubt by the Manu Kyay, *no reference to the other* Dhammathats *was necessary to clear up any ambiguity.*

Held, *also, upon a review of the other* Dhammathats *that the balance of their authority was in favour of the sisters and brothers being preferred to the parent.*

This rule of succession, was laid down

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with reference to the fact that the daughters in this case had separated from their father, it being expressly ruled by their Lordships that this case should not be held as dealing with or affecting parental rights in cases where the family continues to live together.

The facts of the case sufficiently appear from their Lordships' judgment.

Messrs. F. J. Coltman and *H. Houston*, for the Appellant, submitted that the decision of the Chief Court that under Burmese law a father succeeds to the estate of a daughter in preference to the sister, is erroneous at any rate in the case where the sisters are living together apart from the father. An analysis of the texts of the *Dhammathats* dealing with the rights of parents to inherit, as appearing in U. Gaung's Digest of Burmese Law, Vol. I, ss. 310 and 311, shews that out of thirty-six texts only ten deal specifically with the claim of a brother or a sister as opposed to that of a parent. Of the ten texts which deal with this specific question, six or seven support the right of the brother or sister, if it is observed that the term "co-heirs" includes brothers and sisters, (Digest, s. 11). There is no *Dhammathat* which gives the preference to the parents where the children are living apart. The *Manu Kyay*, s. 19, as translated in s. 311 of the above Digest, says as follows :—"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs." The translation of s. 19 in Richardson's *Manu Kyay*, 3rd Ed., 1891, is probably more literal; the second sentence is there rendered " . . . . . if the parents be alive and the deceased has no other relations, they shall inherit his property;" and "relations," as appears from ss. 17, 19, 22 and 25, is used as meaning brothers and sisters. The *Manu Kyay* has always been treated as of the highest authority and its clear statement of the law in favour of the Appellant is not contradicted by any *Dhammathat*. The *Rajabala* and other texts in clear language confirm the *Manu Kyay*.

There is no judicial decision adverse to the Appellant, though there are dicta which appear to be against her contention. The actual decision in *Maung Chit Kywe* v. *Maung Pyo* (1) was that brothers and sisters of the father of the deceased are preferred to a step-father. The learned Judge in the course of his judgment said :—"The Burmese law is opposed to the ascent of the inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to father and mother, and failing them to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals." The decision was based upon s. 19 of the *Manu Kyay*, but if by the above dictum it was intended to exclude brothers and sisters, the dictum is contrary to the terms of that section. In any case it was *obiter*. It was, however, followed in *Ma Sa Bwin* v. *Ma Thi* (2) as an affirmative statement of the law, though it is there misquoted, and it was also followed in *Maung Shwe Bo* v. *Maung Pya* (3) in which the judgment was again founded on s. 19 of the *Manu Kyay*, and in *Ma Po Hmon* v. *Maung Kan* (4). None of these decisions, however, were

(1) (1895) 2 Upper Burma Rulings (1897-1901) Chan Toon L. C. 388.

(2) (1898) 2 Upper Burma Rulings (1897-1901), 111; 1 Chan Toon L. C. (446).

(3) (1899) Printed Judgments (1893-1900), 524; 1 Chan Toon L. C. 476.

(4) (1899) 2 Upper Burma Rulings (1897-1901), 157; 2 Chan Toon L. C. 87.

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relevant to the present question. In the last named case it was held that a mother is preferred to a step-brother or step-sister of the deceased. A step-brother or step-sister, however, stands upon a different footing to a full brother or sister, not being "heirs" within s. 10 of the Digest or "co-heirs" within sec. 11, and the decision is consequently distinguishable. [The following were also referred to: *Mi A. Pruzan* v. *Mi Chumbra* (5); *Mi San Hla Me* v. *Kya Tun* (6); *Ma Gun Bon* v. *Maung Po Kywe* (7); *Ma E. Dok* v. *Maung Ngwe Hlaing* (8); and ss. 24, 25, 27, 28, 97, 320-323 of U. Gaung's Digest.] The preponderating weight of authority in the *Dhammathats*, more specially that of the *Manu Kyay*, is in the Appellant's favour, and there is no relevant decision which supports the Respondent's right of inheritance.

Messrs. L. DeGruyther, *K. C.*, and *Eddis*, for the Respondent. The Buddhist law in Burma is founded on the Institutes of Manu, the *Dhammathats* being equivalent to the *Dharmashastras* in Hindu law: Burge's Colonial and Foreign Law, Vol. I, p. 59. As a consequence, the law of inheritance in Burma is substantially the same as among Hindus. The Chief Court was right in the view that though there are some *Dhammathats* which appear to support the Appellant's contention, the preponderance is in favour of the Respondent. An examination of the texts referred to in the Digest supports this. The three texts of greatest authority are the *Dhammavilasa*, the *Manu Kyay*, and the *Manu Vannana*, of which the first named is the oldest. According to the translation in Jardine's Notes on Buddhist Law, VII, Inheritance, p. 9, sec. 26 of the *Dhammavilasa* says:—"If a man dies without children or grandchildren, let his mother and father get his property; in the absence of mother and father let the younger or elder brother get it." Sec. 58 of this text (p. 17 of the above Notes) strongly supports the same view. Sec. 45 of the *Manu Vannana*, as appears from Jardine's Notes on Buddhist Law, V, p. 19, reproduces and confirms s. 26 of the *Dhammavilasa.* There is no passage in the *Manu Kyay* which says that brothers and sisters exclude the parents, if living, or which contradicts the rule as laid down in the *Dhammavilasa* and the *Manu Vannana.* (Richardson's translation of the *Manu Kyay*, ss. 1, 15, 18, 19, 22, 29, 32 and 56 was referred to.) (The cases referred to in the argument for the Appellant were discussed.) The decision in *Ma Po Hmon* v. *Maung Kan* (4) is directly in point, since the fact that it related to step-brothers and not to full brothers had no bearing upon the actual decision. (Chan Toon's Principles of Buddhist Law, pp. 15 and 16, and Forchhammer's Essay on the Sources and Developments of Burmese Law, pp. 36, 96, 104 and 108 were also referred to.)

Mr. Coltman in reply: Whatever may be the law as to the devolution of ancestral property, the brother and sister, when living apart from the parents, take before the parents in the case of self-acquired property. Sec. 29 of the *Manu Kyay* is an exception in favour of the parent and confirms the Appellant's read-

(5) (1874) 1 Chan Toon L. C. 180.

(6) (1894) Printed Judgments (1893-1900), 116; 1 Chan Toon L. C. 279.

(7) (1897) 2 Upper Burma Rulings (1897-1901), 66; 1 Chan Toon L. C. (406).

(8) (1898) 2 Upper Burma Rulings (1897-1901), 109; 1 Chan Toon L. C. (445).

(4) 2 Upper Burma Rulings (1897-1901), 157.

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ing of s. 19. If the decision in *Maung Chit Kywe* v. *Maung Pyo* (1) be examined, it will be found to be not consistent with s. 58 of the *Dhammavilasa*, but consistent with s. 19 of the *Manu Kyay.*

Their LORDSHIPS' JUDGMENT was delivedred by

LORD SHAW.—This is an Appeal from a Judgment and Decree of the Chief Court of Lower Burma. The Judgment is dated the 14th June 1910, and it reverses a Decree of the same Court in its Original Civil Jurisdiction, dated the 16th February 1909. The Appeal is also from an Order dated the 2nd September 1910 which rejected the Appellant's application for a review of the Decree first mentioned.

The question to be afterwards dealt with is one of wide-spread importance, affecting the rights of succession in Burma. It is, however, necessary to state the circumstances, which are few and plain, in such a way as to show the limits of the decision which is about to be pronounced. These will appear as the narrative proceeds.

The Respondent, U. Shwe Gone, had three daughters by his first marriage. These were Mah Nhin Bwin, the eldest, Mah Nhin Boo, about two years younger, and Mah Nhin Ghine, about six years her junior. The eldest, Mah Nhin Bwin, is the Appellant in this case. She was born about the year 1865.

These three sisters lived together apart from their father. They traded in cocoanuts in the Municipal Bazaar at Rangoon. This state of matters lasted for many years, and one of the outstanding facts in the case is the complete separation of these ladies from their father, who had married again. They were, in fact, independent traders. In later years their business appears to have been of considerable importance. One part of it, for instance, mentioned in the proceedings, is three cargoes of Nicobar nuts, of which one of the ladies was consignee, and the combined value of which amounted to a large sum. In the year 1899, the three sisters bought a house in Rangoon with money derived from the profits of their trading, and they thereafter always lived there together. What were the exact relations in the eye of the law as between these three ladies need not be determined in this case. Whether they were all, or any two of them, in full partnership or in joint adventure with each other does not require to be decided in view of the events of death which happened, and of the opinion on the legal point of succession which is afterwards to be announced.

In May 1905, Mah Nhin Ghine died. Her sister, Mah Nhin Boo, took out Letters of Administration and took possession of her property. Their father, the Respondent, however, made a claim thereto, and threatened proceedings, but nothing further was done. In June 1906, Mah Nhin Boo died of plague. Of the three sisters, the Appellant was thus the sole survivor.

Should it accordingly be determined, as the Respondent contends, that he, being the father of these two deceasing ladies, is entitled by the law of Burma to succeed to their property as their heir in preference to their surviving sister, then the corpus of the estate, whether it originally belonged to the one sister or the other, or to both, will go to him. If, on the other hand, as the Appellant, the surviving sister, contends, it be the case that she is entitled as such to succeed

(1) 2 Upper Burma Rulings (1892-1906), 184.

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as heir to her sisters, then again the entire corpus of the estate of both will pass to her in preference to her father. The point to be determined in this case is which of those two contentions is correct according to Burmese Buddhist law.

A subsidiary question was raised in the Appeal. It was founded upon allegations of commercial partnership existing between the Appellant and her sister, Mah Nhin Boo. Separate issues, which in appropriate circumstances might come to be of great importance under the law of Burma, were raised as to the rights of a surviving partner on the one hand in a full partnership, and on the other in a limited partnership or co-adventure. These questions have not been lost sight of, but they are superseded by the conclusion to which their Lordships have come as to the right of succession in law by the father on the one hand, or by the sister on the other. The right of succession being determined in favour of the surviving sister carries with it and covers subsidiary rights of partnership as among the sisters *inter se*. No pronouncement accordingly is necessary in regard to the separate case under this head

A still further question has been argued, and it is well illustrated by the course which the case took in the Courts below. The learned Judge in the Court of First Instance held that by Burmese Buddhist law the Respondent, the father, was entitled to succeed to the estate of his two deceased daughters in preference to the Appellant, their sister. But he also held, however, that the father by his conduct, which in the opinion of the Court amounted to "desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred," had forfeited the right of succession which would otherwise have opened to him, and that for this reason the suit, which was to declare such a right of succession, must fail. On this latter point the Appellate Court came to a different conclusion, holding that the Respondent's conduct had not been so grave and reprehensible as to justify forfeiture. Accordingly agreeing as it did, with the Court of First Instance, that the father fell to be preferred as the heir entitled to the succession to his daughter's estate, they affirmed that right and gave decree in his favour. But the Appellate Court, in reaching their conclusion as to the import of the Appellant's conduct, showed very clearly by their judgment that, so far as actual separation in life of the daughters from their father was concerned, this had been established beyond doubt; and in short it may be taken as a salient fact in the present case that the life lived for years by these ladies was lived as a life separate from and independent of their father.

The need for this fact being pointedly alluded to is that their Lordships are desirous that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. The rights of a parent in Burma in such circumstances appear, according to their traditions and text-books, and to Eastern patriarchal ideas, to be of a high order; and they indeed recall to the mind various drastic rules of the earlier Roman Law with regard to the scope of the *patria potestas*. Many illustrations arise in the books, but one may suffice. It is mentioned in even the *Manu Kyay*, the authority of which is the subject of separate treatment hereafter, that an im-

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poverished parent could sell his children into slavery. These observations are, of course, not made, to give any colour to the view that rights to such an extent still remain in modern Burmese law or practice, but to indicate that the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life.

On the broad, distinct and simple issue now to be determined, it might have been thought that the recorded traditions and legal institutes of the country would have been clear. Unfortunately, it is very far from being so. This may no doubt be accounted for to some extent by the fact alluded to by Burge (Colonial and Foreign Law, I. 60) that litigation was appealed to "when the parties refuse such compromises as may be suggested by relations and village elders." This salutary practice of compromise has the disadvantage, however, that its results do not enter the records or procure the stamp of authority for a guide in future cases. So far as these results or the decisions of local native tribunals are concerned, they appear to have failed to find a place in the chronicles of the people.

There were, however, as there are still, documents that could be appealed to, all of them authoritative, but varying in the weight of their authority. These are the *Dhammathats*, usually reckoned as thirty-six in number. They form the expositions of *inter alia* customs and judicial rules, their dates of issue varying sometimes by many hundreds of years. It is no doubt true that with regard to them a certain evolution can be traced, and it seems by those who have written on this subject also to be admitted that they differ from the ordinary legal institutes in the sense, that a change of dynasty was sometimes accompanied by a fresh composition in the shape of a new, and, it might be a comprehensive *Dhammathat*, which, while not removing or extinguishing its predecessors, appeared upon the scene clothed with the authority of the fresh Government and containing the latest revisal of accepted juridical doctrine.

It appears to be acknowledged that the laws or rules, contained in the earlier *Dhammathats*, were in their remotest origin derived from the laws of Manu, which reached Burma by way of Southern India. But with the establishment of Buddhism and the spread of Buddhist doctrine, came, in the course of time, the not unnatural desire to strengthen the sanctions of juridical rule by associating its foundations, the *Dhammathats* themselves, with the religious sentiments of the people, and in the later *Dhammathats* the commands, precepts and principles are represented as truly being emanations from the spirit of Buddha himself.

This state of matters must have made the administration of justice still dependent on a comparison of *Dhammathat* with *Dhammathat* and a balancing of the weight of their authority. It cannot be said that at the present moment such difficulties have disappeared. Traces of them, indeed, are plain enough in the present case, and one cannot peruse the judgments under review without noting the care with which the learned Judges of Burma address themselves to this task.

There are two views which may be taken. Either the subject is dealt with sufficiently by a single, clear or governing

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authority, or the *Dhammathats* as a whole must be collated, and judgment determined by the best balance which can be framed as the result of their dicta. The Judges of the Court below have adopted the latter course, and with regard to it their Lordships are not satisfied that even on such a collation the balance has been correctly struck. But the importance of the subject induces their Lordships to put on record how this matter stands according to all the *Dhammathats*, if the version contained in the Digest of the Burmese Buddhist Law concerning inheritance and marriage, prepared by Mr. U. Gaung, be taken. Mr. Gaung was a member of the Legislative Council of the Lieutenant-Governor, and the Digest was prepared under the authority of the late Judicial Commissioner and is published with the sanction of the Government of Burma.

As showing the variety and conflict of the *Dhammathats*, reference may be made in particular to secs. 310 and 311 of Volume I of the Digest of Burmese Buddhist Law on the subject of inheritance. Sec. 310 refers to "relatives of previous generations who are not entitled to inherit," and the rule of the *Manu Kyay* is thus cited :—

"The Rule whereby elder relatives are debarred from inheritance is as follows —The co-heirs live apart from one another, one of them dies without leaving a wife or a husband or a child, his or her estate shall be partitioned among his or her younger brothers and sisters, but not among the elder co-heirs."

The point of the citation is as to the significance of the word "co-heirs" in this passage, and that is illustrated by sec. 311, where Mr. Gaung quotes from the *Dhammava* :—

"The five kinds of co-heirs are the following, namely, one's elder and younger brothers elder and younger sisters, and their children."

It would thus appear that it was not within the conception of the *Manu Kyay* on this particular sec. 310 to reckon the parent as having a preferred right to the co-heirs. The co-heirs came first, namely, the brothers and sisters of the deceased; and the point of the section is that as among these it was the younger brothers and sisters that were preferred to the elder co-heirs As stated, the introduction of the parent as to be preferred to brothers and sisters as a class and as a whole is completely negatived.

But their Lordships recognise that the real difficulties of the case—and that the difficulties are real is established not only by the consideration given to the matter by the learned Judges in the present case, but by the course of Burmese decisions to which they refer—arise from the construction of sec. 311. That section deals with "relatives of previous generations who are entitled to inherit."

The conflict had better be exhaustively set forth, and the forces on either side stand in this way :—

On the side of preferring the parents and ignoring the brothers and sisters, the *Dhammathats* stand as follows :—

Manu.—"On the death of a person leaving "not even a casually adopted son, his or her parents may inherit."

Various other *Dhammathats* are cited by Mr. Gaung to the same effect as this extract from *Manu.*

Vilasa.—"In the absence of descendants the parents are entitled to inherit.

This is repeated—almost literally—in *Dhammathat Kyaw*, in *Nandaw* and in *Vannana.*

Razathat—"If the deceased person leaves no wife, children, grandchildren, or other descendant, his parent, grandparent,

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or other relatives of previous generations are entitled to succeed to the estate."

To the same effect is the extract from *Varulinga*, namely, "In the absence of sons, including those publicly or casually adopted, the parents are entitled to inherit."

Finally comes *Kyannet.*—"In the absence of wife and children, the parents are entitled to inherit the estate of their son."

It is plain that these extracts do not proceed upon the principle of express exclusion of a right of succession by brothers and sisters. The brothers and sisters are omitted or ignored in the statement of the succession.

On the other side, the same section (sec. 311) cites later *Dhammathats* which give very ample warrant not for ignoring, but for recognising, and for placing in priority to parents, the rights of succession on the part of brothers and sisters. The historical light in which these later *Dhammathats* should be viewed will be remarked upon later. But meantime this observation may be made. The opinion appears to be entertained that the Burmese Empire was in the 18th Century of the Christian Era one of the greatest Empires of the Eastern world. But it is at least certain that in the middle of that century a strong attempt was made to put the jurisprudence of Burma into a settled and more easily referable form. In the reign of Alompra, one of his Ministers, a Judge, completed a prose *Dhammathat*, known as the *Dhamma*, and the citation from the *Dhammathats* affirmatory of the right of succession on the part of brothers and sisters as in preference to parents becomes thereafter fairly clear.

These citations are as follows:—

The *Dhamma.*—"If a deceased person has neither co-heirs nor descendants, his or her parents shall inherit the estate."

It has been already made clear that co-heirs include brothers and sisters, and the exclusion of a right of succession by the parents if such brothers or sisters are alive is thus plain.

The *Manu Kyay.*—"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

The *Vannana* has been already cited as ignoring the rights of brothers and sisters in one passage, but in another the situation is expressed thus:—"Failing children, the parents or brothers and sisters of the deceased are entitled to inherit."

The *Rajabala.*—"In the absence of husband or wife, children, and brothers or sisters, the parents are entitled to inherit."

The *Manu.*—"If children living apart from their parents die leaving neither heirs nor co-heirs, their parents inherit the estate."

Cittra.—"In the absence of heirs, parents, grandparents or other relatives are entitled to inherit."

Kyetyo.—"In the absence of other relatives, the parents are entitled to inherit."

It will be subsequently shown that by the use of the phrase, "in the absence of other relatives," is meant simply "in the absence of brothers and sisters." This would necessarily appear to be so. And it is from this body of authority quite manifest that the right of parents is not only not preferred, but is on the contrary very plainly postponed to the rights of succession on the part of brothers and sisters.

With regard to the *Dhammathats* as a

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whole, it has to be admitted that the figurative language so frequently employed becomes little helpful in expiscating the idea of inheritance. "It is natural," says *Razathat*, "for sea-water to flow back into the ocean after entering rivers and streams"; and in another passage, "When lakes are full, the overflow is returned to rivers and streams, and tidal water always flows back to the ocean." In later centuries the mind of the commentators was still struggling with these figurative expressions; as, for instance, in the *Manu Vannana:* "In the absence of wife and children, the parents inherit. Why so? Because of the water which flows into the sea, a portion returns up the river." The figure which earlier appears is the simple one of water which cannot find an outlet being borne back to its source; but as the *Dhammathats* develop, it is found that the source of the returning water cannot be reached until the intervening inlets and creeks have all been filled up, and there appears to be the conception accordingly, not of at once reaching to the source, namely, the parent, without having exhausted the collaterals, namely, the brothers and sisters. These struggles with figurative language appear even in the decisions in recent times in the Courts in Burma, and, as is not obscurely indicated in some of these Judgments, they rather perplex than help the mind.

In their Lordships' opinion the balance of the authority of the *Dhammathats* is upon the side of the sisters and brothers of the deceased being preferred to the parent. It has been already noted that there is nowhere throughout any of the *Dhammathats* a specific exclusion of brothers and sisters, and it may further be added that the language of the earliest *Dhammathats*, where collaterals are, as has been stated, either omitted or ignored, seems not to be analysed or explained or the omission accounted for in the later *Dhammathats* holding the same view, and the concurrence is a mere repetition. Their Lordships incline to the opinion—and a special reason therefor will be immediately given—that a clearer note is struck by the *Dhammathats* from the time of the 12th Century of the Burmese, or from about the middle of the 18th Century of the Christian, Era. Brothers and sisters as such, co-heirs as such, and relatives as such, are all dealt with and find a place in the discussion, and wherever they appear as a class they appear in the first rank, that is to say, in the rank preferred to parents.

But these views of their Lordships are fortunately confirmed by another and an historical consideration. There can be little doubt that in the middle of the 18th Century of the Christian Era the conquest and subjugation of the country by Alompra was accompanied by a serious attempt by him and his high functionaries of State to place the jurisprudence of the country in a position of fresh and settled authority. One of his Ministers, supposed to be a Judge, issued under the Royal authority one *Dhammathat* in prose, known briefly as the *Dhamma*. Another, "in charge of the Moat of the City of Shwebal," and taken by Dr. Forchhammer to have been Alompra's Minister of War, compiled in prose the *Manugye* or *Manu Kyay Dhammathat*, and it is this document last mentioned which was issued by Royal authority in 1756, and which obtained the commanding position which it seems to have occupied for a succeeding period of nearly 170 years.

What was the attitude of the British

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Government in respect to these particulars constituting the foundations of Burmese law? A period of about a century in the case of Lower Burma and a period of about 130 years in the case of Upper Burma intervened between the Alompraic Code and the British occupation. During this intervening period the Burmese jurisprudence had existed on the footing just described.

It would have been, of course, open to the British Government to adopt the ancient practice of issuing a fresh and authoritative Code. But it was more in accord with the genius and practice of the extension of British rule and of the incorporation of various races and populations within the British Empire to accept the native laws in their main elements in so far as they contained a working system of jurisprudence which was in accord with the traditions and habits of the people. This latter course was adopted. An instance to hand may be cited: In 1892, after the overthrow of King Theebaw and the establishment of settled order in Upper Burma under the British rule, a Circular was issued "for the assistance of the Courts in dealing with questions of Buddhist Law." The Circular issued a translation of the Letters Patent in use under the Burmese Government for the appointment of Judges. A list of *Dhammathats* was appended to it, but, as showing the complexity of the subject, the Judicial Commissioner adds that he "will be glad of information regarding any copies that may be extant of any of these *Dhammathats* other than the more commonly known ones." After a recital of many resounding titles of the Sovereign, including that of "Mighty Fountain of Justice," the Circular proceeds thus:—

"Now with respect to the office of Judge, it is on this wise: In the Kingdom of which we are the Sovereign Ruler our numerous subjects must not be permitted one to oppress another, and the Judges must admonish and chastise, repress, and judge. In case of dispute they must, in accordance with the *Dhammathats*, enquire into the causes of the people and decide between them. And for this purpose they are appointed to the Courts as Judges."

This is the general rule, involving as it does that judicial task the difficulty of which has been already mentioned.

To recur to the *Manu Kyay*—which for so long had been recognised as the leading guide in the administration of justice, Prof. Forchhammer, in his Treatise on the Sources and Development of Burmese Law, thus describes it:—

"This Law Book is written in plain Burmese with very little Pali intermixed. It is not really a Code or a Digest of Law, but rather an encyclopædic record of existing laws and customs and of the rulings preserved in former *Dhammatha's*. *Manu Kyay* does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages; religious elements are freely introduced; unjust judges shall suffer punishment in Hell with head downwards; a man to whom deposits are made must be a strict performer of his religious duties; a person guilty of perjury will be visited by preternatural punishments."

And having dealt with the development of Burmese jurisprudence and made a division of it into three periods, Dr. Forchhammer concludes thus:—

"The *Manu Kyay* incorporates the contents of the Law Books of the first and second periods and records laws and customs existing among the people of his time. It deals with the religious laws and usages of the Brahmins and the monastic rules of the Buddhist clergy. It allows the Buddhist element to predominate and draws largely from the Buddhist Scriptures."

It is not seriously disputed that the authority of this text-book, where it is clear, as among the *Dhammathats*, is of the highest rank. And accordingly, when British rule was extended over Burmese

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territory, the recommendation to the judicial officers substantially accepted this situation as it was found. In the words of Dr. Forchhammer :—

"The *Manu Kyay* is to this day the most widely read and studied law book in Burma, and after the British had taken possession of this province, the natives pointed to this *Dhammathat* as containing the body of laws by which they had been governed."

Much has been done during the last thirty years to extend the knowledge of the various *Dhammathats*; and the labours and encouragement of the Judicial Commissioner, Sir John Jardine, have greatly assisted this extension. The *Manu Kyay* itself has been textually translated by Dr. Richardson, and is in familiar use as a work of reference; and their Lordships do not understand that the pre-eminent authority of this *Dhammathat* has been lowered by the labours of other authors or the translation of other *Dhammathats*.

On the point in issue in the present case, the Digest of Mr. Gaung represents the dicta of the *Manu Kyay* thus :—

"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

There does not seem to be any room for ambiguity here. Both classes are dealt with. The one class—wife, children, brothers and sisters—are specifically and exclusively preferred to the other class, namely, parents.

In the 10th book, chapter 19, of Dr. Richardson's translation, the text reads thus :—

"Though this is the law (that property shall not ascend), why is it also said, the father and mother of the deceased have a right to his property? Because if the parents be alive and the deceased has no ther relations, they shall inherit his property."

In short, the *Manu Kyay* is clear that the property cannot ascend to parents unless there be no other relations, and "relations," it should be added, are as appears clearly from chapters 17, 19, 22 and 25 of the same book, synonymous with brothers and sisters.

Their Lordships do not think it necessary accordingly to pursue the enquiry further. In this *Dhammathat*, which still remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other *Dhammathats* do not require to be appealed to to clear up any ambiguity. Were that appeal to be made, it would, in the opinion of their Lordships, as already stated, lead to the same result.

The doubt, however, thrown upon the subject by the judgments of the Courts below can be explained to some extent by a brief glance at the development of authority on the subject.

The sense of the *Manu Kyay* and the authority of its rule, as above expounded, seem to have been accepted in Burma until the year 1894 On the 12th November of that year there occurred the case of *Mi San Hla Me* (6), and the narrative is observable :—

"The two lower Courts have held that according to Buddhist Law property cannot ascend where there are collateral heirs, and they have awarded Plaintiff's claim. The general rule that property shall not ascend is laid down in the *Manu Dhammathat*, Book 10, Secs. 1, 18, 19, but the rule is not without exceptions"

(It may be noted that the "*Manu Dhammathat*" here referred to is simply the *Manu Kyay*.)

The exception referred to in that case had reference to the separation of one from his adoptive brothers and sisters, and

(6) (1894) Printed Judgments (1893-1900), 116; 1 Chan Toon L. C. 279.

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to an adopted son living with his adoptive mother. It is manifest that this so-called exception has nothing to do with the present broad and general case. And it is also clear that the law as above laid down was held to be the general law of Burma.

Thereafter, however, a certain mischance arose by way of what is reported as an *obiter dictum* in the case of *Maung Chit Kywe* (1) in the year 1895. The substantial question in the case is described as "whether the brothers and sisters of the father of the deceased, Mah Pean, who was unmarried, have, under the rules of inheritance in the *Dhammathats*, a title to the estate of Mah Pean superior to any title of the Defendant as step-father living with deceased." Here it is also quite clear that the broad and simple question now to be determined was not before the Court. The step-father was held to have no equitable claim, but in the course of the judgment there occurs this sentence :—

"The Buddhist law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals, and in the absence of heirs in that degree, to the grandfather and grandmother and the next line of collaterals.

By "the first line of collaterals" is here meant the line of the father and mother, and it will be observed from this sentence that the true line of collaterals, namely, the sisters and brothers of the deceased themselves, appears to be excluded from the succession, although on each of the higher lines they are included ; that is to say, uncles and aunts would be preferred to the grandfather, although brothers and sisters would not be preferred to the father. Whatever may be said of this reasoning, at all events it is probably sufficient to observe that it is not applicable to the question in the present case, and it was not necessary to that decision.

In 1897, however, the case of *Mah Gun Bon* (7) was tried, determining that the estate of a deceased step-parent or grandparent goes by descent to the step-children or grandchildren in preference to collateral relatives by blood. Again it must be observed that the broad and simple question now to be determined was not before the Court. Many citations are made from the *Dhammathats* and, as generally happens, these texts appear to be somewhat inconsistent with each other, but whether they are so in reality or not is difficult to say. After much examination the learned Judge says :—

"From these various authorities and from the other *Dhammathats* of which there are printed translations, it is clear that, when the ascending line and the descending line fail, the collateral line succeeds, and probably brothers and sisters would be preferred in certain instances to parents."

No indications are given of what this probability is, and it may be sufficient with regard to this authority to say that it does not cover the simple point now to be determined.

The case of *Mah E. Dok* (8) (18th May 1898) was referred to. It was a case with reference to adoptive parents. Various texts were cited, concluding with sec. 211 of the *Attathanyepa Vannana*, which says :—

"Where there is no younger brother or sister, then the property may revert or ascend to the elder members of the family, such as elder brothers, elder sisters, parents, or grand-parents."

And the learned Judge says :—

"Although the last-quoted text throws some

(1) (1895) 2 Upper Burma Rulings (1897-1901) Chan Toon L. C. 382.

(7) (1897) 2 Upper Burma Rulings (1897-1901), 66 ; 1 Chan Toon L. C. (406).

(8) (1898) 2 Upper Burma Rulings (1897-1901), 109 ; 1 Chan Toon L. C. (445).

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doubt on the subject, there seems to be good authority to the rule that parents are entitled to inherit in the absence of direct descendants. There has been no argument on the point."

The "good authority" here referred to appears to have been the cases just cited, and in their Lordships' judgment the case of *Mah E. Dok* (8) does not advance the proposition in any respect.

Reference was also made to the case of *Maung Shwe Bo* (3) (27th February 1899), the head-note of which is this :—

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent, the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals."

It is to be noted that "the Respondents in this case were not represented by Counsel and were unable to afford the Court any assistance in dealing with the difficult point of law involved." In those circumstances the Judge, perhaps not unnaturally, accepted the *Chit Kywe* case (1) as a guide, and with that their Lordships have already dealt.

It is manifest that the clear and broad issue now to be determined has never been the subject of judicial decision, and that no series of precedents can be relied upon in justification of the Judgments of the Courts below. Out of respect to the Judges, and in view of the embarrassments produced by the cases cited and by the conflict among the *Dhammathats*, as well as of the importance of the general question being authoritatively settled, their Lordships have thought it right to make an independent investigation so as, if possible, to clear up the whole question. In the result they are of opinion that the right of the Respondent, the father of the deceased, cannot be maintained as against the right of the Appellant, her sister.

(1) (1895) 2 Upper Burma Rulings (1897-1901) Chan Toon L. C. 388.

(3) (1899) Printed Judgments (1893-1900), 524; 1 Chan Toon L. C. 476.

(8) (1898) 2 Upper Burma Rulings (1897-1901), 109; 1 Chan Toon L. C. (445).

Their Lordships will accordingly humbly advise His Majesty that the Judgment of the Court below be reversed, and that the suit stand dismissed, the Plaintiff, Respondent to pay to the Appellant the costs of the proceedings here and in the Courts below.

Solicitors: *Messrs. Arnould & Son* for the Appellant.

Solicitors: *Messrs. Sanderson, Adkin, Lee & Eddis* for the Respondent.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEAL NO. 95 OF 1913.

JENKINS, C. J.
CHATTERJEE, J.
1914,
Heard, 26 and 27, March.
Judgment, 27, March.

BADIATANNESSA BIBEE, Defendant No. 2, Appellant,
v.
AMBIKA CHARAN GHOSH, Plaintiff, Respondent.

Purdanashin *lady executing mortgage for husband's benefit—Proof of intelligent execution—Explanation—Independent advice—Undue influence—Indian Contract Act (IX of 1872), sec. 16.*

Where a purdanashin *lady was induced by her husband to give a mortgage by way of security at a time when she was living with her husband and the evidence was that the document was read and explained to her by the husband in the presence of the mortgagee :*

Held—*That the Court would not be justified in holding that the mortgage was fairly taken or that the lady executing it was a free agent duly informed of what she was about ; and the mortgagee must be taken to have been aware of the influences*

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under which the lady came to execute the document.

Held (*without expressing any opinion as to whether sec. 16 of the Contract Act requires the undue influence to proceed from a party to the suit*)—*That the undue influence which may affect a* purdanashin *lady's understanding of a document may proceed from a third party.*

GIREESH CH. LAHOREY *v.* BHUGOBUTTY DEBIA (1), BANK OF MONTREAL *v.* STUART (3), IN RE COOMBER (4), KANHAYA LAL *v.* THE NATIONAL BANK OF INDIA, LD. (2) *referred to.*

This was an Appeal under sec. 15 of the Letters Patent preferred on the 25th July 1913 against the decree of Sharfuddin, J, dated the 27th of June 1913, passed in Second Appeal No. 2695 of 1911.

The material facts will appear from the judgment.

Babus Mohendra Nath Ray, Brojendra Nath Chatterjee and *Shyam Lal Bose* for the Appellant.

Babu Ram Charan Mojumdar and *Babu Sajani Kant Sinha* for *Babu Debendra Nath Bagchi* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is an appeal from a judgment of Mr. Justice Sharfuddin who has confirmed the decree of the lower Appellate Court by which the previous decree of the Munsif had been reversed.

The suit is one brought by a mortgagee against a man and his wife on a mortgage bond.

With the rights against the man we have no concern, for this appeal has merely to do with the right of the mortgagee, the Plaintiff, against the wife.

The transaction was one from which the wife derived no direct benefit for herself, as she was giving a mortgage by way of security for her husband. In these circumstances it is contended on behalf of the wife that she being a Mahomedan *purdanashin* lady is not bound by the mortgage.

It was said by the Privy Council in *Gireesh Ch. Lahorey* v. *Bhugobutty Debia* (1), that the committee has always been careful to see that deeds taken from *purdah* women have been fairly taken, that the party executing them has been a free agent, and duly informed of what she was about. The burden of establishing this rests on him who claims against the *purdanashin* lady ; so that what we have to see is whether on the findings of the lower Appellate Court such a case has been made out.

I have said that the lady herself derived no direct benefit from the transaction, and we have it in evidence that when a similar transaction of an earlier date was proposed, the lady, at that time living with her husband's father and brothers, under their advice repudiated the execution by her of a document which has been represented to us as having been somewhat similar in effect.

At the time when this document was executed, the lady was living with her husband, and it is found as a fact by the lower Appellate Court that she evidently acted under the influence of her husband in consenting to mortgaging her house for her husband's debt. The learned Judge goes on to say that "though this would have rendered the transaction invalid as between husband and wife, he did

(1) 13 M. I. A. 419 (1870).
(2) 17 C. W. N. 541 (1913).
(3) [1911] A. C. 120.
(4) [19■■] 1 Ch. 723 at p. 730.

(1) 13 M. I. A. 419 (1870).

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not think that it affected the validity of the mortgage so far as the Plaintiff was concerned, as he acted in good faith."

Now, the Plaintiff is a muktear and he was present on the only occasion when the contents of the document were read, and, it is said, explained to her. Who was the person who read the document and explained it? The husband—the husband whose undue influence procured the execution of the document by his wife. Who was present when this reading and explanation took place? Among others the mortgagee, so that we not only have the fact that all that is shown is a reading and explanation of the document by the husband but the knowledge of the mortgagee that that was the means whereby it could be suggested that she was a free agent and duly informed of what she was about.

In my opinion it is impossible in these circumstances to accept the view that the undue influence of the husband had nothing to do with the matter. The mortgagee himself must have known the influences under which the lady came to sign the document. What the explanation is that was given to the lady we do not know; but I should not expect a very critical questioning or a very elaborate explanation, between one who exercised undue influence, and another, over whom he exercised it.

It may be, as has been suggested before us, that sec. 16 of the Contract Act, as it now stands, requires that the undue influence should proceed from a party to the suit and that the language of the section is in this respect narrower than of the section for which it was substituted. I do not wish to express any definite and conclusive view on this point at present, but the undue influence which may affect a *purdanashin* lady's understanding of a document may proceed from a third party. In the very instructive judgment of Lord Moulton in *Kanhaya Lal* v. *The National Bank of India, Ld.* (2), it is made clear that the word 'coercion' and, by parity of reasoning, the other words which have a special definition for the purposes of Chap. II of the Contract Act, are not by that definition deprived of the wider meaning that they may otherwise possess for other purposes.

This case is in its circumstances similar to that which came before their Lordships of the Privy Council in *Bank of Montreal* v. *Stuart* (3). It was held there, in circumstances substantially undistinguishable from the present, that the lady was not bound by the transaction into which she purported to enter with the creditor of her husband for the benefit of her husband; and, their Lordships came to that conclusion, although the lady in her evidence repudiated the suggestion that there had been undue influence.

It appears to me that the findings in this case fall short of establishing that the mortgage was fairly taken or that the lady executing it was a free agent duly informed of what she was about. I have already stated the situation in which the document was explained to her; and, if I may adopt the language of another judgment of Lord Moulton, Lord Justice Moulton, as he was at that time, in *In re Coomber* (4), I would say that it has not been shown that any independent person free from any taint of the relationship, or of the consideration of interest which would affect the act, has clearly put before the lady what are

(2) 17 C. W. N. 541 (1913).
(3) [1911] A. C. 120.
(4) [1911] 1 Ch. 723 at p. 730.

BADIATANNESSA BIBEE *v.* AMBIKA CHARAN GHOSH.

the nature and consequences of the act, and the advice, if advice was given, was certainly not removed entirely or at all from the suspected atmosphere: nor had the lady an opportunity of learning, from the clear language of an independent mind, precisely what she was doing.

In this view of the case it appears that while we cannot uphold the judgment of Mr. Justice Sharfuddin and the decree of the Subordinate Judge, it will be unprofitable to send back the case, and we must, therefore, reverse the decree of the lower Appellate Court so far as it relates to Defendant No. 2 and restore the decree of the Munsif so far as it relates to that Defendant. As between the Plaintiff and Defendant No. 2, the Plaintiff must bear her costs of this litigation in all the Courts.

CHATTERJEE, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2401 OF 1912.

D. CHATTERJEE, J.
N. R. CHATTERJEA, J.
1914,
Heard, 6, May.
Judgment, 11, June.

BASUNTA KUMAR CHUCKERBUTTY, Plaintiff, Appellant,
v.
GOPAL CHUNDER DAS, Defendant, Respondent.

Will of which probate has not been taken, whether can be proved—Succession Act (X of 1865), sec. 187—Proper representation of testator's estate, where no probate taken.

SARBAMUNGOLA DEBI *v.* MAHENDRO NATH NATH (2) *is authority for holding that a will of which probate has not been taken may be proved in a proceeding other than a proceeding under the Probate Act.*

But a will uncovered by a probate or letters of administration cannot prove that anybody named therein has title to the estate of the testator.

A legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will.

PROSUNNO CHANDRA BHATTACHARYA *v.* KRISTA CHAITANYA PAL (1), CHOONY LAL BOSE *v.* OSMOND BIBEE (3) *referred to.*

This was an Appeal preferred on the 14th August 1912, against a decree of Babu Biroja Ch. Mitra, Subordinate Judge of Zilla Faridpur, dated the 23rd May 1912, affirming a decree of Babu Banwari Lal Banerjee, Munsif at Goalundo, dated the 15th September 1911.

The facts of the case will appear from the judgment.

Babu Surendra Kumar Bose (for *Babu Preo Sankor Majumdar*) for the Appellant.

Babu Kishori Lal Sarkar for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The father of the Plaintiff purchased a holding in execution of a decree and had notices under sec. 167 of the Bengal Tenancy Act issued on the Defendants who are under-raiyats. On the death of his father the Plaintiff brought this suit for ejectment. The plea of the Defendants was, amongst others, that the deceased father of the Plaintiff had left a Will under which the Plaintiff was only a part-owner of the property in suit and could not as such eject them. The Plaintiff in his deposition admits that he has heard of the execution of a will by his

(1) I. L. R. 4 Cal. 342 (1878).
(2) I. L. R. 4 Cal. 509 (1879).
(3) I. L. R. 30 Cal. 1044 (1903).

BASUNTA KUMAR CHUCKERBUTTY *v.* GOPAL CHUNDER DAS.

father. The Defendant produced the will, and the Plaintiff objected to its being proved. The Court of first instance allowed the will to be proved and dismissed the suit of the Plaintiff as incompetent.

It has been contended before us that the Courts below are wrong in allowing the Will to be proved and should have proceeded to try the suit, notwithstanding the Will which could be proved only in a proper proceeding under the Probate Act.

It is contended that so long as probate is not taken, the estate of the testator must be represented by the heir-at-law. In the case of *Prosunno Chandra Bhattacharya v. Krista Chaitanya Pal* (1), Mr. Justice Markby said :—"I think that until some other claimant comes forward, the party who takes possession of the estate of a deceased Hindu must, in the present state of the law, be treated for some purposes as his representative and a judgment obtained against such a representative is not a mere nullity." The reason given was that otherwise the remedy of the creditor against the estate might be barred by an intentional delay in taking out probate. In the case of *Sarbamungola* v. *Mahendro Nath* (2), Mr. Justice White allowed a Will to be proved ; although no probate had been granted of the same, the heiress was allowed to prove it for the purpose of construing it and shewing that it was void. This latter case is authority for upholding the proof of the execution of the Will ; that however is not sufficient for passing title under the Will. Sec. 187 of the Succession Act applies to the Wills of Hindus and no title under the Will can be established in any Court of Justice unless a probate or letters of administration with the Will annexed has been granted by a competent Court. The Will therefore uncovered as it is by a Probate or Letters of Administration cannot prove that anybody named therein has title to the estate of the testator. The plea of non-joinder must therefore fail. The question however still remains to be decided—does the Plaintiff represent his deceased father so as to be competent to maintain the suit ? The case of *Prosunno Chandra Bhattacharya* v. *Krista Chaitanya Pal* (1) is authority for holding that he might, if he is in possession of his father's estate represent him for the purpose of being sued by a creditor. In the case of *Choony Lal* v. *Osmond Bibee* (3) the residuary legatee as well as the heir *ab intestato* were substituted as the representatives of a deceased judgment-debtor, and it was held that the representation was complete. Mr. Justice Markby, in the case of *Prosunno Chandra* (1), says "the executor does not represent the deceased by virtue of the Will until he has obtained probate. Who then represents the deceased who has left a Will until probate has been obtained ? Surely some one must do so, or the law would not have provided that the statute of limitation should run between the death and the grant of probate and it undoubtedly does." If this be the reason why the party in possession should represent the deceased until the Will is proved so far as a claimant against the estate is concerned, there is no reason why the heir in possession should not represent the estate for the benefit of the estate against persons liable to the estate. Just as the decree against the party in possession may be available to the creditor for work-

(1) I. L. R. 4 Cal. 342 (1878).
(2) I. L. R. 4 Cal. 509 (1879).

(1) I. L. R. 4 Cal. 342 (1878).
(3) I. L. R. 30 Cal. 1044 (1903).

ing out his remedy against the executor when he obtains probate, the decree obtained by the party so in possession may enure to the benefit of the claimants under the Will when they can rely on the same as their deed of title. The heir-at-law may claim adversely to the Will, he may impeach the validity of the Will notwithstanding that execution is proved: he may have various defences available to him against any claimant under the Will.

In any case, if he can prove that he has come into possession of the general estate of his father, he can as the legal heir maintain a suit for the benefit of the estate, so long as any other claimant does not establish his right to the same under the Will.

The learned Munsif in this case was satisfied with the mere proof of the execution of the Will. The Will although in Court was not even put to the Plaintiff when he was examined. We think that the judgments of the Courts below should be set aside, and the case sent back to the first Court for decision on the merits after allowing the parties opportunity for adducing such evidence as may be relevant. The Plaintiff is entitled to the costs of this and the lower Appellate Court. The costs in the first Court will abide the result.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2255 OF 1912.

MOOKERJEE, J. BEACHCROFT, J. 1914, 14, May.

PROMODE RANJAN GHOSH, Defendant, Appellant, *v.* ASWINI KUMAR NAG, Plaintiff, Respondent.

Nim-howla *lease, stipulation in, against voluntary alienation by tenant to person other than landlord—Purchase of tenure by stranger at sale in execution of money-decree—Purchaser if acquires good title—Landlord if can sue original tenants for rent and obtain decree binding on tenure.*

The Plaintiff purchased at an execution sale the right, title and interest of the tenants in a nim-howla *tenure. Notwithstanding the purchase by the Plaintiff which was duly notified to the landlord, the latter brought a suit for rent against the tenants and obtained a decree. The Plaintiff brought a suit for declaration that this decree was not binding on him and that the tenure in his hands was not liable to be sold in execution thereof. The lease which created the* nim-howla *provided as follows :—"Let it be known that if you find it necessary to transfer the* nim-howla *tenure, you will transfer it to me for proper price. You will not be at liberty to transfer it to any person other than myself. If you transfer it to any other person, such transfer will be invalid."*

Held—That there being no covenant against involuntary alienations and no covenant for re-entry, the Plaintiff acquired a good title by his purchase and consequently it was not open to the landlord to sue the original tenants with a view to obtain a decree whereby he could proceed against the tenure in the hands of the Plaintiff.

This was an Appeal against a decree of Babu Jogendra Nath Bose, Subordinate Judge of Khulna, dated the 3rd May 1912, confirming a decree of Babu Naro Nath Mukherjee, Munsif, Bagerhat, dated the 21st July 1911.

The Judgment of the Subordinate Judge was as follows :—

"The Plaintiff has purchased the *nim-howla* right of the Defendants Nos. 2 and

PROMODE RANJAN GHOSH *v.* ASWINI KUMAR NAG.

3, in execution of a money-decree against their father. After this the *malik* obtained a decree for rent against the Defendants Nos. 2 and 3 for the *nim-howla* on a compromise. This suit has been brought for a declaration that the decree does not affect the Plaintiff, that the *nim-howla* cannot be sold in execution of the said rent-decree. The only defence which needs consideration now in this appeal is whether the *nim-howla* was transferable. The suit has been decreed and the Defendant No. 1 (*malik*) has appealed. The first point which arises for consideration is that about the law applicable to this case. The lower Court has applied sec. 10 of the Transfer of Property Act. The Appellant's pleader contends that as the *nim-howla* was created before the passing of the Act, the Act is not applicable and cites *Hari Nath Karmokar* v. *Raj Chandra Karmokar* (8). I think his contention is right. Under the previous law, *nim-howlas* were transferable. There is a clause in the *nim-howla patta* to the effect that if the *nim-howladar* wants to sell the property, he must sell it to the lessor and will not be able to sell it to any one else. On this the Appellant's pleader contends that the Plaintiff's purchase has not conferred any right on the purchaser. The Plaintiff has however purchased it in execution of a decree and there is nothing in the *patta* against sales in execution of decrees. The contention is only with respect to voluntary sale by the *nim-howladar*. The restriction cannot be construed into a restriction against sales of all kinds. The decisions in *Nilmadhab Sikdar* v. *Narattam Sikdar* (3), *Goloknath Roy* v. *Mathuranath Roy* (4) are in favour of the Respondent. The Appellant's pleader wants to distinguish the decisions saying that there is a general restriction of sales in this case as mentioned in the decisions alluded to above, as the *patta* authorizes sales to the *malik*, but I think the word 'general' as used there does not mean 'absolute.' I think the principle laid down in these cases is that when the restriction does not refer to Court-sales specifically, the restriction does not make sales in execution of decrees void. I do not believe recognition by the prior *malik*, but as the appeal fails on the point discussed, I do not discuss this point at length. The Appeal is dismissed with costs."

(3) I. L. R. 17 Cal. 826 (1890).
(4) I. L. R. 20 Cal. 273 (1891).
(8) 2 C. W. N. 122 (1897).

Babus Jogendra Chandra Ghosh, Anilendra Nath Ray Chowdhury and Smritish Chandra Ghosh for the Appellant.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal on behalf of the landlord Defendant in a suit for declaration that the Plaintiff is not bound by a decree for rent obtained by the landlord against the tenant Defendants. The Plaintiff is the purchaser, at an execution sale, of the right, title and interest of the tenant Defendants in a *nim-howla* tenure which lay originally in the District of Backergunge, but is now included in the District of Khulna. Notwithstanding the purchase by the Plaintiff, which was duly notified to the landlord, the latter brought a suit for rent against the tenant Defendants and obtained a decree. The Plaintiff asks for a declaration that this decree is not binding on him and that the tenure in his hands is not liable to be sold in execution of this decree. The

question consequently arises, whether the Plaintiff has acquired a valid title to the tenure by his purchase at the execution sale. The determination of this question depends upon the terms of the *nim-howla* lease of the 20th February 1878, which provides as follows:—"Let it be known that if you find it necessary to transfer the *nim-howla* tenure, you will transfer it to me for proper price. You will not be at liberty to transfer it to any person other than myself. If you transfer it to any other person, such transfer will be invalid."

On behalf of the landlord Defendant it has been argued that the tenure was expressly made non-transferable except in one event, namely, a transfer by the tenants to the landlord, and that consequently the Plaintiff has not acquired a valid title by his purchase. There are two obvious answers to this contention. In the first place, there was no covenant against involuntary alienation, as there was in the case of *Vyankatraya* v. *Shivrambhat* (1) where there was a covenant that the tenant would not let the land of the tenancy be sold, or attached and sold, in satisfaction of judgment-debts. It follows consequently that the Plaintiff has acquired a valid title by his purchase. This view is supported by a long series of decisions amongst which may be mentioned *Tamaya* v. *Timapa* (2), *Nilmadhab Sikdar* v. *Narattam Sikdar* (3), *Goloknath Roy* v. *Mathuranath Roy* (4), *Parameshri* v. *Vittappa* (5). In the first of these cases, it was pointed out that where land had been sold against the will of the lessee by the act of a Court, the lessee could not be said to have voluntarily transferred his interest and thereby committed breach of a covenant not to assign.

In the second place, it is clear that, as there was no covenant for re-entry, the Plaintiff has acquired a valid title. In support of this proposition, reference may be made to the case of *Basarat Ali Khan* v. *Manirullah* (6) in which it was pointed out, on the authority of the decision of Blackburn, J., in *Williams* v. *Earle* (7), that where no right of re-entry is reserved, though there is a covenant binding on the tenant not to assign, the assignment is nevertheless operative. If the assignment in the case before us be thus deemed operative, it necessarily follows that title passed to the Plaintiff, and it was consequently not open to the Defendant to sue the original tenants with a view to obtain a decree whereby he could proceed against the tenure in the hands of the Plaintiff.

The result is that the decree made by the Subordinate Judge is confirmed and this appeal is dismissed.

(1) I. L. R. 7 Bom. 256 (1883).
(2) I. L. R. 7 Bom. 262 (1883).
(3) I. L. R. 17 Cal. 826 (1890).
(4) I. L. R. 20 Cal. 273 (1891).
(5) I. L. R. 26 Mad. 157 (1902).
(6) I. L. R. 36 Cal. 745 (1909).
(7) L. R. 3 Q. B. 739, 9 B. & S. 740 (1868).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 587 OF 1914.

HOLMWOOD, J.
CHAPMAN, J.
1914,
19, June.

MUNSHI ABDUL KADIR, Decree-holder, Petitioner,
v.
SHAHABAZPUR CO-OPERATIVE BANK and others, Opposite Party.

Co-operative Societies Act (II of 1912), secs. 19, 20—Priority of registered societies to other creditors, how enforceable—Rateable distribution—Sec.

MUNSHI ABDUL KADIR *v.* SHAHABAZPUR CO-OPERATIVE BANK.

73, Civil Procedure Code (Act V of 1908), if applicable—Charge if any.

By an application made under sec. 73 of the Code of Civil Procedure a registered Co-operative Society cannot enforce its prior claim within the meaning of sec. 19 of Act II of 1912, as against a judgment-creditor at whose instance property is going to be sold, if they have no decree or a charge under sec. 20 of the said Act.

Other remedies may still be open to such Society.

This Rule was issued against the order of the Munsif, 1st Court, Nabinagar, in Title Execution Case No. 147 of 1913 of 26th February 1914. The Petitioner Abdul Kadir in execution of his decree against one Samiraddi, Opposite Party No. 5, attached, among other things, his paddy and jute crops and a few heads of cattle belonging to him, after the Court had overruled the objections of the judgment-debtor. After attachment, but before sale, the Opposite Party Nos. 1—4, the Shahabazpur Co-operative Bank and three of its managing members, filed an application before the Munsif which purported to have been one under sec. 73 and Or. 21, r. 66 of the Code of Civil Procedure praying for an enquiry and for enforcement of the prior claim of the Society under Act II of 1912 upon the cattle and crops so attached in respect of a debt of of Rs. 100 amounting to Rs. 108 and odd with interest due to the said Society from Samiraddi who was a member of the Society. Their allegations were that the judgment-debtor had borrowed the said sum in order to purchase seed-grains and the cattle attached, and that no other creditor could get the sale-proceeds of the crops and the cattle in priority over the Bank. The attaching decree holder Abdul Kadir opposed the application.

The Munsif found upon the evidence that the money lent by the Bank was spent in the purchase of seed-grains and the cattle attached, although the decree-holder had attempted to prove otherwise and that the Bank did lend the amount to Samiraddi as evidenced by the entries in the Bank account-books and the statements of witnesses, and he was of opinion that although the petition purported to have been one under sec. 73 of the Civil Procedure Code, it was really one under sec. 19 of Act II of 1912 and upon the above findings held that the Bank was entitled to enforce its outstanding demand in priority to the attaching creditor under sec. 19 of the Act, and allowed the Bank to take out the major portion of the sale-proceeds.

Moulvi A. K. Fazlul Huq for the Petitioners submitted that the application under sec. 73 of the Civil Procedure Code was incompetent inasmuch as the Bank had no decree against the judgment-debtor, and so it could not claim rateable distribution with the Petitioner; persons coming under that section must be decree-holders. Nor does cl. (*a*) of that section cover this case inasmuch as the Bank has no charge upon the properties attached and sold. It is only sec. 20 of Act II of 1912 that contemplates a charge, but that section is not applicable here, because it contemplates a charge upon the share or dividend, etc., of a member. And sec. 19 of the Act does not create any charge in favour of the Society. Submits that the order of the Munsif passed under sec. 73, C. P. C., is illegal and without jurisdiction.

Mr. Rasul (with him *Babu Upendra Kumar Ray*) for the Opposite Party in showing cause submitted—Assuming there was some difficulty as to the application of

sec. 73 of the Code of Civil Procedure, the Munsif's order is quite clear when he says—"This is an application under sec. 73, C. P. C, for enforcing the charge of the Applicant who appears for one Co-operative Bank. The Applicant comes under sec. 19 of Act II of 1912." The application is dealt with as one really under the new Act. Sec. 19 is an enabling section, and the Society is entitled to enforce its outstanding demands under this section. In the face of the provisions of sec. 19, an application need not be made under the Civil Procedure Code or any particular section thereof. The learned Munsif does not treat this application as one under sec. 73, C. P. C., as is quite apparent from his order.

Sec. 19 does create an equitable charge in favour of the Society, although the expression 'charge' or 'lien' does not occur there. It creates a charge upon the specific classes of property mentioned in cls. (*a*) and (*b*) of that section. Act II of 1912 is a special Act and gives certain special privileges to the co-operative societies. The heading under which sec. 19 is placed shows clearly that such societies are given special privileges and that for obvious reasons. In this section, the Society is given priority to other creditors to enforce its claim upon two classes of property only and nothing more. These are the crops or other agricultural produce, when the Society has supplied the seed or manure or lent money for purchase of seed or manure, and secondly upon the cattle, fodder, implements, etc, supplied by the Society, or when it has lent money for the purchase thereof. The judgment-debtor may have lots of other properties, but the special privilege conferred by this section does not extend to those properties. The Society in order to proceed against those properties must proceed just like any other creditor. But where, as in the present case, the Society looks to the crops and cattle only for the realisation of its dues and it is clearly found that the seed-grains and the cattle were purchased with the money lent by the society, the Court has jurisdiction to give relief to the Bank under this section, and the learned Munsif's order is quite correct. The entries in the account-books of the Bank filed in this case as well as oral evidence prove the debt due to it, and in order to enforce its prior claim under sec. 19, the Bank need not obtain a decree or a certificate; for that cumbrous process would itself defeat one of the purposes of the Act, namely, speedy realisation of the money due to the society which had been advanced for the promotion of thrift and self-help among agriculturists.

The JUDGMENT OF THE COURT was as follows :—

This is a Rule which was obtained by the decree-holder in an application under sec. 73 of the Code of Civil Procedure made by a Co-operative Society for enforcing a charge under sec. 19 of Act II of 1912. The application was undoubtedly made under sec. 73, and under that section we are of opinion that the Co-operative Society could have no priority to other creditors, unless there are one or more persons than one who have made applications to the Court for the execution of decrees for payment of money passed against the same judgment-debtors. To hold otherwise would be to give these Co-operative Societies a power which even Government in its much discussed certificate procedure does not claim. They would claim in other

words to recover money without either decree or certificate or any legal title to enforce their debt. Admittedly there is no charge within the meaning of sec. 20 of the Co-operative Societies Act, so that the proviso to sec. 73 does not come in. It is possible that under sec. 19, the Society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure, but with that we are not concerned. It appears to us perfectly clear that under sec. 73 the claim of a Co-operative Society cannot be enforced, unless they have a decree or a charge under sec. 20

The Rule therefore must be made absolute and the order of the lower Court set aside without prejudice to any action which the Society may deem fit to take, if so advised.

The Petitioner is entitled to his costs in this Rule which we assess at one gold mohur.

Rule made absolute.

[CRIMINAL REFERENCE.]

REF. NOS. 2 TO 7 OF 1914

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
30, January.

KING-EMPEROR
v.
RIHR CHAMAR, Accused.

Labour and Emigration (Assam) Act (VI of 1901), secs. 2, 152, 162, 164—Illegal recruitment of cooly—Repatriation at the expense of the employer—Jurisdiction of Magistrate.

In a case under sec. 164 of the Assam Labour and Emigration Act for illegal recruitment of coolies, the Sub-Deputy Magistrate while acquitting the accused, made an order that the proprietor of the garden should deposit the expenses of repatriation of the coolies in question :

Held—*That the Sub-Deputy Magistrate not being appointed by the Local Government within the meaning of sec. 2 of the Act, his order was* ultra vires.

That the order was also bad on the ground that the Sub-Deputy Magistrate did not call upon the employer to show cause against the order, there being an acquittal of the accused and nothing to show undue influence or coercion.

This was a Reference under sec. 438, Cr. P. C, dated the 2nd of January 1914, made by J. A. Woodhead, Esq, District Magistrate of Faridpur for revision of an order of the Sub-Deputy Magistrate of Goalundo, dated the 19th of April 1913, acquitting, under sec. 245, Cr. P. C., the accused who was charged with an offence under sec. 164 of the Emigration Act and directing the coolies recruited to be repatriated at the cost of the employer.

Certain persons were sent up for illegal recruitment of coolies and were all acquitted by the Sub-Deputy Magistrate of Goalundo, who however passed an order to the effect that the coolies were to be repatriated at the cost of the employer to whose estate they were being conveyed. The District Magistrate made a reference to the High Court as stated above.

Mr. Gregory with *Babu Hemendra Kumar Das* for the Accused.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference from the learned Magistrate of Faridpur in six cases in which the Sub-Deputy Magistrate acquitted certain persons of offences under sec. 164 of the Labour and Emigration (Assam) Act, VI of 1901, and at the same time passed an order that the proprietor of the garden should deposit the expenses

KING-EMPEROR *v.* RIHE CHAMAR.

of repatriation of the coolies in question in each case.

The Magistrate points out to us that the Sub-Deputy Magistrate's orders were entirely without jurisdiction inasmuch as sec. 2 of the Act defines the Magistrate as the Magistrate of the District, Sub-Divisional Magistrate or other persons appointed by the Local Government to perform the functions of the Magistrate under this Act, and this Sub-Deputy Magistrate was not so appointed by the Local Government. His orders therefore are clearly *ultra vires*, and the Magistrate asks us to set aside the order directing that the employer should bear the costs of repatriation. The learned Counsel who appears for the employer takes the further ground that inasmuch as the accused were acquitted and there is nothing to show that there was any undue influence or coercion and the employer was not called upon to show cause, as the law directs, the order was a bad one.

Upon both these grounds, we think, that the order must be set aside and the amounts if paid must be refunded.

We do not express any opinion as to what the result of setting aside the Sub-Deputy Magistrate's orders as wholly without jurisdiction may be upon the acquittal of the accused persons. The only order which we are now concerned with is the order for repatriation.

This judgment will govern all these six cases.

Order set aside.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 249 OF 1914.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
6, March

CHIRAGUDDIN, Accused
v.
EMPEROR, Opposite Party.

Circumstantial evidence necessary for conviction, nature and character of—Indian Penal Code (Act XLV of 1860), sec 380.

The Petitioner was convicted under sec. 380, I. P. C., for theft of a number of currency notes and the findings were that he as well as five other persons entered the room at or about the time the notes were stolen, that his brother in-law was present when two of the stolen notes were cashed in Calcutta, that shortly after the theft he was in possession of a large sum of money for which he could not satisfactorily account.

Held—*That circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused.*

That in the present case the evidence did not fulfil the conditions of circumstantial proof at all.

This was a Rule granted against the order of M. Yusuf Ali, Deputy Magistrate of Ranchi, dated the 12th of December 1913, convicting the Petitioner under sec. 380, I. P. C., and sentencing him to suffer two years' rigorous imprisonment, which order was, on appeal, modified by D. H. Kingsford, Esq., Judicial Commissioner of Chota Nagpur, on the 19th December 1913, by altering the sentence to one of eighteen months' rigorous imprisonment and a fine of Rs. 200, or in default six months rigorous imprisonment.

The material facts appear from the judgment.

CHIRAGUDDIN *v.* EMPEROR.

Babu Nagendra Nath Ghose for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the Deputy Commissioner of Ranchi to show cause why the conviction and sentence passed on the Petitioner should not be set aside on the ground that there is no incriminating finding against him in the judgments of the Courts below.

The Petitioner was sentenced to two years' rigorous imprisonment under sec. 380, I. P. C., for complicity in a theft of currency notes from the office of the Secretary, Public Works Department, Bihar and Orissa Secretariat. That sentence was reduced in appeal by the learned Judicial Commissioner of Chota Nagpur to one of 18 months' rigorous imprisonment and a fine of Rs. 200, in default six months' additional rigorous imprisonment ; and the findings against the Petitioner were three in number and amounted in the learned Judicial Commissioner's opinion to exhaustive circumstantial evidence that he was one of the guilty parties.

Now the three points are these—first, the opportunity, in that he entered the room at about the time the money was stolen and in Mr. Priday's absence. But the learned Judicial Commissioner himself holds that there were at least five other persons who entered the room during Mr. Priday's absence, and it is clear in fact that the opportunity was not the Petitioner's exclusively.

The second point is that the Petitioner's brother-in-law Tuni was present when two of the stolen notes were cashed in Calcutta two months later at the shop of Jamaluddin by one Alijan, who is Tuni's brother-in-law, in circumstances which indicate dishonest knowledge on the part of Tuni. It is perfectly clear that this cannot be any evidence whatever against the Petitioner. No man can be responsible for the dishonest acts of his brother-in-law ; and no connection in time or place is shown between the Petitioner and Tuni with reference to the changing of these notes.

The third and final ground against the Petitioner is that shortly after the theft he was in possession of a large sum of money for which he cannot satisfactorily account. The defence account for it in a rather curious way. It is suggested that the Petitioner being a peon on Rs. 5 a month may have derived the money from some other illegitimate sources. That obviously is a very sound, if not a very moral, argument, and there is nothing whatever to indicate that the money which was in the possession of the Petitioner was a portion of the stolen money. Indeed the facts seem to negative it, for the theft was in respect of currency notes in the denomination of Rs. 150 to the value of Rs. 350 and a sum of Rs. 210 in cash and 10-rupee notes ; and the evidence against the Petitioner is that on the 12th and 21st May he deposited in the Post Office Savings Bank the sums of Rs. 29 and Rs. 155 respectively, total Rs. 184 The learned Judge remarks that this closely corresponds with the sum of Rs. 210 stolen in cash and 10-rupee notes. This is obviously not sufficient to show that this money was derived from the proceeds of this particular theft. The circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person, or must point conclusively to the complicity of the accused. It is obvious that this evidence does not fulfil

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the conditions of circumstantial proof at all.

The Rule must therefore be made absolute. The conviction and sentence are set aside and the Petitioner will be released from bail. The fine, if paid, will be refunded.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 638 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
30, May.

BISESUR SING
v.
KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 517, if applies to immoveable property.

Sec. 517, Cr. P. C., has no application to immoveable property.

This was a Rule granted on the 29th April 1913 against an order of the Sub-Divisional Magistrate of Aurangabad dated the 25th April 1913.

The material facts of the case will appear from the judgment.

Babus Dasarathi Sanyal, Ramtaran Chatterji and *Suresh Chandra Mukerji* for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

This was a Rule on the District Magistrate of Gaya to show cause why the order under sec. 517 should not be set aside on the ground that the order is entirely illegal and without jurisdiction.

The facts of this case may be shortly stated to be that the Petitioners dispossessed the Complainant of his garden by breaking the padlock of its gate and entering it, whereupon they were convicted of an offence of criminal trespass.

There is no evidence to show that there was any force or violence used in the commission of the offence. The Magistrate who tried this case passed an order under sec. 517, Cr. P. C., restoring the garden to the Complainant. The question in this case is whether sec. 517 of the Code applies to moveable and immoveable property alike. We have no hesitation, after comparing sec. 517 with sec. 522, in saying that the former section has no application to immoveable property. If that section had any application to immoveable property, the provisions of sec. 522 would become superfluous; because if the word "property" comprehends both moveable and immoveable property, sec. 517 then becomes much more comprehensive in its meaning than sec. 522. The Magistrate obviously proceeded to pass an order under sec. 517 in this case on the interpretation of the word "property" which, being commonly applicable to moveable and immoveable property alike, has been taken to mean by him property of either kind.

In this connection, as to the interpretation of the word "property," the learned Vakil on behalf of the Petitioners has drawn our attention to the case of *Jugdown Sinha* v. *Queen-Empress* (1), where the word "property" as used in sec. 405, I. P. C., has been explained to mean moveable property only. Similarly, in sec. 517 from the language employed we do not understand the word "property" to mean immoveable property. In the case of *Ahmed Ali* v. *Keenoo Khan* (2), where a person had been dispossessed of a bungalow and its contents, it was contended with force, and Brett and Ryves, JJ., held that in respect of them, orders ought to have been passed under secs. 522

(1) I. L. R. 23 Cal. 372 (1895).
(2) I. L. R. 36 Cal. 44 (1908).

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and 517, Cr. P. C. Although the point was not discussed, we clearly see that the learned Judges in that case did not think that an order under sec. 517 could have been made in respect of the bungalow.

Following, therefore, the decision above referred to, we make this Rule absolute and set aside the order under sec. 517 passed in respect of the garden.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1721 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
21, November.

SHEONANDAN SINGH and another, Petitioners, *v.* BHOLANATH PATTAK, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 517—Setting aside of order by High Court—Re-delivery of possession.

The Petitioners were convicted under sec. 426, I. P. C. The Magistrate directed the Police under sec. 517 to deliver possession of a garden over which the Petitioners were alleged to have obtained possession by means of trespass. The order under sec. 517 was set aside by the High Court in revision on the application of the Petitioners, but the Magistrate refused to re-deliver possession of the garden to them.

Held—*The order of the High Court setting aside the order under sec. 517, Cr. P. C., carried with it the incident of restoration of the garden in question to the Petitioners.*

The High Court directed the Magistrate to restore possession of the garden in question to the Petitioners through the Police.

This was a Rule granted on the 3rd November 1913 against an order of the Sub-Divisional Magistrate of Aurangabad, dated the 1st day of August 1913, refusing to direct the Police to re-deliver possession of the garden in dispute to the Petitioners.

The facts of the case will sufficiently appear from the judgment.

Babu Debendranarain Bhattacharjee for the Petitioners.

The JUDGMENT OF THE COURT was as follows :—

This Rule arose out of a case in which the Sub-Divisional Magistrate of Aurangabad convicted the Petitioners under sec. 426, I. P. C., and directed the Police under sec. 517, Cr. P. C, to deliver possession of a garden over which the Petitioners were alleged to have obtained possession by means of trespass. Against this order of the Sub-Divisional Magistrate the Petitioners moved this Court and obtained a Rule which was made absolute.* On the Petitioners' applying to the Sub-Divisional Magistrate for re-delivery of the possession of the garden to them, the Magistrate passed the following order—"My order *re* delivery of possession has been set aside by the High Court and there the matter ends. I am not aware of any law authorising me to direct the Police to restore the garden to Petitioners' possession. File." Against that order of the Magistrate the Petitioners obtained this Rule calling upon the District Magistrate of Gya to show cause why the Sub-Divisional Magistrate of Aurangabad should not be directed to order the Police to deliver possession of the garden in question to the Petitioners.

No cause is shown against this Rule, and we are of opinion that it must be made absolute. The first Rule that we made absolute on the 30th May last set aside the order under sec. 517. Clearly

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* *Bisesur Sing* v. *King-Emperor*, p. 1146 *ante.*

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our order of the 30th May last carried with it the incident of restoration of the garden in question to the Petitioners.

We now direct that the Sub-Divisional Magistrate of Aurangabad through the Police do restore possession of the garden in question to the Petitioners.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 471 OF 1914.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
23, April.

MAHOMED ASHRAFUDDIN and ors., 1st Party, Petitioners,
v.
SHEIKH KARIM BUKSH and ors., 2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 133, scope of—Claim of right, Magistrate bound to determine bonâ fides *of, before appointing jury—Case in which* bonâ fide *claim of right raised as also appointment of jury asked for—Duty of jury to hear parties and evidence.*

Sec. 133, Cr. P. C., contemplates only an enquiry as to the existence or non-existence of the obstruction complained of and not an enquiry into a disputed question of title, and where a bonâ fide *claim of private right is raised, the Magistrate cannot make an order under the section, but should leave the determination of the question to the Civil Court.*

When once a party who raised a private right has asked for a jury and has had the case referred to the jury, the jury are bound to hear the parties and such witnesses as they may desire to be heard.

When a second party to a proceeding under sec. 133, Cr. P. C., raises a question of private right and insists on having it decided, the Magistrate should look into the bonâ fides *of that claim before submitting the case to a jury.*

Where however the second party raised the question of private right and also stated that if it was thought proper a jury might be appointed and a jury was appointed who on evidence held that inasmuch as a question of title was involved, the proceeding could not be proceeded with and the Magistrate on perusing the materials placed before the jury decided that the matter was one for the Civil Court and dropped the proceedings:

Held—*That the Magistrate was justified in making the order passed by him.*

This was a Rule granted on the 23rd of March 1914, against an order of Babu S. C. Ghosh, Deputy Magistrate of Bhagalpur, dated the 26th of February 1914, dropping the proceedings under sec. 133, Cr. P. C., and referring the parties to go to the Civil Court.

The facts briefly stated are these:

The Petitioners on 26th December 1913 applied to the Deputy Magistrate of Bhagalpur for proceeding under sec. 133, Cr. P. C., against the Opposite Party second party, for the removal of a big block of wood that was placed by him on a passage called Mirdana Lane which was the only carriage way leading to the house of the Petitioners and the Opposite Party.

Notice to remove the nuisance was served on the Opposite Party who asserted that the alleged passage was the courtyard of their house and that neither the public nor the Petitioners had any right of way therein. The Opposite Party also stated that if it be thought proper, a jury might be appointed.

Five persons were appointed to act as jurors under sec. 133, Cr. P. C.

Several witnesses were examined on behalf of the Petitioners, but none on behalf of the Opposite Party.

Four jurors reported that they had no

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jurisdiction to decide whether the way was a public one or not, and that because a question of title was involved, the first party alleging that the way is public and the second party asserting that it was a portion of his courtyard, the proceeding under sec. 133, Cr. P. C., ought not to be followed.

The Deputy Magistrate accepted the verdict of the majority of the jurors and dropped the proceedings.

Mr. Akbari and *Babu Ray Guru Sharan Proshad* for the Petitioners.

Maulvi Mahomed Ishfaq and *Maulvi Sayed Mahomed Taher* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

We do not think that this is a case which calls for our interference. If there has been any technical irregularity, which we do not say there has been, it is clear from the findings on the evidence recorded before the jury that there was a *bonâ fide* claim of private right raised by the second party, and where that is the case, the Magistrate cannot make an order under sec. 133, but should leave the determination of the question to the Civil Court. See *Queen-Empress* v. *Bissessur Sahu* (1). This is a case where the second party who raised the question of private right is supporting the order of the lower Court, and the person who originally asked for the obstruction to be removed as detrimental to the public interests is now strenuously arguing before us that we ought to allow the Magistrate to enter into a second enquiry to establish what really amounts to his private right to take carts along the alleged road. It is not as if there was no evidence on the record.

(1) I. L. R. 17 Cal. 562 (1890).

The effect of the jury's enquiry was to give the Magistrate sufficient material to enable him to judge for himself that this was a case of civil dispute, and the jury made their procedure perfectly correct by declining to decide the question themselves, as it involved the question of private or public right. They cited several authorities of this Court, and there seems to be nothing in those authorities which would militate against the course which has been followed in this case. When once a party who raised a private right has asked for a jury and has had the case referred to the jury, the jury are bound to hear the parties and such witnesses as they may desire to be heard. Then again the jury have held on the authority of the same case [*Queen-Empress* v. *Bissessur Sahu* (1)], that it is beyond their scope to decide whether the way obstructed is or is not a public way; and there are still stronger authorities in two cases, in *Askar Mea* v. *Sardar Mea* (2), *Lal Meah* v. *Nazir Khalashi* (3), that when the second party raises a question of title, the case then becomes one for the Civil Court. The section contemplates only an enquiry as to the existence or non-existence of the obstruction complained of and not an enquiry into a disputed question of title. Against this we have cited before us the case of *Dularam Deb* v. *Baisnab Charan Deb* (4). There is no authorised report of the facts of this case, but from the judgment, a copy of which appears at p. 846 of the report, it would seem that the question there was one where the jury had been directed by the Magistrate to decide the question of public or private right in

(1) I. L. R. 17 Cal. 562 (1890).
(2) I. L. R. 12 Cal. 187 (1885).
(3) I. L. R. 12 Cal. 696 (1886).
(4) 10 C. W. N. 845 (1906).

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opposition to the objections of the second party who objected that he had a private right, and it has always been held in this Court that where the second party raises such a question and insists on having it decided, the Magistrate should look into the *bonâ fides* of that claim before submitting the case to a jury, and that is where the irregularity if any has occurred in this case. The Magistrate submitted the case to the jury upon the application of the second party who had the power to object to his doing so, but did not object; and had the jury come to a decision upon the point and the Magistrate had come to no decision, it might have been necessary in the interests of justice to send the matter back. But it is clear in this case that the jury collected the evidence and then very properly found that they had no jurisdiction to decide the civil question. The matter was referred to the Magistrate who, we presume, perused what was before the jury and the maps which also go to show that there were other ways to approach the complainant's house, and he decided that this was a matter for the Civil Courts. We think that he is quite justified in doing so and we decline to interfere.

The Rule is discharged.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1723 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
5, December.

SADASIB MANDAL, Accused, Petitioner,
v.
EMPEROR on the Complaint of Purna Chandra Nag, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 522—Indian Penal Code (Act XLV of 1860), secs. 147, 349—Restoration of possession of immoveable property—Criminal force, meaning of—Rioting with the common object of causing violence to inanimate object—Applicability of sec. 522.

Where the accused was convicted of rioting for causing violence in the prosecution of a common object, viz, *by destroying the Complainant's fencing and raising a new fencing on the Complainant's land:*

Held—*That violence having been caused in this case to the fencing only and not to any person, there was no criminal "force" as defined in sec. 349, I. P. C., and no order directing delivery of possession could be made under sec. 522, Cr. P. C.*

This was a Rule against an order of H. R. Wilkinson, Esq., Assistant Magistrate of Dacca, dated the 18th day of September 1913, convicting the Petitioner under secs. 147 and 379/114, Cr. P. C., and sentencing him to 3 months' rigorous imprisonment under each section for concurrent terms and directing restoration of the disputed land under sec. 522, Cr. P. C., which order was, on appeal, modified by W. A. Seaton, Esq., Additional District Magistrate of Dacca, dated the 29th September 1913.

The facts will appear from the judgment of the Assistant Magistrate, the material portion of which is as follows:—

"The Complainant says that between 1 and 3 A.M. on 11th Posh (December 27th) he was awakened by cries to discover 60 or 70 men, including Sadashib Mandal and seven others whom he recognised, breaking down his iron fencing and pelting his house with brick-bats. On his protest they threw the brick-bats at him and his relations and eventually went off with the materials of the fencing and set up a new fencing of their own, in a different place, of bamboo.

"The reason given is a dispute over a

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strip of land with Srish Babu, landlord of Sadashib (see the map—Ex. 5). Sadashib's house is in the east of the Nags', and in the Nags' place there is a tank ; the Nags say that their fencing was some 8 cubits east of the tank, and that Sadashib and other tenants of Srish had demolished this fencing and a piece at the north-east corner, and had set up a bamboo and *Mandar* fencing along the bank of the tank, so that it should appear as if the contested strip belonged to Sadashib.

* * * *

"I . . . find the case proved against Sadashib Mandal ; and as the number of men engaged was more than five and as they used violence in prosecution of a common object, *viz*, the demolition of the Nags' fence, he is guilty of rioting under sec. 147. As they removed the fencing, he is also guilty of theft under sec. 379 in connection with sec. 114, I. P. C. ; for though it cannot be proved that he actually with his own hands moved the fencing, yet he was present with the others and joined in the conspiracy for removing the fence, which was removed in furtherance of that conspiracy.

"I therefore find him guilty under sec. 147 and sentence him to three months' rigorous imprisonment, and guilty under secs. 379/114 and sentence him to three months' rigorous imprisonment, the sentences to run concurrently.

"Under sec. 522, Cr. P. C., I order complainant to be restored to the possession of the disputed land by the removal of the bamboo fencing."

Babu Surendra Nath Guha for the Petitioner.

Babu Heramba Chandra Guha for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner was convicted of the offence of rioting under sec. 147, I. P. C., and of abetment of theft under sec. 379, read with sec. 114, I. P. C, and sentenced on each count to three months' rigorous imprisonment. The charge under sec. 147, I. P. C., set out the common object of the rioters to be destruction of the Complainant's fencing and raising of a new fencing on the Complainant's land. The conviction under sec. 379, read with sec. 114, was set aside on appeal. There was further an order passed under sec. 522, Cr. P. C., directing delivery to the Complainant of the piece of land that had been taken possession of by the Petitioner unlawfully.

The findings of the lower Courts clearly show that though there was the conviction under sec. 147, I. P. C., it was not for the use of criminal force but for causing violence in prosecution of the common object. In sec. 349, I P. C., the term "force" is defined as being applicable to force when used in connection with human body ; and under sec. 522, Cr. P. C., delivery of immoveable property may be made to the person who had been dispossessed of it when the accused is convicted of an offence attended by criminal force. In the present instance violence was caused to the fencing and not to any person. Under the circumstances the order under sec. 522, Cr. P. C., should not have been passed inasmuch as there was no use of criminal force to any individual. This Rule therefore must be made absolute and the order directing delivery of possession of the land in question to the Opposite Party is set aside.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 783 OF 1913.

HOLMWOOD, J.
SHARFUDDIN, J.
1913,
17, December.

RAMAN BEHARY DAS, Appellant,
v.
THE KING EMPEROR, Respondent.

Criminal Procedure Code (Act V of 1898), secs. 222, 233—Indian Penal Code (Act XLV of 1860), secs. 409, 477A—Misjoinder of charges—Falsification of accounts and criminal breach of trust.

Where the accused was charged with three offences under sec. 477A and three offences under sec. 409, I. P. C., and tried and convicted :

Held—*That the trial was void by reason of misjoinder of charges.*

That sec. 222 does not cover two sets of offences any number of which may be tried together. Sub sec. (2) of sec. 222, Cr. P. C, cannot be applied to sec. 477A, I. P. C.

That sec. 233, Cr. P. C., must be strictly followed save and except where the law itself provides an exception and the joinder of three charges under sec. 409 and three charges under sec. 477A is not covered by any of the exceptions provided in the subsequent sections of the Code.

This was an Appeal preferred on the 12th September 1913, against an order of S. E. Stinton, Esq , Sessions Judge of Sylhet, dated the 28th of July 1913, convicting the accused under secs. 477A and 509, I. P. C, and sentencing him to undergo two years' rigorous imprisonment.

The accused who was a cashier in charge of the cash book in the Executive Engineer's Office, Sylhet, was charged under sec. 477A, I. P. C., with falsifying 3 items on the debit side purporting to show payment of certain sums into the treasury. In the Sessions Court a charge of misappropriation under sec. 409 in respect of these three items was added. The Sessions Judge convicted the accused of those charges and sentenced him to two years' rigorous imprisonment under each section, the sentences running concurrently.

Mr. Gregory and *Babu Ambika Charan Das* for the Appellant.

Mr. Bagram and *Babu Manindra Nath Banerjee* for the Crown

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal from the judgment and sentence of the learned Sessions Judge of Sylhet who in partial agreement with both the assessors convicted the Appellant Raman Behary Das of three offences under sec. 477A and three offences under sec. 409, I. P. C, and sentenced him to two years' rigorous imprisonment under each section, the sentences to run concurrently.

We are met at the outset by the objection that this trial is wholly void by reason of misjoinder of charges and that this is so is perfectly clear from the authority of *Kasi Viswanathan* v. *The Emperor* (1) The same principle has been affirmed in more than one case recently decided by the Criminal Bench of this Court, and there cannot be the slightest doubt that sec. 222 does not cover two sets of offences any number of which may be tried together. The second clause of the section refers to cases of criminal breach of trust or dishonest misappropriation of money, and it is held that it is not necessary to specify the separate sums which have been embezzled, provided that the time included between the first and the last date on which the sums were misappropriated shall not exceed one year. This sub-section cannot be applied to sec.

(1) I. L. R. 30 Mad. 328 (1907).

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Contents

NOTES.

Criminal Sessions.

The fourth Criminal Sessions commences its sittings from date, Mr. Justice Stephen presiding.

Personal and property rights of an alien enemy.

The declaration of war by Great Britain against Germany has had the immediate effect of affecting the legal status of all resident Germans in this country as also the relative rights and obligations between them and British subjects. Every German subject or person of German nationality or domicile (in its limited international sense) would be regarded as an alien enemy. The Government may expel them from the country if they like. During the South African war the British subjects were so expelled from the Transvaal. But the usual practice is to allow the enemy subjects a reasonable time to withdraw from the belligerent country unmolested. In the Continental countries they ordinarily so depart, but if some choose to reside, they are not now made prisoners, as used to be done in earlier times, but are allowed to reside with the necessary safeguards. In the Turko-Italian war and in the Russo-Japanese war this practice was followed. They are registered and are put under surveillance; arms and even valuables are taken away from them This is done to keep them out of harm's way. If they conduct themselves as peaceful citizens, they are allowed to trade but not with the enemy country. The proceeds by way of rent or otherwise in landed property or from mines or funds payable to enemy subjects may be taken charge of by Government and refunded to them or compensation made after the conclusion of peace. If after the specified time allowed them to withdraw, they are found to leave for joining their country's force they may be arrested and made prisoners. Those who are allowed to reside may not join any invading force under pain of death. If they do or attempt to do this they will not be entitled to the privileges of prisoners of war.

Commercial intercourse with alien enemy.

All commercial intercourse with alien enemy is prohibited. A British subject or even a resident neutral who has trade or commercial connections in Germany will since the outbreak of war also acquire an enemy character unless he severs forthwith such connections. No British subject may trade or enter into any transaction with an enemy subjec which might result in a remittance or transmission of money to the enemy country. All enemy Banks have therefore to suspend their business and any money or funds that may be found in their custody may be taken charge of or sequestrated by Government. But such monies and funds are not confiscated but refunded on the conclusion of peace. Interests on foreign bonds are on this principle also suspended. So are all insurance premiums, interests, etc., payable to the enemy country. All interests payable on mortgages or debts to an alien enemy are likewise suspended. Foreign cargoes already paid for may be cleared but not any in respect of which payment has got to be made to an enemy subject or enemy country. Any attempt to carry

on trade with the enemy country by a subject will make his goods and vessels liable to confiscation by Government. All contractual obligations between a British subject and an enemy subject are suspended. All executory contracts entered into before the outbreak of war are avoided. All partnerships with them are dissolved.

Right of suit between subjects and alien enemies.

The general principle accepted by English and American Courts is that war in itself involves a general prohibition of intercourse between persons residing in the territories of the respective belligerents. This is a rule not merely of international law but of municipal law as well. This rule is based on the political ground that stoppage of commercial intercourse brings pressure on the enemies while its continuance would operate to strengthen their hand. From a legal point of view this rule is supported on the ground that an alien enemy has no *persona standi in judicio* and this fact alone excludes the possibility of any legal commerce being carried on between an *alien enemy* and a subject. Since an enemy person has no judicial status it must necessarily follow that he is not entitled to sue nor be sued in a country which is at war with his. But this rule is subject to relaxation by the Sovereign authority. If he concedes right of intercourse, right of suit would necessarily follow. (See *The Hoop* case.) With reference to alien subjects resident in the country, the same general principle would obviously apply to them as well, but it is usual for the Government of the country tacitly or expressly to grant the resident alien subjects license to trade, provided they behave as peaceful citizens. But in the course of trading intercourse between alien enemies and subjects or resident neutrals, a great deal of legal complication may, all the same, arise.

Let us take the simplest case of contractual obligations between an alien enemy and a subject or resident neutral. The ordinary incidents of war are that all contractual relationships between them are suspended, executory contracts avoided, and partnerships dissolved. It would therefore naturally follow that right of suit is also suspended. Since *Wells'* case (1 Ld. Raym. 282) it may be taken as a general principle of the English law that "debts already subsisting between individuals divided by the line of war are suspended during the war, both as regards the right of action of the creditor and the duty of payment on the part of the debtor." But the Sovereign, as we have already said, may give permisson to an alien enemy to sue in His Majesty's Courts. With this view sec. 83 of the Code of Civil Procedure has been enacted. During the war, alien enemies carrying on internal trade with subjects usually carry on cash transactions, unless they are given liberty or license to sue.

In respect of past transactions or debts, whether an alien enemy may be sued at the time of war is also a difficult question. The Sovereign has every right to arrest or detain him in his territory and take possession of his property without any process of law. A creditor cannot expect a more effective mode of preventing him from escaping from his obligations. But if he is sued during the pendency of the war he may surely object to being sued because as the country's laws do not recognise any judicial status in him he may be hampered in making his defence. Every suit means reciprocity of remedies. Thus an alien enemy sued may claim a set off or put forward counter claims and if he is allowed to advance such pleas, it amounts to conferring on him the right of suit. It may also necessitate communication with the enemy country which is also prohibited. Then in the result of the suit a decree may have to be passed in an alien enemy's favour, costs allowed, execution issued, sales of property effected at his instance and the proceeds paid to him by Court. We doubt if any Court in British India would be prepared to take the responsibility upon themselves of bringing about these consequences by allowing any suits to be instituted against an enemy subject without authority of the Executive Government. The Sovereign authority in the land is more competent to judge of the character and conduct of the alien enemy than a Court of law and therefore it is desirable that sanction to sue or *be sued* in respect of an alien enemy should always be taken from the head of the Executive Government. The Code of Civil Procedure makes no provision as to whether an alien enemy may be sued in the British Courts. But we have said before that if the Executive Government have given an alien enemy a tacit or express license to reside he may be sued. Alien enemies are however entitled to the protection of criminal law, and necessarily they are amenable to criminal law, and may also be held civilly liable for torts. When alien enemies are expressly or impliedly authorised to reside, the consequences of licensed residence will attach to them.

Law of limitation if suspended in respect of alien enemies during war and need for legislation.

Although right of suit may be suspended against alien enemies during the pendency of war, the right would revive on the conclusion of peace and in the meantime the operation of the law of limitation would be suspended. According to American and English jurists,

limitation cannot be pleaded by persons who may not sue or be sued owing to the suspension of their rights during the pendency of war. This seems to be quite the reasonable view. The suspension of right of suit means not only the suspension of substantive rights but also the law of procedure. This suspension arises out of the Order of King in Council declaring war on a foreign Sovereign. Such Order of King in Council is binding on Prize Cou ts. The Indian Courts are bound to take judicial notice of Ord rs of King in Council published in the *Official Gazette*. It is curious that the Indian Limitation Act amongst the disabilities embodied in secs. 6, 7, 8 and 9 makes no mention of any disabili ies arising out of a state of war. On the contrary, sec. 9 being strictly construed would imply that time will not cease to run during the time of war. But we are sure that when right of suit becomes suspended in consequence of declaration of war by Sovereign, His Majesty's Courts in India would surely take the equitable view that in such cases, as the right of suit became suspended by act of the Sovereign, the law of limitation also became suspended along wi h it. In any event this is a question that should receive the immedia e attention of the Government of India and of the Indian Legislature. Pending legislation the Governor-General in Council may issue an Ordinance in this behalf. The urgency of the matter will be appreciated from the fact that German Banks and Trading Corporations which have suspended payments or may yet suspend payments cannot very well be sued till the conclusion of peace. If in the meantime limitation would begin to run against Indian and British depositors, and they might be punished more by this aggressive war than the alien enemy.

CASUS BELLI OF THE PRESENT WAR.

Every war has some sort of justification. But the present war of Germany against France and England hardly admits of any moral justification. It is purely a series of acts of aggression on the part of Germany that has forced France and G eat Britain to go to war wi h her. France and Great Britain have practically exhausted all possible means which are consistent with their self-respect for the preservation of European peace before taking up arms in defence of their hearth and home and their respective prestige and interests both at home and abroad. Austria may or may not have a just grievance against Servians in connection with the assasination of her heir-apparent. But even the suspec ed complicity of some Servian officials with the abominable crime of an anarchist band would hardly justify her violation of the sovereignty of Servia and going to war with her. Austro-Hungary is, however, under the rule of a more or less arbitrary Monarch and the Teutonic race to which he belongs. The inhabitants of Servia, the Balkan States and also a substantial section of Austro-Hungary largely belong to the Slav race. The Russians are their kith-and-kin. Besides Russia's treaty obligations with the Balkan States, politically these States form a buffer between Russia and Austria. So on the declaration of war by Austro-Hungary against Servia, Russia could claim political justification by her treaty obligations and even moral justification by reasons of affinity of race and blood for coming to the rescue of the Servians. Germany, however, by reason of her treaty obligations to Austro-Hungary would have been jus ified in joining her ally, on Russia participating in the war between Austria and Servia, assuming that the declaration of war by Austria against Servia was in any view justifiable. But even before Russia committed any act of war against Austria, the German Emperor peremptorily called upon the Tsar forthwith to offer to him an explanation as to the reason for the mobilisation of Russian troops. England offered to mediate, with the co-operation of the European powers, between Austria and Servia. France readily agreed to the proposal and even the Tsar was anxious to meet the Kaiser evidently with a genuine desire for the preservation of European peace. Whatever opinion we may have of the Tsar's Government, it would be universally admitted that as a Monarch or at any rate as an individual he has always had a genuine longing for peace. But in singular contrast to him stands out in bold relief the personality of his neighbour the Kaiser whose watchward in life has ever been "War." He has not only been the spoilt child of his own nation but also of the whole of the Teutonic race.

With the progress of culture and industry in the Nineteenth Century and after, even the nation who under the leadership of Napolean only a century ago fought and overran the whole of Europe singlehanded has become one of the most industrious, frugal and sensible nations in the World. The French like the English Government cannot go to war against the wishes of the people. In 1870 the war was forced upon the French people in the interests of an effete and imbecile monarchy. The French people at heart were averse to it even in 1870 and they are still more so to day. They still maintain a powerful army and navy not for aggression but for self-preservation. With singular patience the English and Franch Ministers implored the War-god of Europe not to break the peace of nations and set back the world, but he was obdurate. France in self-defence had to mobilize her army. The Kaiser regarding himself as the Master of Europe asked her equally peremptorily to explain why she was mobilising her army. The forbearance of

these friendly nations and of Great Britain was taxed to the breaking point, yet they continued to negotiate for peace. It is after Austria had marched her army into the Balkans, that Russia in sheer self-defence blew up a bridge and even after declaration of war between Russia and Germany in consequence, France and Great Britain continued to carry on diplomatic *pour parlor* for the preservation of peace. Great Britain in no way sympathised with Russia in her participation in war and put on the latter an amount of diplomatic pressure which well nigh threatened to break down the friendly understanding that has existed between these countries since some years past But the masterful monarch was determined to drag France and England into war along with Russia and his next move was to violate the neutrality of Luxemburg and Belgium which had been guaranteed by Germany, England and France. The offer of neutrality to England in respect of the west coast of Belgium and France, after the violation of her treaty obligations to England and giving her *casus belli* was a height of hypocrisy almost unsurpassed in the history of the world. If England had accepted the offer, her international position would have been at once reduced to that of Belgium or Holland and she would have from that day been regarded by Europe as a neutral power, not in her own sovereign right as a first class power, but as one whose neutrality had been preserved by the sufferance of Germany. Germany would then have been at liberty to attack the French Fleet in the Mediterranean with her partners in the Triple Alliance and the latter would have been practically the mistress of the Mediterranean which would have involved not merely the loss of her trade route but also of her high-way to the East. What would then have been the position of Egypt, India and Australia, one may falter even to speculate. The present war is being described as an European war, but the fate of the East is as intimately connected with it as that of any country or nation in Europe. We wish our people to realise that the interests of India are as intimately involved in the issues of this war as that of Great Britain and perhaps much more than that of any colony or protectorate in the British Empire.

From our review of recent events it is evident that the present war is a purely aggressive war on the part of Germany. Let us enquire next what may be the real reason and object of the imperious Kaiser to provoke war with France and Great Britain in this manner. Sir Edward Grey in his lucid speech of last Monday has taken us back to the Algeciras Conference and the Agadir incident in 1906, when Germany was bent upon forcing war on France over the Morocco question and it was the diplomatic support of Great Britain that saved the situation. But this intervention of Great Britain at the critical moment when Germany wanted to secure a footing in the South Coast of the Mediterranean must have been rankling in the Kaiser's heart ever since. Germany has been for the last twenty years carrying on practically a war in armaments and naval programme against any possible combination of France and England. Her jealousy of British trade and position in the East and Britain's naval supremacy over the seas is too well-known to require any repetition. This long-standing tension between these rival powers no doubt became more acute since the Morocco incident. But Sir Edward Grey has preserved a discreet silence over more recent events in the East which have to a great extent served to precipitate the present crisis.

The Turko-Bulgarian War would have surely involved Europe in a general war, if Turkey had only been a Christian power. It is an open secret that while Germany helped Turkey with money and supply of arms, France did the same to Bulgaria, and England not only lent her diplomatic support to Greece by reason of the relationship between the Royal houses of Greece and Great Britain, but also acted as a peace-maker between Turkey and the Balkan States. Austria who had previously annexed Bosnia and Herzegovina, at the time of this Eastern war, made no secret of her intention to annex Montenegro and to acquire an outlet in the Mediterranean by wresting the ports of Antivari and Salonica which would then be converted into naval bases and placed in direct communication with the land forces by means of railways. She had surely the warmest support of Germany in her intentions which would have placed these allies in a position to keep their war-vessels out in the Mediterranean. But this nice little plan was frustrated by the diplomatic support of the Triple *entente* to the Balkan States and Greece. At the conclusion of peace, Great Britain managed to get the upper hand in Cyprus and also acquired a substantial interest in the Bagdad Railway. So not only was the diplomacy of the Triple Alliance completely baffled, but Germany's long contemplated scheme of having a line of railway under her exclusive and independent control giving her an outlet into the Persian Gulf was also at the same time shattered. As we have already said, if Turkey had been a Christian power, Germany and Austria would have taken up arms on her side openly, not for any love of Turkey, but in their own interests and for their own aggrandizement. It is out of deference to the opinion of the Christian world that they refrained from joining a non-Christian Power in a war against the Christian States. Since then Austria with the support of the Triple Alliance has been seeking to annex and partition Albania, which would also mean the

fall of Servia and Montenegro into her clutches. Russia with her treaty obligations could not be an idle spectator of the scheme. While this plan was being matured, the assasination of the Austrian Crown Prince and the supposed complicity of some Servian officials furnished the excuse not merely to Austria but also to Germany to throw its gauntlet to the Triple *entente*. The Kaiser himself is not only his own Foreign Minister, but is also the Commander-in-Chief of the German army and navy. He has been advancing in years and feels that the time for stamping his name on the pages of history is fast slipping by. He entertains a very high opinion of himself and feels that his legitimate position as the premier Monarch of Europe and necessarily of the World is not being sufficiently recognised. Then again every stroke of his policy that has met with rebuff from the more sober-headed statesmen of Europe has raised his ire against France, and England in particular. The objective of the Kaiser is not merely to cripple the British trade, and deprive her of the supremacy over the seas, but as we have already explained, to deal a serious blow to her supremacy in the East. Thus while the aggression of Germany is wholly unjustifiable from the point of view of international morality, the declaration of war by England and France against Germany being in self-defence is both just and proper from whatever point of view we may choose to regard it.

CURRENT INDIAN CASES.

(CIVIL.)

Hindu Law.

JANKIBAI *v.* SHRINIVAS, I. L. R. 38 Bom. 120.

Members of a joint and undivided Hindu family hold family estate jointly and are seized of it "*per my et per tout.*" The joint tenants have each of them the entire possession as well of every parcel as of the whole. On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate. Such co-parceners are not the heirs of the deceased. They inherit by survivorship.

Indian Divorce Act (IV of 1869)—Marriage between a Christian woman and a Parsi.

NUSSERWANJEE *v.* ELEONORA, I. L. R. 38 Bom. 125.

The Petitioner, an English woman professing the Christian religion, was married in London to a Parsi whose parents resided in Bombay. After marriage the couple came to Bombay where they resided for some time and again left for London when the Respondent left the Petitioner who came back to Bombay and filed her petition for restitution in the Bombay High Court.

Held—That the Court had no jurisdiction to grant a decree for restitution either against a Parsi Respondent or a Respondent not within the Presidency.

That the Petitioner was not residing in India at the time of the petition. In order to give the Court jurisdiction the residence of the Petitioner must be *bonâ fide* and not casual or as a traveller.

Execution of decree—Limitation.

BAI UJAIN *v.* BAI RUXMUNI, I. L. R. 38 Bom. 153.

An application for execution of a decree was made on the 8th August 1908, whereupon order was made for execution as to part of the decree. This order was appealed against and was stayed from 9th January to 16th February 1909. On 12th August 1911, a fresh application for execution was made.

Held—That for purposes of limitation the period during which the stay order was in force was to be excluded.

Mortgage bond—Limitation.

DINKAR *v.* CHAGANLAL, I. L. R. 38 Bom. 177.

A mortgage bond attested by one witness is inoperative.

A suit though in form a suit for money due on a bond may be in substance a suit for compensation for breach of a contract within the meaning of Art. 116 of the Limitation Act and the period of six years provided in that article would apply if the bond is registered.

Review.

THE ANNUAL DIGEST OF INDIAN CASE LAW, 1913. *By M. B. Dorai Swamiengar, B. A., B. L. Published by M. B. Doraiswamiengar, B.A, B.L, at "Rama Vilas," Mylapore. 1914.*

We have great pleasure in extending our customary welcome to this annual digest originally started by the late lamented Mr. Srinivasa Aiyar and since his death taken up and ably continued by the present compiler. The notes of cases are as usual concise and well arranged and cross-references plentiful.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.*

[APPEAL FROM BOMBAY.]

THE LORD CHANCELLOR.	BHOWANIDAS VERAMAL
LORD MOULTON.	& Co., Appellants,
LORD PARKER.	*v.*
1914,	RABIABAI and others,
	RESPONDENTS.

Special leave, application for—Inference from facts proved—Question of law.

This was an application for special leave to appeal from a judgment of the Bombay High Court, dated the 11th November 1913.

One Abdool Latiff purchased the property in dispute in the name of Haji Ahmed, and the Petitioners claimed title from the said *benamidar*.

The issue between the parties was as to who was the owner of the property. The trial Judge held that the property belonged to the estate of the

said Abdool Latiff. He held that the recitals in the conveyance were quite sufficient to show that Abdool Latiff was the owner, and that the Petitioners were thereby put upon enquiry, but they did not take reasonable care to ascertain that the said Haji Ahmed had power to make the transfer to the Petitioners.

On appeal the Bombay High Court affirmed the judgment and decree of the trial Judge. The High Court refused leave to appeal to His Majesty in Council, holding that no question of law was involved therein. Hence this petition.

Sir Robert Finaly, K. C. (with him *Mr. G. R. Lowndes*), for the Petitioners, submitted that the finding of the Courts below was not based on the recorded evidence. It was not denied that Haji Ahmed was a *benamidar*, nor was the good faith of the Petitioners challenged. The Petitioners' case satisfied the requirements of sec. 41 of the Transfer of Property Act, 1882. There was nothing in the recitals in the conveyance which put the Petitioners on enquiry. The appeal involved a question of law, namely, whether the inferences were properly drawn from facts proved. Reference was made to *Ramgopal* v. *Shamskhaton*, L. R. 19 I. A. pp. 228, 232.

Their Lordships rejected the petition.

Solicitors: *Messrs. T. L. Wilson & Co.*, for the Petitioners.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before SHARFUDDIN and TEUNON, JJ. CRIM. REV. NO. 807 OF 1914. SADANANDA MANDAL, 1st Party, Petitioner *v.* KRISHNA MANDAL, 2nd Party, Opposite Party. 24th June 1914.

Criminal Procedure Code, secs. 145, 356 (3)—Memorandum of evidence in proceeding under sec. 145, if legal.

The Rule was issued upon the District Magistrate of Jessore and the Opposite Party to show cause why the order of the trying Magistrate adjudging possession to be with the 2nd Party should not be set aside on the ground that the depositions of witnesses were not recorded by him in the manner prescribed by sec. 356, Cr. P. C. The Magistrate in his explanation said that a memorandum of the substance of the depositions was taken in accordance with the provisions of cl. 3 of sec. 356, Cr. P. C, and that that was sufficient compliance with the law;

Held, that cl. 3 of sec. 356 did not apply to this case and the memorandum was insufficient. The Rule was therefore made absolute and the order of the Sub-Divisional Magistrate set aside.

Babus Hari Bhusan Mookerjee and *Satish Chandar Ghatak* for the Petitioner.

Babu Narendra Kumar Bose showed cause.

Rule made absolute.

CIVIL APPELLATE JURISDICTION.—Before JENKINS, C. J., AND N. R. CHATTERJEA, J. APPEAL FROM ORIGINAL DECREE NO. 493 OF 1913. SATISH CHANDRA GHOSH, Defendant, Appellant *v.* JAGANNATH PROSAD LAL AND ANOTHER, Plaintiffs, Respondents. Heard, 25th and 26th June 1914 and 2nd July 1914 Judgment, 7th July 1914.

Ex parte *decree, sale in execution thereof—Purchase by decree-holder*—Ex parte *decree set aside as fraudulent—Sale set aside whether affects* bonâ fide *purchasers for value from decree holder.*

This appeal arose out of a suit for partition instituted by Srimati Rameswari Dassi against the Defendant-Appellant. The Plaintiff claimed two-thirds share in Schedule 'Ka' lands of the plaint and one-third share in the two plots in Schedule "kha" of the plaint lands. The Plaintiff's husband Jadunandan had two other brothers, Shibnandan and Ramnandan. The properties were all ancestral properties. Shibnandan died first in 1900 leaving a widow named Jasoda Dassi and a predeceased son's widow named Bhagwani Dassi as his heirs. By a will executed before his death he made his brother Ramnandan an executor and Ramnandan took out probate and administered the estate for some time and then died in 1905 childless, leaving his elder brother Jadunandan as his heir. Then Jadunandan died early in 1906. In 1906 Jasoda and Bhagwani brought a suit for accounts against Rameswari as heir of Ramnandan on the ground that Ramnandan was liable for accounts to them as executor to Shibnandan's estate. They got an *ex parte* decree and in execution of that *ex parte* decree they purchased the one-third share of the *ejmali* properties belonging to Ramnandan which Rameswari got by inheritance on 17th January 1908 at Rs. 1,500 only. They sold their rights and interests in the two-thirds share of the *ejmali* by a registered *kobala* to Satish Chandra Ghosh on 14th October 1909. In 1910 Rameswari came to know of the *ex parte* decree and she then applied to set aside the *ex parte* decree. The *ex parte* decree was set aside as a fraudulent one on 24th April 1911, and the auction sale was also set aside on 29th July 1911. The present suit for partition was then instituted on 11th September 1911 against Satish Chandra Ghosh, the purchaser. The defence *inter alia* was that so far as the one-third share of Ramnandan was concerned, the Plaintiff could not get back

the properties from the Defendant, as he was a *bonâ fide* purchaser for value from the decree-holder auction-purchaser and as he was not a party to the proceeding for setting aside the decree and sale, he was not bound by them. The Subordinate Judge held that he was bound and gave the Plaintiff's heirs a decree, as the Plaintiff died pending suit."

On behalf of the Appellant it was contended that the Defendant being a *bonâ fide* purchaser for value, his rights by purchase remained unaffected, although the decree and sale were set aside. Reference was made to *Shaik Ismail Rowther* v. *Rajab Rowther*, I. L. R. 30 Mad. 295; *Marimuthu* v. *Subbaraya*, 13 M. L. J. 231 and *Pratinga Koer* v. *Madhavanand Ram*, 14 C. L. J. 476, and Leake on Contracts, 6th Ed. 262.

On behalf of the Respondents it was contended that the *ex parte* decree having been set aside as fraudulent and the sale having been also set aside, the Appellant who is a private purchaser from the decree-holder auction-purchaser has no longer any right to the lands sold at the auction sale. He stands in the shoes of his vendor and his title depends upon the title of his vendor, the decree holder auction-purchaser. The case of *Zainalab din Khan* v. *Mahomed Ashgar Ali*, reported in I. L. R. 10 All. 166 (P. C.), was a complete answer to the Appellants. In that case the term decree-holder in the judgment of their Lordships of the Privy Council includes persons claiming under the decree-holder and private purchasers from the decree-holder purchaser were included in the term "decree-holder." Reference was also made to *Syed Nathadu Sahib* v. *Nallu Mudaly*, I. L. R. 27 Mad. 98, 101, where private assignees from decree-holders were placed in the same position as decree-holders themselves. References were also made to Leake on Contracts, 6th Edn., pp. 263 264 and Addison on Contracts, p. 593, 10th Edn The case reported in *Pratinga Koer* v. *Madhavanand Ram*, 14 C. L J. 476, was clearly distinguishable and I. L. R. 30 Madras case was not an authority in the face of the Privy Council case of *Zainalabdin Khan* v. *Mahomed Ashgar Ali*, I. L. R. 10 All. 162.

Held—Following the Privy Council case of *Zainalabdin Khan* v. *Mahomed Ashgar Ali*, I. L. R. 10 All. 162, that the Appellant stood in the shoes of their vendor and the decree having been set aside, the sale also failed.

Babus Sarat Chandra Ray Chaudhuri, Biraj Mohan Majumdar and *Bhudeb Chandra Ray*, for the Appellants.

Babu Atul Krishna Ray, for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION.—Before D. CHATTERJEE AND WALMSLEY, JJ. APPEAL FROM ORDER NO 443 OF 1913 WITH ORDER NO. 0302 OF 1913. SAHDEO SINGH AND OTHERS, Appellants *v.* KULDIP SINGH AND ANOTHER, Respondents. Heard, 9th and 10th July. Judgment, 22nd July 1914.

Bengal Tenancy Act (VIII of 1885), sec. 170 (3)—Deposit by transferee of a portion of non-transferable occupancy holding, if valid.

The purchaser of a portion of a non-transferable occupancy holding made a deposit under sec. 170 (3) of the Bengal Tenancy Act, and it was accepted by the learned Munsif. The landlord then objected, but his objection was disallowed. He appealed to the District Judge who thought the appeal was incompetent. He then preferred a second appeal and an application for revision of the order of the Munsif.

Held, that the purchaser of a part of a holding of an occupancy raiyat was entitled to make a deposit under sec. 170 (3) of the Bengal Tenancy Act.

Jugal Mohini v. *Srinath* (12 C. L. J. 609) and *Radhika* v. *Rakhal Raj* (13 C. W. N. 1175) followed.

Jotindra v. *Durga* (10 C.W.N. 638) not followed.

That the sale of part of an occupancy holding which was not transferable by local custom or usage conferred an interest on the purchaser and the landlord was not ordinarily entitled to enter on the part sold.

Doyamoyi v. *Ananda* (18 C. W. N. 971 F. B) referred to.

Babu Akhoy Kumar Banerji, for the Appellants.

Babu Joges Chunder Roy and *Rajendra Prosad*, for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and MULLICK, JJ. APPEAL FROM ORDER No. 655 of 1908 WITH RULE No. 590 OF 1909. KALI CHARAN MAHTO, Appellant *v.* SHEO NARAIN SINGH AND OTHERS, Respondents. Heard, 29th June. Judgment, 13th July 1914.

Appeal—Non-transferable occupancy holding, purchaser of a portion of—Representative—Civil Procedure Code (Act XIV of 1882), sec. 244—Sale under rent law—Bengal Tenancy Act (VIII of 1885), secs. 173, 174.

The Appellant was the purchaser of a portion of a non-transferable occupancy holding. The holding was sold in execution of a decree for rent on the 20th March 1908 and purchased by one Gouri Sankar Singh. On the 31st March 1908, the Appellant made an application to have the sale set aside. In that application the Appellant sought relief

not only under sec. 173 of the Bengal Tenancy Act, but also under sec. 174, Bengal Tenancy Act, and secs. 310A and 244 of the Civil Procedure Code of 1882. The Munsif came to the conclusion that the auction-purchaser was not a *benamidar* for the judgment-debtor, and that therefore sec. 173, Bengal Tenancy Act, did not apply. He accordingly dismissed the application. The District Judge, to whom the Applicant appealed, held that there was no appeal against an order under sec 173 and declined to interfere.

Held—That neither sec. 173 nor sec. 174 of the Bengal Tenancy Act was applicable; that sec. 310A of the Code of Civil Procedure of 1882 was not applicable to execution proceedings under the Tenancy Act by virtue of sec. 170, Bengal Tenancy Act, as amended by Bengal Act I of 1907.

That the Applicant as a purchaser of a portion of a non-transferable occupancy holding was a representative of the judgment-debtor within the meaning of sec. 244 of the Code of Civil Procedure.

Sreemati Dayamayi v *Ananda Mohan Roy* (18 C. W. N. 971 F. B.) followed. The question whether the sale should be set aside on the ground of fraud or under the provisions of sec. 173 of the Bengal Tenancy Act, was a question between the parties to the suit or their representatives and therefore both an appeal and a second appeal lay.

Babu Surendra Nath Ghosal, for the Appellant.

Moulvi Muhammad Mustafa Khan, for the Respondents.

A. T. M. *Appeal allowed. Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before FLETCHER AND RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 1619 OF 1913. BAIKUNTHA NATH GUI AND OTHERS, Plaintiffs, Appellants, *v.* LALCHAND SAMANTA AND OTHERS, Defendants, Respondents. 17th July 1914.

Application under r. 6, Or. 34, C. P. C., for personal decree against mortgagors—Suit instituted more than 6 years from due date of payment—Whether payment of interest by one co-mortgagor who was karta *of joint family extends the period of limitation.*

This appeal arose out of an application by the mortgagee decree holders to obtain a personal decree, against the judgment-debtors mortgagors. The mortgage was executed on 29th January 1900 by several members of a joint family. The due date for payment was 13th April 1901. The mortgage suit was instituted on 23rd January 1909, and the decree was passed on 9th March 1909, and the mortgaged properties were sold and purchased by the decree-holders. The present application was filed on 8th February 1911 for obtaining a personal decree under r. 6, Or. 34, C. P. C., as the decretal amount was not fully satisfied by the sale of the mortgaged properties. The executants of the mortgage were three brothers and two nephews who were two sons of two other brothers. Some interest was paid by one of the executants, Goberdhan, on 6th March 1906. The decree-holders contended that 'Goberdhan was the *karta* of the joint family and that payment of interest by him within 6 years from the due date of payment gave rise to a fresh period of limitation and that they were therefore entitled to get a personal decree against all the Defendants. Goberdhan denied that he paid the interest. The other contesting Defendants alleged that there was a dispute between Goberdhan and themselves, and that they were not bound by payment, if any, made by Goberdhan, and they further alleged that they were separate at the time of the alleged payment and that Goberdhan was not their *karta*. The Munsif held that Goberdhan was the *karta* at the time, and that payment by him was binding on all the judgment-debtors and so granted the application. The Subordinate Judge on appeal held that there was no evidence to show that Goderdhan was such a *karta* as is contemplated by the Hindu Law, and assuming that he was such a *karta*, any payment made by him, one of the co-contractors, will not bind the rest, and he therefore held that the decree-holders were entitled to get a personal decree only against Goberdhan.

On appeal to the High Court by the Plaintiffs decree-holders, it was contended that payment by the *karta* of a joint Hindu family is payment by a duly authorised agent within the meaning of sec. 20 of the Limitation Act, and the case of *Saroda Charan Chakravarti* v. *Durgaram Dey Singh*, 14 C. W. N. 741 : 11 C. L. J. 484 was cited as an authority.

For the Respondents it was contended that the finding that Goberdhan was not the *karta* of the family, as is contemplated by the Hindu Law, concludes the appeal. Assuming for argument's sake that he was the *karta*, any payment of interest made by him did not bind his co-mortgagors. Reference was made to sec. 22, cl. (2) of the Limitation Act and to *Narayana Ayyar* v. *Venkataramana Ayyar*, I. L. R. 25 Mad. 220, 234 (F. B.). The case cited by the Appellants is distinguishable.

Held, following *Narayana Ayyar* v. *Venkataramana Ayyar*, I. L. R. 25 Mad. 220, 234 (F. B.), that the payment by one co-mortgagor did not extend the period of limitation, although he might be the *karta* of the family.

Dr. Rashbehary Ghosh and *Babu Bepin Behary Ghosh*, for the Appellants.

Babu Atul Krishna Ray, for the Respondents.

A. T. M. *Appeal dismissed.*

RAMAN BEHARY DAS *v.* THE KING-EMPEROR.

477A, I. P. C., as was pointed out in the case of *Queen-Empress* v. *Matilal Lahiri* (2). Sec. 233 must be strictly followed save and except where the law itself provides an exception, and this joinder of three charges under sec. 409 and three charges under sec. 477A is not covered, as was pointed out in the Madras ruling, by any of the exceptions provided in the subsequent sections of the Code. It is true that it was not necessary for the learned Judge to have drawn up three charges under sec. 409, inasmuch as by reason of sec. 222 one charge would have been sufficient. In the same way it is perhaps doubtful whether it is necessary to draw up three charges under sec. 477A. A series of alterations in accounts made to cover a defalcation might all be charged in one charge under the provisions of sec. 477A and there are not three distinct offences committed by an accused person merely by reason of the fact that he makes more than one false entry to cover one defalcation. But the false entry in that case can only relate to one defalcation. It is impossible to take a series of false entries referring to three different defalcations in the same trial, although it might be possible to try three defalcations in one charge, or to try a whole series of falsified accounts in one charge. The two could not be combined in the manner in which they have been combined in this case. Such misjoinder is, since the well-known ruling of the Privy Council in the case of *Subramania Ayyar* v. *King-Emperor* (3), absolutely fatal to the trial which must accordingly be held to be void.

We have heard the learned counsel at some length upon the merits, and we do not wish to say anything which would prejudice the case, inasmuch as after giving the matter our most patient consideration we are convinced that this is a case where the ends of justice require that there should be a re-trial, and that re-trial should be held upon the charges under sec. 477A upon which the accused was originally committed to the Court of Sessions. The charge should be framed as nearly as possible in the words of the section itself. We may refer to the ruling in *Emperor* v. *Rash Behari Das* (4) as showing what we mean. It was there held that where an accused in making entries which are charged against him was in reality furthering a fraud that had already been committed, that fell within the purview of sec. 477A. But it would appear upon that ruling to be safer to set out the separate items of falsification in separate charges. We therefore on the whole think that the case should be re-tried upon the three charges under sec. 477A as originally committed to the Sessions.

The conviction and sentence passed upon the Appellant are set aside and he will remain on the same bail pending his re-trial before the Court of Sessions as ordered above.

Appeal allowed.

(2) I. L. R. 26 Cal. 560 (1899).

(3) 4 C. W. N. 866: s. c. I. L. R. 25 Mad. 61 (1901).

(4) I. L. R. 35 Cal. 450 (1908).

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914, 29, June.

RAMCHANDRA MARTAND WAIKAR and ors., Appellants, *v.* VINAYAK VENKATESH KOTHEKAR and anr., Respondents.

Hindu Law—Mitakshara—"Sapindaship," *definition of, if governs inheritance or marriage only—*Bhinna-gotra sapindas *or* bandhus, *who may succeed as—Limit of five degrees and mutuality to be satisfied—Classes of* bandhus *enumerated in Mitakshara, if to be extended—Interpretation of rules of Hindu Law—Suit in ejectment—Plaintiff to strictly prove title.*

Sapinda *relationship, according to the Mitakshara, is based not on the presentation of funeral oblations, but on descent from a common ancestor, and in the case of females, also on marriage with descendants from a common ancestor, this relationship ceasing—not merely for purposes of marriage but generally and therefore for purposes of inheritance also—after the seventh degree from the* propositus *on the father's side and fifth on the mother's.*

The word "bandhu" *in the system of the Mitakshara bears a distinct and technical meaning signifying the* bhinna-gotra sapindas, *and the limitation of the five degrees clearly applies and can only apply to the* bhinna-gotra sapindas.

Besides being within the fifth degree from the propositus, *a* bandhu *to be entitled to succeed to the inheritance must be so related to the* propositus *that they are* sapindas *to each other.*

Held, *accordingly, that the Plaintiffs who were the paternal grandfather's son's son's daughter's daughter's sons of the* propositus *were not his heirs, both because they were his* bhinna-gotra *beyond the fifth degree and also because the element of mutuality was wanting between them and the* propositus.

The ruling in GRIDARI LALL *v.* THE BENGAL GOVERNMENT (4) *that the enumeration of* bandhus *who are entitled to succeed is not exhaustive but merely illustrative, hardly warrants the conclusion that the classes specified by Vijnaneswar,* viz., atma-bandhus, pitri-bandhus, matri-bandhus *can be added to.*

LALLUBHAI *v.* MANKUVARBAI (1), UMAID BAHADUR *v.* UDOI CHAND (3), BABU LAL *v.* NANKURAM (5) *referred to.*

The Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of laws, but must depend for their decisions on the rules and doctrines enunciated by its own law-givers and recognised expounders.

In order to succeed in an action of ejectment the Plaintiff must strictly prove his title.

This was an Appeal from a decree and judgment of the Court of the Judicial Commissioner, Central Provinces, dated the 23rd March 1910, which affirmed a decree and judgment of the Court of the District Judge, Balaghat, dated the 26th February 1907.

The question for determination in this Appeal was whether the Appellants were under the Mitakshara law the heirs of one Lakshman Rao deceased.

The relationship of the parties appears from the pedigree set out in their Lordships' judgment.

The said Lakshman Rao was the last male owner of the property in suit with

(1) I. L. R. 2 Bom. 388 (1876).
(3) I. L. R. 6 Cal. 119 (1880).
(4) 12 M. I. A. 448 (1868).
(5) I. L. R. 22 Cal. 339 (1894).

the exception of a two anna share in each of the villages of Kattipar and Gosaintola and a four-anna share in the village of Pipartola. He died in or about the year 1851, leaving him surviving a widow, Janki Bai, and a daughter, Chitku Bai. Janki Bai, who succeeded Lakshman Rao, died in or about the year 1883, and was succeeded by Chitku Bai, who died on the 7th May 1894. Chitku Bai did not leave any issue her surviving, and the heirs of the said Lakshman Rao would, therefore, be entitled to succeed to the property left by him. But on Chitku Bai's death, her husband Vinayak Venkatesh Kothekar, Respondent No. 1, obtained possession thereof. In the year 1900, Chitku Bai's husband adopted Venkatesh, Respondent No. 2, as his son. The present suit was instituted by the Appellants, as Plaintiffs, on the 25th March 1906, in the Court of the District Judge, Balaghat, against Chitku Bai's husband and his adopted son, as Defendants. The Appellants by their plaint alleged that the family to which they and the said Lakshman Rao belonged was governed by the Benares School of the Mitakshara law; that they were Lakshman Rao's *bandhus* or *bhinna-gotra sapindas*; and that as such they were his nearest heirs and entitled to succeed to the property in suit. The Appellants, therefore, prayed for a decree for possession of the same.

The Respondents, by their written statement, dated the 16th July 1906, contended that the Appellants did not "come within the definition of *bandhus* or *bhinna-gotra sapindas* of Lakshman Rao entitled to succeed to his estate." The Respondents also pleaded that the law applicable to the case was the Western School of the Mitakshara law under which Chitku Bai took an absolute estate in her deceased father's property, and that on her death it went to her own heirs. Both Courts in India have found that the Benares School of the Mitakshara law was applicable to the case, and that under that School of law Chitku Bai took the ordinary estate of a Hindu female, and that on her death the property in suit would devolve upon the heirs of Lakshman Rao. The Respondents further contended that the said shares in the said three villages of Kattipar, Gosaintola and Pipartola were the self-acquired property of Chitku Bai, and, therefore, her own heirs would be entitled to succeed to the same. Both Courts in India upheld this contention and held that the Appellants were not entitled to succeed to that portion of the property in suit.

On the pleadings, the District Judge settled several issues of which only the following is material:—

"17. Are the Plaintiffs heritable *bandhus* of Lakshman Rao, and, as such entitled to the property in dispute?"

The District Judge, Mr. G. G. Ranade, recorded the oral and documentary evidence adduced by the parties, and, on the 26th February 1907, delivered his judgment. On the said issue his opinion was as follows:—

"*Issue* No. 17.—This is the most important point in this case. In fact the whole case hinges upon this very important issue. If the Plaintiffs are heritable *bandhus* of Lakshman Rao, then they are entitled to succeed to the property in suit and the Defendants are no longer any sharers of the same, but if the Plaintiffs are not heritable *bandhus*, the case of the Plaintiffs must entirely fail and the Defendant No. 1 is the only person entitled to succeed and to retain the property which he has got.

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The established case law on the point is first of all discussed in the case of *Umaid Bahadur* v. *Udoi Chand* (3). It has been expressly said there that the author of the Mitakshara in verse 3, sec. 5, uses the word *sapinda* in the sense of connection by particles of one body and not in the sense of connection by funeral oblations and that in order to determine whether a person is a *sapinda* of the *propositus* within the meaning of the definition given by the author of Mitakshara in *Achara-kanda* (chapter treating of rituals), it is necessary to see whether they are related as *sapindas* to each other, either through themselves or through their mothers and fathers. If this test is applied to the present case, it is to be seen whether the Plaintiffs are the *sapindas* of the common ancestor, Timajipant, and whether Lakahman Rao is the *sapinda* of Timajipant. A reference to the genealogical table will at once show that the deceased Lakshman Rao is the third person from the common ancestor, while the Plaintiffs are the sixth in degree from Timajipant. The Plaintiffs claim the property as *bandhus* through their mother, Mt. Rango Bai, the wife of Martand Rao Waikar. As a female comes in the inheritance and the present inheritance is claimed through a mother, the *sapindaship* from the Plaintiffs goes as far as Sadashivapant. It does not reach the common ancestor, Timajipant. This important care of *Umaid Bahadur* v. *Udoi Chand* (3) has been followed in various cases, and it has been again quoted as an authority in the recent case of *Babu Lal* v. *Nankuram* (5). On page 345 it is said that "again a *sapinda* of the *propositus*, to be capable of inheritance, must satisfy a further condition, namely, that he must be so related to the *propositus*, that the *propositus* is also a *sapinda* of him, either directly or through the father and the mother. This mutuality of *sapinda* relationship between the *propositus* and the heritable *sapinda* is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udoi Chand* (3) and the authority for this is to be found in the text of Manu, Chapter IX, 187, cited in the Mitakshara, Chapter II, sec. 3, as interpreted by Balambhatta and Visvesvarbhatta, the two leading commentators on Mitakshara. The text according to these commentators, means this, that 'the property of a near *sapinda* shall be that of a near *sapinda*.'

This is the established law on the subject, but the learned counsel for the Plaintiffs contended that even in the case of a female, that is, when inheritance is claimed through a mother, *sapinda* relationship goes up to the 7th or at least 6th degree and the authority of Golapchandra Sarkar Shastri has been quoted (Hindu Law by Golapchandra Sarkar, page 262).

Bandhus are 'भिन्नगोत्राणां सपिण्डानां बंधुशब्देन ग्रहणात्' *bhinna-gotra sapindas* are *bandhus*. In the present case the Plaintiffs are of a *gotra* different from that of the family of Asirgaday. The *sapindaship* is defined as:—सपिण्डतातु पुरुषे सप्तमे विनिवर्तते। समानोदकभावस्तु जन्मनाम्नोरवेदने॥—that *sapinda* relationship ceases in the 7th degree from the father. The author of the book referred to above takes the verse to mean 7 degrees both from the father and mother. He does not take practically into consideration the subsequent verse of याज्ञवल्क्य 'पंचमात् सप्तमादूर्द्ध्वं मातृतः

(3) I. L. R. 6 Cal. 119 (1880).
(5) I. L. R. 22 Cal. 339 (1894).

(3) I. L. R. 6 Cal. 119 (1880).

पितृतस्सप्तमा,' which means that *sapinda* relationship is restricted to 5 degrees in the case of a mother and 7 degrees in the case of a father. It was contended that this definition of *sapinda* relationship has been given in the याज्ञवल्क्य Smriti for the purpose of marriage and not for the purpose of inheritance. This contention of the Plaintiffs is not supported by any authority. The authorities are against the Plaintiffs. In the case of *Lallubhai* v. *Mankuvarbai* (1), it has been decided on page 427 that the relation of *sapindaship*, as given by Vijnaneswara and Nilkantha, is not different for the purpose of inheritance from that for the purpose of marriage. 'If Vijnaneswara and Nilkantha contemplated such a distinction for the purpose of inheritance and *sapindaship*, for the marriage and ceremonial or religious purposes, they would have expressly said so.' Messrs. West and Bühler in their valuable work on Hindu Law regard the *sapindaship* the same both for the purpose of marriages and for the purpose of inheritance. On page 434 it is said that 'it is quite consistent with the adoption of community of particles as the basis of *sapindaship* and it is an additional proof that he did not limit that doctrine to marriage or ceremonial matters.'

"The view taken by the learned author, Golapchandra Sarkar Shastri, is not the view as taken by the commentators and as accepted by custom.

"Mr. Martand Rao also quoted निर्णयसिंधु. It is a work prepared by कमलाकरभट्ट by the end of the 17th century. This कमलाकरभट्ट was the uncle of the famous गागाभट्ट (Gagabhatt) who performed the installation ceremony of Shivaji in 1674 at Raigad in the Bombay Presidency. The authority of निर्णयसिंधुकार is of great importance, and though he on page 217 says that 'आसप्तमात् रिक्थविच्छित्तिर्भवति', that is, the inheritance goes as far as 7 degrees and then it ceases; he further says that in the case of mother it is restricted to 5 degrees only.

"On page 490 of the Digest of West and Bühler (3rd edition, Volume 1, printed at the Bombay Education Society's Press, Byculla, 1884) it is said that in the mother's line the *sapinda* relationship ceases with the 5th person. In the present case it ceases with Sadashivapant and does not go up to Timajipant. Plaintiffs are not therefore the heritable *bandhus* of Lakshman Rao.

"The opinion of Sarvadhikari (Tagore Law Lectures, 1884) is against the contention of the Plaintiffs. After giving the definition of *bandhus* on page 702 he goes on to page 705 and there says that five is to be substituted for four in the case of father's *bandhus*. If the deceased or his ancestor be related through father's mother, then five degrees, instead of four, should be counted on both directions. The table, which he has given on page 712 III (Mother's *bandhus*), is exactly applicable to the present case. There the *sapinda* relationship goes as far as *B* only, that is, in the present case as far as Sadashivapant only and does not go as far as Timaji. On page 490 of the Digest of West and Bühler it is said that the deceased's great-great-granddaughter's son is no longer a *sapinda* and the same view was held in *Giridari Lall* v. *The Bengal Government* (4). *Vide* page 160 of Volume II of Judgments of Privy Council by D. Sutherland. In the present case the Plaintiffs are the मातृबंधु

(1) I. L. R. 2 Bom. 388 (1876).

(4) 12 M. I. A. 448 (1868).

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(*matri-bandhu*) of the deceased and they come last of all, that is, after the आत्मबंधु and पितृबंधु (*atma-bandhus* and *pitri-bandhus*) are exhausted.

"It was contended by Mr. Martand Rao, the guardian of the Plaintiffs Nos. 2 and 3, and by the learned Counsel, Mr. Mitra, Barrister-at-law, that the author of the Tagore Law Lectures, 1884, Mr. Rajkumar Sarvadhikari, has said, on page 705, that the word five should be substituted for four in the case of father's *bandhus*. It was argued from this that if a concession is given in the case of father's *bandhus*, why on the same analogy a concession should not be given in the case of mother's *bandhus*? I admit that the author does not give any reason for this, but there is no reason why the same concession should be given in the case of mother's *bandhus* when the Shastras do not allow that. The Court is not to see what law will be convenient to the parties or in particular to the Plaintiffs, but the law as it exists is to be administered. I do not see therefore any reason why the Plaintiffs who are decidedly *bandhus* through mother should have that concession. Mr. Martand Rao had further argued that *Apararka*, a commentator on the Yajnavalkya Smriti, also supported the view of Mitakshara and that in the case of females too, the *sapindaship* goes as far as the 6th degree. I must say that *Apararka* is not in conflict with Mitakshara and I must say that proper meaning of the verse पञ्चमात् सप्तमाद्दूर्ध्वं मातृतः पितृतस्तथा is as has been given above. *Apararka* is a late commentator and his work is an authority in Kashmir. He was a sovereign who reigned in the Konkan between 1140 and 1186. The words in Mitakshara तथाच मातरमारभ्य ... तत्पितृपितामहादिगणनायां पञ्चमपुरुषवर्त्तिनी मातृतः पंचमीत्युपपद्यते clearly shows that the *sapinda* relationship goes up to the 5th person including the mother. The son of that mother does not become a *sapinda* of the common ancestor. The case becomes different when the *sapindaship* is claimed through father. Had Mt Sako Bai had a son instead of a daughter, Mt. Rango Bai or Janki Bai, the *sapinda* relationship would have come to the Plaintiffs under the rule that *sapinda* relationship through father goes as far as the 6th degree.

"The case in *Musstt. Umroot* v. *Kulyandas* (8), was cited as authority by Mr. Martand Rao to support his contention that relations through mother up to the 7th degree can become *sapindas* and that in the absence of any preferential heir a person who comes within 7th degree through his mother can succeed to the property. I have read the report, and from that report it is quite clear that that was not the opinion of the Court. It was the case of *Musstt. Umroot* v. *Kulyandas* (8) and the Court had given certain points for the opinion of the Shastris of the Court and the Shastris in giving their opinion had said that 'under the word *bandhus*, the author has included the *asagotras* also wherefore should there be neither the abovenamed relations nor yet the *bandhu* or cognate on his side then the children of Raghunathdass are the lawful heirs, though not specified by the author in the text, because they are within 7th generation though in the female line.'

"This case has been referred to in the Digest of West and Bühler on page 489 and it has been said there 'that this assertion is too wide and vague to be of any use.' Further, the Shastris were not asked their opinion on this point,

(8) 1 Borradaile's Rep. 814, 828 (1820)

but they gave their opinion as an *obiter dictum* and the Court has not acted upon the opinion of the Shastris. With due deference to the Shastris who gave that opinion, I must say that the interpretation as put on the verse of Yajnavalkya is wrong.

सपिण्डतातु पुरुषे सप्तमे विनिवर्त्तते । समानो-दक भावस्तु निवर्त्तेताचतुर्द्दशात् ॥

This is the verse taken by Mitakshara from वृद्धमनु. This verse shows the *sapinda* relationship amongst persons of the same *gotra* and not for persons bearing a *gotra* different from that of the common ancestor. In order to have a different *gotra*, a female, as a daughter or sister, etc., must intervene. Again the same verse has been taken by Manu in his book called मनुस्मृति, Chapter V 60, and what the commentators have said upon that verse is very important and it supports the view that I have taken. On page 211 of that book as printed at the Nirnaya Sagar Press, Bombay, in the year 1884, the author has said—

तदुक्तं मत्स्य पुराणे 'लेपभाजश्चतुर्थाद्याः पित्राद्याः पिण्डभागिनः। पिण्डदः सप्तमस्तेषां सापिण्ड्यं साप्तपौरुषं' मागोत्रत्वेपीयं सपिण्डता। अतएव शंखलिखितौ। 'सपिण्डतातु सर्वेषां गोत्रतः साप्तपौरुषी'।

"These sentences leave no room for any doubt as to what was the meaning intended by Yajnavalkya. Here it has been clearly and unmistakably said that the verse quoted above indicates the relation of *sapindaship* in the same *gotra* and not a *gotra* different from that of the common ancestor. It is not applicable to *bandhus* who are *bhinna-gotra sapindas* I need not therefore say that the translation of the above verse, as made by Golapchandra Sarkar Shastri in his book on Hindu Law on page 48, is not correct. 'But the *sapinda* relationship ceases in the 7th degree (from the father and the mother). *Samanodaka* relationship however ceases, if the descent and the name are unknown.' (Manu 5, Chapter 60.) There is no other definition of *sapindaship* given anywhere in the works on the subject.

"The opinion as given by the Shastris in 1814 at the time when the case in 1 Borradalai was reported has no base or foundation and it appears to be only the personal opinion of the Shastris and it was entirely an *obiter dictum.*

"Moreover the case is very very old. It was decided nearly a century ago when the law on the subject of *bandhus* was not discussed and settled. It has now been a settled law that unless there has been a mutual *sapinda* relationship, the *bandhus* cannot inherit and they are not heritable *bandhus.* It is not the opinion of the English Judges, but it is the opinion of the Shastras on the subject and the same opinion has been held by the public on this difficult question. Even Mr. Golapchandra admits that there must be some limit to the *sapinda* relationship, otherwise the whole thing would be in confusion. Golapchandra Sarkar on page 72 of his book comments on the *dictum* as laid down in the Calcutta case [*Umaid Bahadur* v. *Udoi Chand* (3)] and says 'that I have not been able to find out any *dictum* in the *Achara-kanda* in support of the view taken by the High Court of Calcutta.' I need not say much as regards the opinion of Golapchandra Sarkar. It is opposed both to the established law on the subject and opposed to usages. All along the restriction is observed as far as mother is concerned. On the authority of the rulings quoted above I hold that the Plaintiffs are not heritable *bandhus* of

(3) I. L. R. 6 Cal. 119 (1880).

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the deceased and that they cannot inherit the property in dispute."

In the result the District Judge dismissed the suit.

Against the said decree of the District Judge the Appellants filed their Memorandum of Appeal in the Court of the Judicial Commissioner, Central Provinces, and the Respondents filed their Memorandum of Objections. On the 23rd March 1910, the Judicial Commissioner Mr. H. V. Drake-Brockman delivered his judgment expressing his agreement with the decision of the Court below on the issue in question, and passed a decree dismissing the Appeal with costs. In the course of his judgment the Judicial Commissioner observed as follows :—

"In the case of *Gridari Lall Roy* v. *The Bengal Government* (4) their Lordships of the Privy Council said that when the text of the Mitakshara is doubtful on any point, the *Viramitrodaya*, as a work of authority in the Benares School, may be referred to for the purpose of removing the doubt. In this connection I have referred to Shastri Golapchandra Sarkar's translation of the *Viramitrodaya*. At pages 199-200 will be found the passages corresponding to Mitakshara II-5-6 and II-6-1. The entire work is on Inheritance and appears to contain no reference to any restriction on *sapindaship* other than the ordinary one of seven degrees. On the other hand, the Dattaka-Mimansa in sec. VI-10 and 11 (Stokes' Hindu Law Books, 600) refers to both Vrihat Manu and Gautama as limiting *sapindaship* to the fifth degree on the mother's side in connection with succession.

"The lengthy argument for the Appellant included nothing to show that in applying Vijnaneswara's detailed definition of the term *sapinda* to his rules of inheritance, the Judges—one of them a Hindu and famous as a Sanskritist—who decided *Babu Lall* v. *Nankuram* (5) departed from any rule of interpretation which they were bound to observe. In *Umaid Bahadur* v. *Udoi Chand* (3) the Full Bench said :—

'It is a well understood rule of construction among the authors of the Institutes of Hindu Law that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated.'

"Now the very elaboration of the definition in the *Achara kanda* seems to indicate that it was to be of general application. The same inference may also be drawn from its position in an early part of the Mitakshara. Some weight must also be attached to the fact that not a single case of inheritance by a person standing in a position corresponding to that of the Plaintiff-Appellants has been reported in the books or shown to have been allowed in practice. Lastly, the decision of my learned predecessor, Mr. Ismay, in *Rangu Bai* v. *Ganpat Rao* (6) given after 30 years' service in these Provinces, may fairly serve as an indication that local usage is inconsistent with such a claim as the present one. In *Collector of Madura* v. *Muttu Ramalinga Sathupathy* (7) their Lordships said :—

'The duty, therefore, of a European Judge who is under the obligation to administer Hindu Law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular School which

(4) 12 M. I. A. 448, 466 (1868).

(3) I. L. R. 6 Cal. 119, 126 (1880).

(5) I. L. R. 22 Cal. 339 (1894).

(6) 14 C. P. L. R. 185.

(7) 10 W. R. P. C. 17, 21 (1868).

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governs the district with which he has to deal and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law.'

"Altogether I do not see my way to reversing the lower Court's decision on this difficult question. A very clear case should, I think, have been made out to justify an Englishman in differing from a Brahman whose service as a Judge in these Provinces had extended over nearly 16 years when he wrote his judgment."

Against the said decree of the Court of the Judicial Commissioner, the Plaintiffs preferred the present Appeal.

Mr. L. DeGruyther, K. C., and Mr. J. M. Parikh for the Appellants submitted that the Plaintiffs were heritable *bandhus* of Lakshman Rao under Mitakshara, Ch. II, 6. "*Sapinda*" there means a relation by blood. The word is first used in the Mitakshara in a generic sense for purposes of inheritance, and means nothing more than a blood-relation—"parts of the body." It is also used in a specific sense in three ways—first, for marriage, second, for purposes of impurity at death, etc., and third, for offering funeral oblations: [*Umaid Bahadur v. Udoi Chand* (3)], G. Shastri's Hindu Law, pp. 52 and 80, West & Buhler, Hindu Law, 3rd Ed, p. 120. In the text of Manu, "To the nearest *sapinda* the inheritance next belongs," the Mitakshara takes "*sapinda*" to mean "relation." Throughout the Mitakshara, "*sapinda*" is used in the generic sense. There is a distinction between rules of succession in Mitakshara and in the *Dayabhaga*, where the rules are based upon funeral oblations. It is not so in the Mitakshara. Under the Mitakshara, one may be unable to offer funeral oblations, but that will not preclude him from inheriting: Mayne's Hindu Law, 7th Ed., p. 7 and pp. 678 and 697. In Manu, a "*sapinda*" is to the man himself and the three immediate descendants: Mayne, p. 689. The result is that the power of performing *shradh* is not an index to the right to inherit. In Mit. Ch. II, 5, 6, "*sapinda*" is used in a restrictive sense *qua* funeral rights and in reference to the *gotra* only. Even within a *gotra* the right of inheritance is not limited to *sapindaship* in the narrow or funeral-oblation sense: [*Gridari Lall Roy* v. *The Bengal Government* (4)]. G. Shastri's *Viramitrodaya*, p. 299. The case of *Umaid Bahadur* v. *Udoi Chand* (3) is an *obiter dictum*. *Sapinda* was erroneously translated by Colebrooke into 'Kinsman connected by funeral oblations of food.' West & Buhler have pointed that out. The correct view was taken in *Lallubhai* v. *Mankuvarbai* (1). However, it did not lay down that *sapindaship* must be mutual. The doctrine of mutual *sapindaship* is based on the opinion of Sarvadhikari in Tagore Lectures and is not warranted by *Achara kanda*. If *sapindaship* is blood-relationship, then all *sapindaship* will naturally be mutual. The meaning of "*sapinda*" is discussed differently by several writers: Mayne's Hindu Law, 679, Mandlik's Hindu Law, p. 390, Mandlik's Yajnavalkya, p. 167, Sarvadhikari's Hindu Law, p. 688, Banerjee's Law of Marriage, p. 63, Sarkar's Vyavastha-Chandrika, Vol. 1, Part 1, p. 193. "*Sapinda*" is used in the sense of impurity: Manu, Ch. III, 5, Ch. V, 57, Ch. IX, 187, Mayne's Hindu Law, pp. 103 and 681. The restrictions placed upon "*sapindas*" in marriage are quite modern; some text-writers count six

(3) I. L. R. 6 Cal. 119 at p. 124 (1880).

(1) I. L. R. 2 Bom. 388 (1876).
(3) I. L. R. 6 Cal. 119 at p. 124 (1880).
(4) 12 Moo. I. A. 448, 463 (1868).

degrees, whereas others only four degrees. The prohibited degrees of marriage have nothing to do with funeral oblations or with inheritance. If the rule as to prohibited degrees were applied to inheritance, it would produce the absurdity that a son might inherit where a father could not. The original texts dealing with the subject are given in Shastri's Hindu Law, p. 54, and the following pages where the matter is fully discussed. As to the decided cases, it must be conceded that the majority were against the Appellant, but it was submitted that they were decided on erroneous principles. *Umaid Bahadur* v. *Udoi Chand* (3) was an *obiter dictum*, and the reasoning on which it was based was erroneous. *Babu Lal* v. *Nankuram* (5) assumed that *sapindaship* was limited to the oblation rule. It is not an authority against the Appellant's case. *Lallubhai* v. *Mankuvarbai* (1) was misapprehended by the Subordinate Judge. In *Mussit. Umroot* v. *Kulyandas* (8), the Shastris gave their opinion that the marriage limitation did not apply to inheritance. Mimansa, Ch. XI, 10 and 11, deals with marriage and not succession. The whole principle of Mitakshara under Chap. II, secs. 6 and 7, is that after all the blood relations are exhausted, the inheritance goes to the fellow-student, etc. The reason of the law ought to prevail over the letter of the Code and the rule of prohibited degrees which would produce absurdity ought not to be applied. During the argument reference was made to the following:—Morley's Digest, pp. 201 and 205; *'Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (9), *Venkatagiri* v. *Chandru* (10); Ghose's Hindu Law.

Mr. G. R. Lowndes (with him *Mr. G. E. A. Ross, K. C.*) for the Respondents submitted that the Courts below were right. Appellant's case in the Indian Courts was that *bandhu* relationship through a mother was limited—the limit being 7 degrees. This was also the case made here at first (*see* First Reason in Appellant's case). Now this is thrown over, and it is claimed that there is no limit at all in the case of any *bandhus*. The discussion in India has always been whether the claimants came within the limits of *bandhu* relationship, *e.g.*, *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi* (11). In all the 800 years, no commentator even has suggested such a view except Mr. Golapchandra Sarkar Shastri. The basis of the contention is a fallacy.

The *Achara-kanda* says that all *sapindas* are blood-connections, that *sapindaship* means connection by blood and not connection by funeral oblations, but this does not mean "all blood-connections are *sapindas*."

In Mitakshara, Chs. V and VI, a clear distinction is drawn between *sapindas* and *samanodakas*. First the *sapindas* are to take, and on failure of them the *samanodakas*. This of itself shews that "*sapindas*" in this chapter are a limited class.

The term *sapinda* here is most carefully limited to the nearest male *gotrajas* This is so both in sec. V·5, and sec. V 6. In V·5 Colebrooke's Translation omits the important words "*a saptamat*" at the end, and the last sentence should run—"In this manner must be understood the

(1) I. L. R. 2 Bom. 388 (1876).
(3) I. L. R. 6 Cal. 119 at p. 124 (1880).
(5) I. L. R. 22 Cal. 339 (1894).
(8) 1 Borradaile's Rep. 314, 328 (1820).
(9) I. L. R. 19 Bom. 631 (1894).
(10) I. L. R. 23 Mad. 123 (1899).
(11) I. L. R. 17 Cal. 518 (1889).

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succession of *gotraja-sapindas* up to the 7th degree."

The omission is clearly stated in Jolly's Lectures, pp. 209-210. In sec. V-6 the limitation of *sapindas* to the 7th person is re-iterated and the authority of Vrihat Manu quoted for it. The work of Vrihat Manu from which the quotation is taken has not survived. The term means either "the old Manu" or more probably "the original Manu."

If therefore in speaking of *gotrajas* the term *sapinda* is clearly limited to 7 degrees, it is almost impossible to believe that the same word is not at least equally limited in sec. V-3, where it is used in the explanation of the term *bandhus* as being *bhinna-gotraja sapindas.*

The limitation of the term *gotraja-sapindas* to 7 persons is intended to embrace those who offer both the whole *pinda* and the *lepa* or fragments. In older works the two classes are distinguished as *sapindas* and *sakulyas*, but though this distinction is not maintained in the Mitakshara, and the term *sapindas* is used to denote both classes, the distinction between them and the *samanodakas* is clearly maintained.

When we come to the *bandhus*, we find that the right of inheritance is confined to *bhinna-gotraja sapindas*, there being no recognition as heirs of any *bhinna-gotraja samanodakas*, no such class being in fact known to Hindu writers at all.

The case of the Appellants in the Indian Courts was that all *bandhus* within 7 degrees are entitled to inherit, there being no distinction in matters of inheritance between *bandhus* claiming through the mother and those claiming through the father.

In the case of *bandhus* claiming through the mother the limitation is 5 degrees and not 7.

The argument on this is largely based on the untranslated first part of the Mitakshara which deals with ceremonials, usually known as the *Achara-kanda.*

This limitation is also equally applicable in the case of inheritance.

The rule is ancient. *See* Manu, III, 5; Apastamba, II, 11, 15-16; Gautama, IV, 2-5; Vasistha, VIII, 1-2.

The modern commentators of weight have assumed that the limitation of 5 degrees through the mother applies to *bandhu* inheritance: Mayne, 690-2, 786-87; West and Bühler (3rd Ed.), 121, 488-9, Jolly's Lectures, *Lallubhai* v. *Mankuvarbai* (1), *Umaid Bahadur* v. *Udoi Chand* (3), *Babu Lal* v. *Nankuram* (5), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (12). *See* also the Dattaka-Mimansa, S. VI, 10, where he is dealing with the question of succession of adopted sons and passages quoted in the first Court's judgment from the Nirnaya-Sindhu and *Apararka.*

Against this there is only the opinion of G. Sarkar Shastri who is alive, and might have been called as an expert to support his own view as he was in a case which was heard recently by this Board.

The reason for the adoption of some limitation for *sapinda* relationship in the matter of marriage is said in the *Achara-kanda* that without it all the world would be connected and there would be no possibility of marriage. The same reasoning would equally apply to inheritance.

(1) I. L. R. 2 Bom. 388 a pp. 426-7 (1876).
(3) I. L. R. 6 Cal. 119 a pp. 124-5 (1880).
(5) I. L. R. 22 Cal. 339, 345 (1894).
(12) 13 Moo. I. A. 373, 380 (1870).

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It is suggested that the adoption of this rule in matters of inheritance would lead to an absurdity inasmuch as the Appellant's sons in this case (claiming through their father and so having 7 degrees) would clearly be *bandhus*, but there is no doubt that the rule did apply in the case of marriages where equally absurd results would be produced.

Parallel with this confining of inheritance to members of the *gotra*, we find that they only could perform the necessary funeral ceremonies.

The *parvana shraddha* could only be performed by *sapindas* and *sakulyas*. *Samanodakas* (as their name implied) only made general offerings of water. But no one connected through a female could perform any of the *shraddha* ceremonies. *See* the account of the *shraddha* in Manu, III, 215 16.

It may be doubtful whether inheritance depended upon the right to perform *shraddha*, but there can be no doubt that the two went hand in hand and were intimately connected.

Yajnavalkya was the first to introduce *bandhus* as heirs and he also was the first to mention the offering of a cake to maternal' ancestors. *See* Yajnavalkya, S. 242, Mandlik's translation, p. 190.

It would seem therefore that by Yajnavalkya's time (which was 500 years probably after Manu) it had become customary to offer the *pinda* to maternal ancestors, and consequently (or currently) it had become customary to allow those who could offer it to inherit, and this let *bandhus* in.

It seems quite clear that the only cake offered to maternal ancestors was offered to 3 ascendants of the mother. No *lepa* was offered to higher ascendants and no water-offerings (corresponding to those of the *samanodakas*); so the right of inheritance corresponding to the offering made would be confined to 5 degrees counting the offerer, and this is the exact limit of inheritance, which we say is allowed to persons claiming relationship through the mother.

This may only be a coincidence, but, if so, it is a remarkable one, and we submit, it affords a rational explanation of why *sapinda* relationship through the father extended to 7 degrees and through the mother to only 5.

Although by the period of the Mitakshara the right of inheritance may have come to depend upon blood-connection and not the right to offer funeral oblations, there can be no doubt that the latter had still great influence upon the right of inheritance, and the two were still regarded as going together.

See also Mitakshara, II, ii, 6: "The daughter's son is to 'give' the funeral oblation and possess the inheritance."

This intimate connection of inheritance and funeral rites in *post*-Mitakshara times has also been fully recognised by the Courts. See *Soorendra Nath Roy* v. *Heeramonee Burmoneah* (13), *Amrito Kumar* v. *Lukhinarayan* (14), *Lallubhai* v. *Mankuvarbai* (1). It is also clearly recognised by the *Viramitrodaya* which has high authority (s. 157-8).

The three classes of *bandhus* recognised are *atma-bandhus*, *pitri-bandhus* and *matri-bandhus* and they are mutually exclusive.

It has no doubt been held that the members of each class mentioned in the text are only illustrative and not exhaustive :- *Gridari Lall* v. *The Bengal Government* (4);

(1) I. L. R. 2 Bom. 388, 427 (1876).
(4) 12 Moo. I. A. 448 (1868).
(13) 12 Moo. I. A. 81, 96 (1868).
(14) 2 B. L. R. (F. B) 28, 89 (1868).

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but it has never been suggested, much less held, that the classes themselves are not exhaustive? See *Muthuswami Mudaliyar* v. *Supambedu Muthukumara-swami Mudaliyan* (15), *Amrito Kumar* v. *Lukhinarayan* (14), *Ratnasubbu Chetti* v. *Ponnappa Chetti* (16), Mayne, 688.

The limit in each class is the common ancestor and no one who is not descended at least from the great-grandfather would be a *bandhu* at all.

The *bandhu's* wife would no doubt have to be mutual as settled by *Umaid Bahadur* v. *Udoi Chand* (3), and as the limit of ascendants would be the great-grandfather, so the limit in the descending line would be the great grandson.

This would perhaps contract the class of *bandhus* below the limit of 5 degrees through the mother, but it seems to be the clear reading of S. VI, 1, and is in exact accordance with the *dicta* in *Umaid Bahadur* v. *Udoi Chand* (3), which are otherwise not easy to understand.

Mr. L. DeGruyther, *K. C.*, in reply.—The Respondent's argument was not quite consistent with the reasoning in *Umaid Bahadur* v. *Udoi Chand* (3) and *Babu Lal* v. *Nankuram* (5), on which the lower Courts based their judgments.

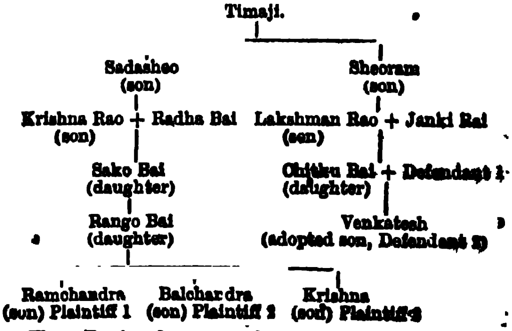
Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The suit that has given rise to the present appeal was brought by the Plaintiffs in the Court of the District Judge of Balaghat, in the Central Provinces of India, for possession of certain properties which originally belonged to one Lakshman Rao, whose next-of-kin or *bandhus* they claim to be under the law of the Mitakshara.

Lakshman Rao died in 1851, leaving him surviving his widow Janki Bai and a daughter Chitku Bai, both since deceased. The Defendant Venkatesh is Chitku Bai's husband. On Lakshman Rao's death without male issue his inheritance devolved on Janki Bai. She held possession of the properties in suit as a Hindu widow until her death in 1883, when Chitku Bai succeeded to her father's estate. She died on the 7th of May 1894, leaving the first Defendant, her husband. The second Defendant is a son adopted by him after Chitku Bai's decease.

The present action was not instituted until March 1906. The Plaintiffs claim that the inheritance to Lakshman Rao opened to them on the death of Chitku Bai, and that they are entitled to recover possession of the properties from the Defendants who have no right of succession to Lakshman Rao's estate.

The following genealogical table will explain the relative position of the parties and the exact nature of the claim :—



The Defendants resisted the claim mainly on two grounds ; they alleged, *firstly*, that the ancestors of the parties had migrated to the Central Provinces from Asirgarh, situated within the Mahratta country, where the law in force conferred

(3) I. L. R. 6 Cal. 119 at p. 124 (1880).
(5) I. L. R. 22 Cal. 339 (1894).
(14) 2 B. L. R. (F. B.) 28, 37-8 (1868).
(15) L. R. 28 I. A. 83 (1896).
(16) I. L. R. 5 Mad. 69 (1882).

on the daughter succeeding to her father's inheritance an absolute estate descendible to her own heirs; that the family of Timaji was still subject to that law, and that accordingly the estate which Chitku Bai had acquired passed on her death without issue to the first Defendant, her husband. In the second place, they urged that the Plaintiffs had no heritable right or interest in Lakshman Rao's estate as they did not come within the category of *bandhus* entitled to succeed to his inheritance.

The Courts in India have overruled the first plea, and have held that on settling in the Central Provinces the family of Timaji adopted the *lex loci* and are now governed by the rules of the Mitakshara generally in force in that Province.

But they have given effect to the Defendants' second contention; they have held in substance that the Mitakshara lays down a well-defined limit where the kinship entitling *bandhus* to succession ceases, and that the Plaintiffs are beyond that limit. They have accordingly dismissed the suit.

The Plaintiffs have appealed to His Majesty in Council, and the case has on both sides been argued with considerable ability and learning.

In dealing with the arguments addressed to this Board on behalf of the Appellants their Lordships cannot help noticing one circumstance, viz, that in the Courts below, so far as appears from the record, it was not denied that there was a limit to the heritable right of *bandhus*, the only contention being whether it was seven degrees from the *propositus* or five as urged by the Defendants. Before this Board, on the other hand, it has been strenuously contended that there is no limit to the succession of *bandhus*. Their Lordships do not wish, however, to draw any inference from this change of ground, for what they have to determine in this appeal is whether the term *bandhus* is to be construed as the Plaintiffs argue in the broadest sense, or whether it is subject to any limitation, and in the latter case what that limitation is according to the law by which the parties are governed.

In the Hindu law the succession of heirs individually specified does not present much difficulty; the controversies and divergences amongst Hindu lawyers are chiefly concerned with collateral succession. Manu, the ancient sage, whose identity is lost in the mist of ages, but whose word is regarded as divine, after giving the rules regarding the succession of lineal male descendants and male ascendants, declares: "The property of near *sapinda* shall be that of a near *sapinda*."* Sir William Jones in his translation of Manu's Institutes has rendered the passage somewhat differently, but for the purposes of the present judgment it is of little importance.

It is upon this enunciation that all the schools base the right of collaterals to succeed to the inheritance of a deceased person. This refers only to the succession of one male to another, for females inherit by express rules. The right of collaterals, therefore, is dependent on the existence of the *sapinda*-relationship between the *propositus* and the claimant. The contest that has arisen in the several schools is with regard to the meaning to be attached to the term *sapinda*, in other words, what does *sapinda*-relationship imply, and what is the true test for determining whether a particular person is a *sapinda* to the

* Chapter IX., v. 187. This is the translation given by Mr. Justice Banerjee, in *Babu Lal* v. *Nankuram*, I. L. R. 22 Cal. 339

deceased or not? Jimutavahana, the author of the *Dayabhaga*, the guiding authority in the Bengal or *Gauriya* school, considers it to mean "community in the offering of funeral oblations." He draws his argument from the word *pinda*, which literally signifies a ball of rice offered at the performance of obsequial rites. Mr. Lowndes is probably right, that in early times the right of inheritance was dependent on the right to participate in the offering of funeral oblations, a doctrine which is part and parcel of the *Dayabhaga* rules.

But it is also clear that Vijnaneswara, the author of the Mitakshara, who appears to have flourished towards the end of the 11th and the beginning of the 12th century of the Christian era, some five centuries before Jimutavahana, abandoned the ancient doctrine, and construed *sapinda* relationship to arise from community of blood, or to use the quaint language of Hindu writers, "community of particles of the same body." His legal conception in this respect will appear clearly from a passage of the Mitakshara, Book I, chapter on Marriage, not included in Mr. Colebrooke's translation. To this passage their Lordships will have to refer later on in the course of this Judgment.

Messrs. West and Bühler in their "Digest of the Hindu Law," whose merit and authority have been recognised by eminent Hindu lawyers, have examined in detail the doctrines of the Mitakshara on this point, and their general conclusion as to Vijnaneswara's legal conception of *sapinda* relationship is summed up in the following words, that he based it "not on the presentation of funeral oblations but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor." Mr. Colebrooke in his rendering of the Mitakshara has paraphrased *sapinda* as a relation "connected by funeral oblations," which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognised that his paraphrase was erroneous, and that the true theory of *sapinda* relationship propounded by Vijnaneswara was based on community of blood. It is on this theory of Vijnaneswara that the learned counsel for the Appellants place their chief reliance. The Plaintiffs, it is urged, are unquestionably related to Lakshman Rao by tie of blood; they are, therefore, his *sapindas*, and consequently, in the absence of nearer kinsmen, entitled to his inheritance. It is to be remarked, as has been observed in previous cases before this Board, that the Hindu Law contains its own principles of exposition, and that questions arising under it cannot be determined on abstract reasoning or analogies, borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders.

The Mitakshara purports to be a commentary on the work of Yajnavalkya, who is supposed to have lived about the second century of the Christian era, about a thousand years before Vijnaneswara. In the Mitakshara he is spoken of in terms of deep veneration; and his doctrines, developed by Vijnaneswara certainly show a marked advance over the legal conceptions of his predecessors. So far as their Lordships have been able to ascertain, the *bandhus*, or distant kinsmen related to the deceased through females, make their appearance as heirs first in Yajnavalkya's enunciations. Mr. Borradaile, in the first volume of his Reports of the Bombay

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Sudder Dewany Adalut Decisions, has given a translation of the Index to the Mitakshara which furnishes a general idea of the scheme of this great and important work of Hindu Law. It consists of two books: the first called the *Acharadhyaya* "On Established Rules of Conduct or Ordinances"; the second the *Vyavaharadhyaya* "On the Laws and Customs of the People." Both books, however, are so inter-related that the rules of the one can scarcely be construed without reference to the other.

It is to be noted that in the Vyavastha-Chandrika, the Book on "Established Rules of Conduct" is cited as the *Acharadhyaya* ("Chapter on Established Rules of Conduct"), whilst in the decisions of the Indian Courts and recent works on Hindu Law, it is referred to under the name of the *Achara-kanda* ("Division or Part relating to Established Rules of Conduct").

In the third chapter of the *Achara kanda*, Vijnaneswara lays down the rules relating to the forbidden degrees of kindred, and here he defines his theory of relationship. A translation of this passage is to be found in the "Digest of Hindu Law,"* by West and Bühler, and also in the judgment of the Bombay High Court in *Lallubhai* v. *Mankuvarbai* (1) which came on appeal to Her Majesty in Council, and was affirmed by this Board: *Lallubhai* v *Cassibai* (2).

That passage runs thus:—

"He should marry a girl who is non-*sapinda* (with himself). She is called his *sapinda* who has (particles of) the body (of some ancestor, &c.), in common (with him). Non *sapinda* means not his *sapinda*. Such a one (he should marry). *Sapinda*-relationship arises between two people through their being connected by particles of one body. Thus the son stands in *sapinda* relationship to his father because of particles of his father's body having entered (his). In like (manner stands the grandson in *sapinda* relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own) Just so is (the son a *sapinda* relation), of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in *sapinda* relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a *sapinda* relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in *sapinda* relationship with paternal uncles and aunts, and the rest. So also the wife and the husband (are *sapinda* relations to each other), because they together beget one body (the son). In like manner brother's wives also are (*sapinda* relations to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i.e*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore one ought to know that whenever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

Then after refuting certain objections to his explanation of the word *sapinda*, Vijnaneswara proceeds thus:—

"In the explanation of the word '*asapindam*' (non-*sapinda*, verse 52), it has been said that *sapinda* relation arises from the circumstance that particles of one body have entered into (the bodies of the persons thus related) either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yajnavalkya) says:—

Verse 53: "After the fifth ancestor on the mother's and after the seventh on the fathers side."—"On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor) the *sapinda* relationship

(1) I. L. R. 2 Bom. 388 (1876).
(2) L. R. 7 I. A. 212 (1880).

* Volume I, page 120.

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ceases; these latter two words must be understood; and therefore the word *sapinda*, which on account of its (etymological) import (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means 'growing in the mud,' and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are *sapinda* relations."†

The rendering of the above passages by Pandit Rajkumar Sarvadhikari though apparently more free is certainly instructive and interesting, and deserves quotation as showing what a learned Hindu scholar considered was in the mind of Vijnaneswara when defining the word *sapinda*.

"The Mitakshara then explains the following words in the next verse of Yajnavalkya, beyond the fifth and seventh degrees on the mother's side and the father's side respectively.

It has been already explained, that the relation of *sapinda* exists by reason of the connection of the parts of the same body, both directly and indirectly. But such a relationship is possible everywhere, in some way or other, between all men in this wide, wide world without a beginning. So the definition would be too wide. It is for this reason that the sage limits it thus, 'Beyond the fifth, &c.'

The meaning is 'on the mother's side', *i.e*, in the line of the mother, after the fifth degree: 'on the father's side,' *i.e.*, in the line of the father, after the seventh degree the relation of *sapinda* ceases.

Although the word *sapinda*, therefore, may be applied in its etymological sense almost to all men, it is, there can be no doubt, limited in its signification to certain definite individuals, just as the word mud-born is applied only to a lotus.

Thus the father and the other ascendants are six *sapindas*; and the son and the other descendants are six; and the man himself is the seventh. In case of the division of a line also, the enumeration should be made until the seventh degree, commencing from whence the direction of the line changes. This rule should be applied in every case."*

Their Lordships have no manner of doubt that in the passages quoted above, Vijnaneswara was laying down rules for the limitation of *sapinda* relationship generally.

It has been suggested in argument that this limitation is with regard to marriage only; that it defines the prohibited degrees within which a man cannot marry. A similar contention was put forward in *Lallubhai* v. *Mankuvarbai* (1). The observations on this point of the learned Judges, one of whom was the distinguished jurist Mr. Justice West (co-author of the Digest, and afterwards Sir Raymond West), appear to their Lordships as extremely apposite to the present case.

Chief Justice Westropp in that case at p. 426, said as follows:—

"It has been contended for the Plaintiffs that in the above extracts from the *Achara-kanda* and the *Sanskara-mayukha* the respective authors were dealing with *sapinda* relationship in its ceremonial aspect only, and that when they wrote upon *sapinda* relationship with reference to inheritance they may be regarded as viewing *sapinda* relationship in the same light as the author of the *Dayabhaga* and certain other commentators on Hindu Law. But we think that the burden rests upon the Plaintiffs to show that Vijnaneswara and Nilkantha regarded *sapinda* relationship as resting on a different basis for the purpose of inheritances from that on which, dogmatically perhaps, but most distinctly, the one has placed it in the *Achara-kanda* and the other in the *Sanskara-mayukha*. We do not think that the learned counsel for the Plaintiffs has given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular

(1) I. L. R. 2 Bom. 388 (1876).

† West and Bühler, Vol. I, p. 102.

* Sarvadhikari's Tagore Law Lectures, p. 608.

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localities, is generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional."

As a matter of fact, as Messrs. West and Bühler point out, Vijnaneswara expressly says "wherever the word *sapinda* is used, there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent."

In *Umaid Bahadur* v. *Udoi Chand* (3) the learned Judges of the Full Bench (one of whom was a Hindu Judge of great eminence) express themselves on this point in the following terms :—

"Having taken great pains in accurately defining the word *sapinda* in the beginning of his work, and having said in clear words in the passage in question that 'one ought to know that wherever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent,' it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense It is a well understood rule of construction amongst the authors of the Institute of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work unless the contrary is expressedly indicated."

Nor have the learned counsel for the Appellants been in a position in this case to refer to any authority excepting one, which their Lordships will notice later on, in support of their proposition that the limitations of Vijnaneswara on *sapinda* relationship are confined to marriage, impurity and exequial rites, and do not relate to inheritance.

The law of inheritance in the Mitakshara, translated by Mr. Colebrooke, occurs in Book II, and forms Chap. VI of that part of the work. It is entitled "*dayavibhaga*," or "partition of heritage." It is unnecessary to refer to Chap. I of Mr. Colebrooke's Translation, or to the earlier sections of Chap. II, as they deal with subjects which do not come within the purview of this judgment. It is with secs. V, VI and VII of Chap. II that their Lordships are principally concerned. The rendering of the word *sapinda* as "relations connected by funeral oblations" runs throughout Mr. Colebrooke's Translation. His arrangement of the matter is also different from the original where the subject of inheritance appears to be dealt with in a consecutive form in Chap. VI.

Mr. Colebrooke has split it up into two chapters, divided into sections. (This circumstance is noticed in the Bombay judgment.) Sec. V, Chap. II (in Mr. Colebrooke's Translation), deals with the succession of the *gotraja*, on failure of "brother's sons." Although *gotraja* is explained by the term *gentiles* borrowed from the Roman system, to which no doubt the Hindu system bears a remarkable analogy, it would be more convenient to adhere to the definition given in the Mitakshara itself. Omitting the English equivalents introduced into the Translation, and retaining the Sanskrit expressions, the paragraphs run as follows :—

"3. On failure of the paternal grandmother, *gotraja-sapindas*, namely, the paternal grandfather and the rest, inherit the estate.

"For *bhinna-gotra sapindas* are indicated by the term *bandhu*.

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit In this manner must be understood the succession of the *samana-gotra sapindas*.

"6. If there be none such, the succession devolves on *samanodakas*, and they must be under-

(3) I. L. R. 6 Cal. 119 at p. 126 (1880).

stood to reach the seven degrees beyond *sapindas*, or else as far as the limit of knowledge and name extend. Accordingly, Vrihat Manu says—'The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas* extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is 'signified by *gotra*.'"

Their Lordships have preferred to adopt for the purposes of this Judgment the translation which was before this Board in *Lallubhai's* case (2).

It is to be observed that the rule in paragraph 3 is thus stated in the *Viramitrodaya**—"On failure of the paternal grandmother, the paternal grandfather and the other *sapindas* of the same *gotra* are heirs, since the *sapindas* (or persons connected through the *pinda* or body) of a different *gotra* are included under the term *bandhu* or 'cognates.'"

The earliest expounders appear sometimes to have used the term *bandhu* to signify a *sapinda* without any idea of including cognates. This is clear from a passage of the *Viramitrodaya*†, where, after quoting the rule as to the succession of collaterals given by Vishnu who places the *bandhus* immediately after brother's sons, it says as follows :—"Here the term *bandhu* (kinsman) signifies a *sapinda*, and the term *sakulya* (distant kinsman) means a *sagotra*, or one descended from a common ancestor in the male line (other than a *sapinda*) ; if by the term *bandhu* the cognates of the father were comprised, then there would be a conflict with the order mentioned by Jogiswara, "the Contemplative Saint,", *i.e.*, Yajnavalkya. Yajnavalkya himself employs the expression indiscriminately in various places to signify connections and friends. But in Chap. II of his *Dharmasastram*, he distinctly introduces *bandhus* as acquiring a heritable right on failure of the *gotraja*. The passage in Rao Vishwanath Mandlik's translation* is as follows :—"The wife, daughters, both parents, brothers, and likewise their sons, *gotrajas* (gentiles), *bandhus* (cognates), a pupil and a fellow-student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no *putra* (lineal male descendants)."

Learned counsel for the Respondents urges that this inclusion of *bandhus* or cognates forms a marked extension of the right of inheritance to people who until then were not regarded as heirs, and he contends that it is hardly likely, this remarkable change should have been made without any limitation, considering that the *sapinda* relationship was subject to a limit.

To determine how far this contention is well-founded, it is necessary to examine a little more closely the doctrines of the Mitakshara relating to the succession of collaterals. Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance in force in the Benares school. In paragraph 3, sec. V (Colebrooke's Translation) in describing the *gotraja sapinda* or consanguineous relations sprung from the same stock, he emphasises the fact of their being members of the same family by the specific statement that the *sapindas* belonging to a different family (*gotra*)—the *bhinna gotra*—are included under the designation of *bandhus*. This is clearly borne out by the passage of the *Viramitrodaya* already referred to. Henceforth

(2) L. R. 7 I. A. 212 (1880).

* Shastri Golapchandra Sarkar's Translation page 199.

† *Ibid*, page 142.

* Page 220.

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the word *bandhu*, therefore, has, in the system of the Mitakshara, a distinctive and technical meaning, in other words it signifies the *bhinna-gotra sapindas*.

In paragraph 5 for the word *gotraja-sapinda* is substituted the more definite term of *samana-gotra sapinda*. With regard to this Messrs. West and Bühler observe that "The substitution of *samâna-gotra* for *gotraja*, as well as the employment of *bhinna-gotra* to designate the opposite of the term, both show that Vijnaneswara took *gotraja* in the sense of belonging to the same family." Commenting on the passage relating to the succession of the *gotraja sapinda*, the *Viramitrodaya*, which is regarded as one of the most important commentaries on the Mitakshara, says "similarly to the seventh (degree) the *sapindas* of the same *gotra* take the estate of a person without male issue."*

This limitation of the seventh degree appears in Yajnavalkya's Institutes, Chap. I, paras. 52, 53, in these words :—"A man should marry a girl . . . . who is not a *sapinda* of him . . . . who is descended from one whose *gotra* and pravara are different from him ; and who is removed five degrees on the mother's and seven on the father's side."† The comment of Vijnaneswara on this text of Yajnavalkya has already been given *in extenso* in a previous part of this judgment, but the following lines may be quoted again with advantage :—"On the mother's side, in the mother's line after the fifth, on the father's side, in the father's line, after the seventh (ancestor) the *sapinda*-relationship ceases."‡

* *See* p. 199.

† Rao Vishwanath Mandlik's Transl., p. 167.

‡ West and Bühler, p. 119; Mayne's Hindu Law (7th ed.), p. 691, para. 516.

The translation by Golapchandra Shastri of the passage, in which these words occur, is important, as he is the authority on whose expositions the Appellants chiefly rely. It runs thus :—

"While explaining the term non-*sapinda*, the *sapinda* relationship is stated to be directly or mediately through connection with one body, but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included; hence it is ordained :—

'and is beyond the fifth and seventh from the mother and from the father (respectively).'

"The purport is, that *sapinda* relationship ceases beyond the fifth from the mother, *i e.*, in the mother's line, and beyond the seventh from the father, *i e.*, in the father's line."*

It is quite clear, therefore, that the limitation of the seventh degree with regard to the *samana-gotra sapindas* given by Mitra Misra in the *Viramitrodaya* is taken from the rule enunciated by Vijnaneswara on Yajnavalkya in the *Achara kanda* in respect of the cessation of *sapinda*-relationship.

Now, a *bhinna-gotra sapinda* is a *bandhu* according to Vijnaneswara. The classification contained in section VI, chapter II (Colebrooke's Translation) shows clearly who the *bandhus* are whom Vijnaneswara treats as *bhinna-gotra sapindas* entitled to succession on failure of the *gotraja*. The passage as translated by Mr. Colebrooke runs thus :—

"1. On failure of gentiles, the cognates are heirs. Cognates are of three kinds—related to the person himself, to his father, or to his mother, as is declared by the following text. 'The sons of his own father's sister, sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal

* Hindu Law, p. 54.

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uncles must be deemed his mother's cognate kindred. The sons of his mother's paternal aunt, of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.'

"2. Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them, his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Here Mr. Colebrooke renders the word *gotraja* into gentiles, and *bandhus* into cognates. He also paraphrases the three classes under which Vijnaneswara groups the technical *bandhus*, viz, the *atma-bandhus*, the *pitri-bandhus* and the *matri-bandhus* as "cognates related to the person himself, to his father, or to his mother."

Their Lordships have little doubt reading these passages by the light of the comments in the *Viramitrodaya*,* that Vijnaneswara was using the term *bandhu* in a restricted and technical sense, as implying a relation belonging to a different family but united by *sapinda* relationship. In fact he expressly says so (paragraph 3, section V, chap. II).

It is not disputed that the Plaintiffs do not come within the three categories mentioned above. But it is urged on the authority of *Gridari Lall Roy* v. *The Bengal Government* (4) that the enumeration is not exhaustive but merely illustrative.

In that case the question for decision was whether a maternal uncle not being specifically included in the enumeration of *bandhus* in the Mitakshara was excluded from succession. Answering that proposition in the negative, and holding that although not expressly mentioned, he was entitled to succeed as a *bandhu*, this Board observed that the text did not purport to be an exhaustive enumeration of all *bandhus* "who are capable of inheriting," nor was it cited as such for that purpose by the author; and that it was used simply as a proof or illustration of his proposition that there are three kinds or classes of *bandhus*. These remarks hardly warrant the contention, which is attempted to be based on them, that the classes specified by Vijnaneswara can be added to.

In the present case, however, it does not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be extended, for the point at issue can be decided on other grounds.

The limitation of five degrees clearly applies, and can only apply, to the *bhinna-gotra sapindas*. But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed, a part of the limitation appears to have been applied to the succession of *samana-gotra sapindas*; their Lordships are unable to see on what principle can it be said that the other part relative to kinsmen, who are equally *sapindas* but belong to a different *gotra* or genus, must be restricted to matrimonial affinity.

Considerable reliance has been placed on the statement of the law by Shastri Golapchandra Sarkar in his work on Hindu Law. Great respect is due to the opinions of that learned lawyer. But it seems to their Lordships that their weight is considerably discounted by his desire, in order to prevent the deceased's property becoming so to speak derelict and thus escheating to the Crown, to bring in the caste-people of the deceased also

(4) 12 M. I. A. 448 (1868).

* P. 200.

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as *bandhus*, and the somewhat uncertain note of his conclusion*, where he says :—

"The conclusion, therefore, which appears to legitimately follow from the foregoing consideration, is, that the word *bandhu* in the Mitakshara means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side."

Again, his attempt to widen the signification of the word *sapinda* by employing the English equivalent of *relation* does not seem to be supported by the definition of *sapinda* relationship in the Mitakshara itself.

Reference has also been made to certain passages in Rao Vishwanath Mandlik's valuable work, in which he says that the *sapinda* relationship for inheritance is not always the same as for marriage or impurity (arising from birth or death). That may or may not be ; but in one part of his work to which the Judicial Commissioner has referred in his judgment, the learned translator of Yajnavalkya distinctly says that *sapinda* connection in general is "co extensive with that for marriage purposes." Nor in this connection, their Lordships think, can the following passage in the *Viramitrodaya* be overlooked.

"And the text--'The *sapinda* relationship, how ever, ceases in the seventh generation '—is to be explained consistently with the text of Yajnavalkya, namely, after the fifth and the seventh from the mother and the father (respectively) to mean that it remains in the seventh but ceases in the eighth generation Hence, as in the case of the unmarried females, the *sapinda* relationship extending over three generations, as is declared in the chapter on impurity occasioned by death, &c.,) is considered to be with reference to that alone, so it is to be deemed that this *sapinda* relationship (extending to the fourth degree) is relative to succession alone."†

In the absence of any authoritative text their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the Courts in India, and which the District Judge, an officer of great experience and learning, says is accepted by "public opinion." As has already been observed, the right of inheritance is founded on *sapinda* relationship, which, under the Mitakshara, means consanguinity, in a distinct legal sense clearly explained by the author. This bond comes to an end with the fifth degree when the descent is through a female. It seems difficult to conceive that the right to inherit should continue after the relationship on which it is founded, and which gives it birth, has come to an end.

In the case of *Umaid Bahadur* v. *Udoi Chand* (3) one of the tests employed for determining whether the Defendant in that case was a *sapinda* of the *propositus* was the mutuality of *sapinda* relationship. The doctrine of mutuality is based on the rule enunciated by Manu, and is fully explained by Rajkumar Sarvadhikari in his Lectures at page 690. Another well known Hindu writer of the present day speaks thus of the above rule :—

"It is to be observed here that the wealth of a *sapinda* is taken by his nearest *sapinda*, according to the well known text of Manu. From that text it follows that the relation of *sapindaship* must be mutual Among agnates the relation of *sapindaship* is always mutual, but among cognates it is not so in a few cases. In order to determine whether any persons are heritable cognates of the *propositus* 'it is necessary to see whether they are related as *sapindas* to each other :' *Umaid Bahadur* v. *Udoi Chand* (3). Unless *sapindaship* is mutual, one cannot be the heir of the other."*

(3) I. L. R. 6 Cal. 119 (1880).

* *Viramitrodaya*, page 157.
† Page 74.

* Commentary on Hindu Law by J. N. Bhattacharya, page 459

In *Babu Lal* v. *Nankuram* (5) the rule of the Mitakshara enunciated in the *Achara-kanda* relative to *sapinda*-relationship in respect of marriage is assumed as applicable to inheritance. In fact the judgment proceeds on that basis; and the order of *sapinda*-relationship with its limitations in Rajkumar Sarvadhikari's Tagore Law Lectures is adopted as representing a correct exposition of the Mitakshara law. The doctrine of mutuality is also explained in clear terms :—

"Again, a *sapinda* of the *propositus* to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the *propositus*, that the *propositus* is also a *sapinda* of him either directly or through the father or the mother. This mutuality of *sapinda* relationship between the *propositus* and his heritable *sapindas* is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udoi Chand* (3), and the authority for this is to be found in the text of Manu (chapter IX. 187) cited in the Mitakshara, chapter II, section III, verse 3, as interpreted by Balambhatta and Visweswara Bhatta, the two leading commentators on the Mitakshara. The text according to these commentators means this—the property of a near *sapinda* shall be that of a near *sapinda*. From this it is clear that a man in order to be a heritable *sapinda* of the *propositus* must be so related to him that they are *sapindas* of each other"

These two decisions of the Calcutta High Court have been challenged on the ground that they represent *Dayabhaga* views rather than the doctrines of the Mitakshara. To their Lordships the objection seems hypothetical and without any basis excepting the criticisms of Golapchandra Shastri. One of the learned Judges who decided *Babu Lal's* case (5) was the distinguished Judge and erudite Sanskrit scholar, Mr. Justice Gurudas Banerjee, who was not likely to allow his mind to be confused by *Dayabhaga* conceptions in determining a case under the Mitakshara law.

The general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows : (*a*) that the *sapinda* relationship, on which the heritable right of collaterals is founded, ceases in the case of the *bhinna-gotra sapinda* with the fifth degree from the *propositus* ; (*b*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are *sapindas* of each other, which is only a paraphrase of Manu's rule.

In the present case the Plaintiffs are Lakshman Rao's paternal grandfather's son's son's daughter's daughter's sons. They are his *bhinna-gotra* beyond the fifth degree, and, as the District Judge points out, the element of mutuality is wanting between them and Lakshman Rao.

Two considerations were strongly pressed on behalf of the Appellants to induce their Lordships to extend the application of the *sapinda* relation in the case of *bandhus* beyond the fifth degree mentioned in the Mitakshara. It was urged that it is hardly likely, Vijnaneswara would give a right of inheritance to a spiritual preceptor or *guru* before kinsmen, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood.

As regards the other consideration which

(5) I. L. R. 22 Cal. 339 (1894).
(3) I. L. R. 6 Cal. 119 (1880).

is based on the possibility of the Crown becoming a claimant in the presence of remote *bhinna-gotra*, their Lordships need only observe that whether such a claim would be justified or even be likely to be advanced, it does not seem necessary to express an opinion in the present case.

Here the Defendant is in possession of Lakshman Rao's estate claiming as heir to his wife, Lakshman Rao's daughter. The Plaintiffs' suit is an action in ejectment, and they must, in order to succeed, strictly prove their title.

It is a matter of satisfaction to their Lordships that they find themselves in complete agreement with the learned Judges in the Courts below. The District Judge is himself a Hindu, versed in Sanskrit, and has examined the authorities in original. His decision is entitled to great weight and consideration.

On the whole their Lordships are of opinion that this Appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The Appellants must pay the costs of this appeal.

Solicitor: *Mr. Edward Dalgado* for the Appellants.

Solicitors. *Messrs. T. L. Wilson and Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 396 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
Heard,
30, April.
Judgment,
5, May.

NARSING CHARAN MAHAPATRA, Petitioner,
v.
THE KING EMPEROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 336—Doing an act endangering human life or the safety of others—Temple resorted to by pilgrims on festive occasions—Duty of person in charge to ensure safety of pilgrims attending by license and invitation.

The Petitioner was the lessee of a certain temple from some of the shebaits *and was the general manager of all of them. It appeared that on a certain day in the year pilgrims and others in large numbers visited this temple. Close by the gate leading from an outer courtyard into the inner temple there was a well which was surrounded by a masonry platform 1½ to 2 feet high and the ring or parapet of the well stood again about 1 foot above the platform. Early at night on the day of the congregation of pilgrims, an accident having occurred, the Petitioner at the instance of the Police-officer in charge had a light placed on or near the one foot parapet, but at a later hour the Petitioner had the light removed and thereafter between 1 and 2 A.M. while the people were again entering into the inner temple a boy who had no previous knowledge of the well and in the darkness could not see it fell into it.*

Held—*That the facts constituted an offence within the meaning of sec. 336, I. P. C.*

That on the occasion of the festival in question the temple becomes a place of public resort, and it was the bounden duty of the Petitioner as the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation.

This was a Rule granted on the 9th of March 1914 against the order of J. C. Brahma, Esq., Sub-Divisional Magistrate of Jajpur, dated the 13th January 1914, convicting the Petitioner of an offence under sec. 336, I. P. C., and sentencing him to pay a fine of Rs. 50, an application

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for the revision of which order was summarily rejected by A. E. Scroope, Esq., Sessions Judge of Cuttack, on the 29th January 1914.

The facts of the case will sufficiently appear from the judgment.

Babus Dasarathi Sanyal and *Upendra Kumar Roy* for the Petitioner.

No one for the Crown.

The JUDGMENT OF THE COURT was as follows:—

In this case the Petitioner has been convicted under sec. 336 of the Indian Penal Code and sentenced to pay a fine of Rs. 50.

It appears that in Jajpur in the district of Cuttack, there is a temple known as the Biroja Temple, and that year by year on the Ashtami day pilgrims and others in large numbers visit this temple in order to view the deity therein enthroned and present offerings. There are a number of *shebaits*, and the Petitioner, it appears, has taken a lease from some of them having a 10-anna interest and for the last few years has been the general manager of all.

Close by the gate leading from an outer courtyard into the chief or inner temple known as the Thakurani temple, there is a well. The well is surrounded by a masonry platform 1½ to 2 feet high, and the ring or parapet of the well stands again about 1 foot above the platform. The well is otherwise unprotected.

On the last Ashtami day, the 8th of October 1913, at about 8 or 9 P.M. while the Police officers on duty were controlling the rush of people seeking entrance into the Thakurani's temple, a man named Dhroba Prusti fell into the well. Thereupon at the instance of the Sub-Inspector-in-charge, the Petitioner had a light placed on or near the one-foot parapet. It has then been found that at a later hour, the Petitioner had the light removed and that thereafter between 1 and 2 A.M. while the people were again crowding into the Thakurani's temple, a boy named Gananath Panda fell in the well. He had no previous knowledge of the well and in the darkness could not see it.

On these facts the Petitioner, who it has been found was in charge of the arrangements, has been convicted under sec. 336, *i. e.*, of doing an act so rashly or negligently as to endanger human life or safety and has been sentenced, as we have already stated, to pay a fine of Rs. 50.

On his behalf it is contended that the facts found do not constitute an offence within the meaning of the section.

We are unable to accede to this contention. On the occasion of the festival in question, the temple, it is clear, becomes a place of public resort, and it was the bounden duty of the Petitioner as the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. The well in question stands by the path which the pilgrims must necessarily take in order to reach the shrine which they had come to visit, and in omitting to enclose the well, in omitting even to indicate its position by lights, and lastly in removing the light placed near the well at the instance of the officers on duty, it appears to us, the Petitioner acted with gross negligence and thereby endangered the safety of large numbers.

The Rule is accordingly discharged.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 539 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
21, May.

MOHESWARI PROSHAD SINGH, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 180—Indian Penal Code (Act XLV of 1860), sec 411—Theft within British territory—Retention of stolen articles outside British territory—British Courts if have jurisdiction to try accused for such retention of stolen articles.

The accused was found in possession of stolen articles at a place outside British territory. The theft of the articles took place within British territory. The accused was placed on his trial before the Court in British territory having jurisdiction over the place where the theft took place :

Held—*That the British Courts had no jurisdiction to try the accused for an offence under sec. 411, I. P. C., committed at a place beyond British territory with regard to the stolen properties.*

This was a Rule granted on the 3rd April 1914, against the proceedings taken against the Petitioner under sec. 411, I. P. C., pending trial in the Court of the Deputy Magistrate of Singbhum.

The Petitioner was a land-holder and a dealer in lac, a subject of the Feudatory State of Kharsawan.

In January 1914, the Railway Sub-Inspector of Jharsuguda, District Sambalpur, submitted a report before Babu Bhabadeb Sarkar, Deputy Magistrate, Chaibassa, alleging that on the 21st November 1910. the Postmaster of Panposh committed criminal breach of trust with respect to 3 Government currency notes of Rs. 100 each which were presentted for registration. The cover was addressed to one Sewmull Japarmal of ...r, was duly registered at Panposh Post-office, duly enclosed in the mail-bag and despatched to the railway station. But the mail sorter when he opened the bag found the cover in question missing, and reported that to the Postmaster. Enquiries were made by the Postal authority, but no clue was obtained. Of the 3 notes, one $\frac{7a}{9}$ 33697 was presented at the Currency office at Calcutta, on 7th June 1912. On getting this information, the Sub-Inspector of Jharsuguda took up investigation and traced the notes thus: Sham Lal Sen of Sonapati, Burrabazar, received it from Ram Chunder Kar, who received it from Hari Pratihari of Saraikella who admitted having got it from Khettra Mohan Shaw of Burudoli who again said he had got it from Petitioner through Raghu Pratihari at Burudoli in Kharsawan.

The Petitioner stated that he knew nothing of the said note, but he sent to Khettra Mohan Shaw through Raghu on the date alleged another G. C. note $\frac{a}{88}$ 73974 for buying lac.

Thereafter in January 1914, Petitioner received a summons under sec. 411. I. P. C.

Babu B. Misra, Deputy Magistrate, took up the case and examined witnesses.

The Petitioner objected that the Magistrate had no jurisdiction to try the case as the alleged receiving or retaining did not take place in British India, but the Magistrate disallowed the objection Against this, the Petitioner moved the High Court and obtained this Rule.

Babu Bir Bhusan Dutt for the Petitioner.

Mr. Sultan Ahmad for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the Deputy Commissioner of Singbhum to show

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cause why the proceedings described in the application should not be quashed on the ground that the British Courts had no jurisdiction to take cognizance of retention of stolen articles outside British India. The Deputy Commissioner was further requested to inform this Court whether Panposh or rather the Post-office buildings at Panposh were or were not within British territory.

It is admitted that the village Panposh is not within British territory excepting a certain portion of it which comprises the premises of the Bengal-Nagpur Railway Co. It is also admitted that Kharsawan, the place where the Petitioner resides, is beyond British territory. The offence under sec. 411, I. P. C, is said to have been committed by the Petitioner at Kharsawan which is beyond British territory. The question therefore is whether the Petitioner who has not been prosecuted for theft, but for having been found in Kharsawan in possession of stolen articles, can be tried by the British Courts.

An explanation has been submitted by the learned Deputy Commissioner in which he refers to a certain Government notification in one of the Gazettes of the new province of Bihar and Orissa by which it is declared that a certain portion of Panposh was made subject to the jurisdiction of British Courts. It has been contended that the theft having taken place within the Post-office buildings which are situated within British territory, the offence under sec. 411 should be considered to be an offence which can be tried in British territory although the Petitioner was found retaining the property in question at Kharsawan which is beyond British territory. In support of this view, illustration (*b*) of sec. 180, Cr. P. C., has been relied upon. It is contended that under that section the accused can be tried in a British Court for having been found in possession of the stolen articles at Kharsawan which is beyond British territory. But we are of opinion that we cannot extend the operation of the Criminal Procedure Code beyond British territory. Kharsawan is certainly beyond British territory, and British Courts have got no jurisdiction to try the Petitioner for an offence under sec. 411 committed there with regard to the stolen properties in question.

In connection with this, the learned Deputy Legal Remembrancer has drawn our attention to a Bombay case* which was a case of dacoity committed in the dominions of the Gaekwar. Some people were found in possession of some properties, the subject of that dacoity at Bombay. The question was whether these men could be tried for dacoity at Bombay. It was held that the dacoity having been committed in the dominions of Gaekwar, these men could not be tried by British Court for committing dacoity, but they could be tried under sec. 411, I. P. C., by any Court at Bombay for having been found in possession there of the stolen property. The present case is quite different. It is an offence under sec. 411, I. P. C, committed beyond British territory. In the Bombay case the offence under sec. 411 was committed within British territory and thereupon it was held in the Bombay case that the accused could be tried in any of the Bombay Courts.

We therefore quash the proceedings and make the Rule absolute.

The Petitioner will now be discharged from his bail.

Rule made absolute.

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* *Reg* v. *Lakhya Govind*, I. L. R. 1 Bom 50 (1875).

(CRIMINAL REVISIONAL JURISDICTION.)

REV. No. 715 OF 1914.

SHARFUDDIN, J. TEUNON, J. 1914, 16, June.	ACHAMBIT MONDAL, Complainant, Petitioner, *v.* MOHATAB SINGH and others, Accused, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 247—Order of acquittal on account of Complainant's absence, passed on a date not fixed for hearing of case, effect of.

A case was called on by mistake on a date not fixed for hearing and the Magistrate recorded an order of acquittal under sec. 247, Cr. P. C., on account of the absence of the Complainant. On the date fixed for hearing the mistake was discovered and the Magistrate ignored the order previously passed by him under sec. 247, Cr. P. C., and went on with the case which ended in a conviction:

Held—*That an order passed on a date which was not fixed for the hearing of the case and on which date the Complainant was necessarily absent is no order at all, and the trying Magistrate had jurisdiction to ignore it and go on with the case and come to the finding which he did.*

H. C. PROCEEDINGS, No. 1793 (2) *followed.*

SURESH CHANDRA *v.* BANKU (1) *distinguished.*

This was a Rule granted on the 1st of May 1914, against an order passed on appeal by J. E Scott, Esq., Sessions Judge of Bhagalpur, dated the 31st of March 1914, acquitting, the accused who were convicted under sec. 147, I. P. C., and sentenced to undergo one month's rigorous imprisonment each and to pay a fine of Rs. 20 by J. E. F. Pereira, Esq., Sub-Divisional Magistrate of Madhipura, on the 9th of March 1914.

The material facts will appear from the judgment.

Mr. K. N. Chaudhuri and *Babu Dwijendra Nath Mukerjee* for the Petitioner.

Babu Monmotho Nath Mukerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner in this case obtained a Rule from this Court calling upon the District Magistrate of Bhagalpur and also on the Opposite Party to show cause why the order of the Magistrate dated the 10th January 1914 and the order of the Sessions Judge dated the 31st March 1914 should not be set aside and such other order made as to this Court may seem fit on the ground that the order of the Magistrate dated the 10th January 1914 was so irregular as to amount to no trial at all.

The facts of the case are these: on the 12th December 1913 a complaint was made by the Petitioner against a certain number of persons. The date for the hearing as fixed by the Magistrate was the 16th January 1914, but it so happened that through some mistake or oversight on the part of the Magistrate's *peskhar* the case was called on for hearing on the 10th of January, *i.e.*, six days before the date actually fixed for hearing. Of course on that date the Complainant was absent. The Magistrate thereupon passed an order acquitting the accused under sec. 247, Cr. P. C. On the 16th January, the case was again called on and then the mistake that was made on the 10th January, was discovered for the first time. The trying Magistrate ignored the order of acquittal passed on the 10th January and went on

(1) 2 C. L. J. 622 (1905).
(2) 2 Weir's Rep. 307 (1875).

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with the case. The case was taken up from time to time from the 16th January to the 9th March, witnesses were examined, arguments on both sides heard, and on the 9th of March 1914 the Magistrate convicted the accused and sentenced them each to one month's rigorous imprisonment and to pay a fine of Rs. 20 each. Thereupon the accused preferred an appeal to the Sessions Court. The learned Sessions Judge on the 31st March passed the following order: "Learned Sub-Divisional Officer by his order of acquittal dated the 10th January 1914 debarred himself from trying the accused. The reported case in *Suresh Chandra* v. *Banku* (1) is exactly parallel. The whole of the trial was therefore illegal, as no superior Court was moved to revive the case. I set aside the conviction and sentence and order that the accused be acquitted. The fine, if paid, will be refunded to Appellant."

On the above facts the first question that arises is whether the order of acquittal passed by the Sub-Divisional Officer professedly under sec. 247, Cr. P. C., on the 10th January 1914 was a legal order or a mere nullity. If it was a mere nullity, then the trying Magistrate could ignore that order, and ignoring that order could go on with the case which was fixed originally for the 16th and which was also called on for hearing on the 16th when the parties were present. As a matter of fact the trying Magistrate ignoring that order went on with the case, recorded evidence, heard the arguments and then convicted the accused on the 9th March. If it was a nullity, then the order of the learned Sessions Judge dated the 31st March 1914 cannot stand, because the learned Sessions Judge seems to be of opinion that so long as the order of acquittal passed by the Sub-Divisional Magistrate on the 10th January is not set aside, it is a bar against the re-opening of the case by the Sub-Divisional Magistrate.

There is a case *H. C. Proceedings, No. 1793* (2), the facts of which are similar to the facts of the present case. The reported case was fixed for hearing on the 17th August, on which date both the parties failed to appear. The Magistrate being at the time on circuit postponed the case on his own motion for the 18th, 19th and 20th August without any intimation being given to the parties. The parties having failed to appear on either of these days, the Magistrate on the 20th August dismissed the complaint for default on the part of the Complainant. On the 9th December following, the District Magistrate directed the Magistrate who dismissed the complaint to restore the case to the file and dispose of it in due course. The matter went up to the Madras High Court. It appeared to that High Court that the proceedings of the trying Magistrate were so substantially irregular as to amount to no trial at all, and it was held that in this view the dismissal of the complaint could not be held to operate as an acquittal. This is a clear authority on the point that an order passed on a date which was not fixed for the hearing and on which date the Complainant was necessarily absent is no order at all. If it is a nullity, the trying Magistrate had jurisdiction to go on with the case and to come to the finding which he did. The Sessions Judge relies upon the case of *Suresh Chandra* v. *Banku* (1). The facts of that case are

(1) 2 C. L. J. 622 (1905).

(2) 2 Weir's Rep. 869 (1879).

(1) 2 C. L. J. 622 (1905).

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quite different from the facts of the present case. In this reported case, the Complainant was absent on the date fixed for hearing and the Magistrate acquitted the accused under sec. 247, Cr. P. C. He strictly followed the law. In such a case the order cannot be treated as a nullity. This being our view, we are of opinion that the order of the learned Sessions Judge dated the 31st March 1914 should be set aside and we set it aside accordingly and direct that the Appeal be re-heard on the merits.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

GOVT. APP. NO. 2 OF 1914.

HOLMWOOD, J.
CHAPMAN, J.
1914,
8, June.

THE DEPUTY SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL, Appellant,
v.
SITAL CHANDRA PAL and ors., Respondents.

Provident Insurance Societies Act (V of 1912), sec. 2, sub-sec. (8), secs. 6, 21—Registration if necessary of company with its share-capital divided into shares.

A company under the name and style of the New King Insurance Co., Ld., was started for the purpose of carrying on business as a provident insurance society. Two of the directors of the company were prosecuted for having failed to apply for registration under sec. 6 of the Provident Insurance Societies Act of 1912 and thereby having committed an offence under sec. 21 of the Act. The Chief Presidency Magistrate acquitted the accused on the ground that the company was one which had its share-capital divided into shares and the provisions of the Act did not apply to such a company:

Held (on appeal by the Local Government)—*That the Provident Insurance Societies Act was intended to prevent a company from embarking in the business of life insurance unless and until it had been registered under the Act and sec. 2, sub-sec. (8) clearly lays down that whether the society already in existence is a corporate company before or whether its share-capital is divided into shares or not, registration under the Act is necessary before business can be carried on under the conditions laid down in the Act.*

ORIENTAL GOVERNMENT SECURITY LIFE INSURANCE CO., LTD. *v.* ORIENTAL ASSURANCE CO., LTD. (1).

This was an Appeal preferred on the 20th March 1914 against an order of the Chief Presidency Magistrate of Calcutta, dated the 20th September 1913, acquitting the Respondents of an offence punishable under sec. 21 of the provident insurance Societies Act (V of 1912).

A certain company called the New King Insurance Co., Ld., was started in Calcutta in 1913 for the purpose of carrying on business as a provident insurance society.

Two of the directors of the Company Sital Chandra and Surendra Nath were prosecuted for having failed to apply for registration under sec. 6 of Act V of 1912, and thereby having committed an offence under sec. 21 of the Act.

The two directors as also one B. P. Ghosh, secretary of the Company, and one Purna Chandra Ghosh, agent, were charged and prosecuted at the same time under sec. 7 of the Act for having received premiums without having the company registered and thereby having committed an offence punishable under sec. 21 of the Act.

(1) I. L. R. 40 Cal. 570 (1913).

The Chief Presidency Magistrate on the 20th September 1913 after hearing the case for the prosecution passed the following order :—

"The prosecution admits that the Defendant Company is a company which has its share-capital divided into shares. According to the finding in *Oriental Govt. Security Life Assurance Co.* v. *Oriental Assurance Co.* (1), the provisions of the Provident Insurance Societies Act of 1912 do not apply to such a company. Accused who are charged under that Act are therefore acquitted."

Against this order of acquittal the Local Government preferred this Appeal.

Mr. B. C. Mitter, Standing Counsel, for the Crown, Appellant.

Mr. N. C. Sen and *Babu Hem Chandra Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal preferred by the Government against an order passed by the Chief Presidency Magistrate, Calcutta, on the 20th September 1913, acquitting the Respondents Sital Chandra Pal, Surendra Nath Chowdhury, B. P. Ghosh and Purna Chandra Ghosh of an offence punishable under sec. 21 of the Provident Insurance Societies Act, V of 1912. That section provides that any provident insurance society which makes default in complying with any of the requirements of this Act and every director, manager or secretary or other officer or agent of the society who is knowingly a party to the default shall be punished with fine which may extend to five hundred rupees, etc.

The learned Presidency Magistrate, on an apparent misreading of the judgment of Mr. Justice Fletcher in the case of *Oriental Government Security Life Insurance Co., Ltd.* v. *Oriental Assurance Co., Ltd.* (1), thought that the Company in question called the New King Insurance Company, Ld., was not amenable to Act V of 1912, inasmuch as it was a company which had share-capital divided into shares. But this is obviously untenable upon the construction of the plain wording of the Act in sec 2, sub-cl. (8), where it is stated that a provident insurance society means any person or body of persons whether corporate or uncorporate which receives premiums or contributions for insuring money, etc. That clearly lays down that whether the society already in existence is a corporate company before or whether its share-capital is divided into shares or not, registration under the Provident Insurance Societies Act is necessary before business can be carried on under the conditions laid down in that Act. There is nothing in Mr. Justice Fletcher's judgment to the contrary. It appears that the legal advisers of the company were misled firstly by a remark which Fletcher, J., made in the course of the argument, and secondly by a passage in his judgment at p. 578. The remark was that the Defendant Company cannot be a provident insurance society, as a provident society is not incorporated under the Companies Act, but registered or inscribed under the Provident Insurance Societies Act. That is against the view taken by the Chief Presidency Magistrate; for what Fletcher, J., says is that a company incorporated under the Companies Act cannot be a provident insurance society by reason of its registration under the Companies Act, nor that any society may not be both a company and a provident insurance society: and again in

(1) I. L. R. 40 Cal. 570 (1913).

(1) I. L. R. 40 Cal. 570 (1913).

the passage in his judgment at p. 578 what he says is that the company he was dealing with considered that by issuing policies not exceeding 500 rupees they can bring themselves under the heading of a provident insurance company and were entitled to carry on business untrammelled by the provisions of the law. This is not so, because under the Provident Insurance Societies Act registration has to be made subject to certain conditions which are set out in the Act and which have to be approved of by the Registrar, and these provisions do not apply to a company which has a share-capital divided into shares. In saying this he does not say that a company which wishes to carry on the business of a provident insurance company need not be registered under the Act, but he says that the conditions which are set out in the Act obviously do not apply to a company which has already complied with those conditions in its published prospectus under another Act, and what he is referring to is the form of the policy and he holds that so far from having complied with law they have simply tried to avoid the provisions of another Act, namely, the Indian Life Insurance Act of 1912 which were intended to prevent a company from embarking in the business of life insurance, unless and until they had the amount of cash that was necessary for them to deposit with the Governor-General in Council in order to meet their obligations. So in this case the Act V of 1912 which is before us was intended to prevent the company from embarking in the business of life insurance unless and until it had been registered under the Act. There seems to have been a misunderstanding and the learned Standing Counsel who appears for the Government does not press for anything more than a nominal penalty. But a mistake of law cannot take the Defendants out of the word "knowingly" in the section.

The order of acquittal must therefore be set aside and in lieu thereof the Respondents Nos. 1 to 3 will each be fined five rupees. The Respondent No. 4 Purna Chandra Ghosh against whom proceedings do not seem to have been pressed in the Court below will be exempted from this order.

We understand that the Society has already applied for registration, but that the Government has not yet made rules necessary to carry out the purposes of the Act, and in the circumstances we are of opinion that this conviction should make no difference whatever to the result of any such application.

Appeal allowed.

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Contents

NOTES.

Obituary.

We regret very much to record the untimely death of Mr. Dhannu Lal Agarwalla who was a very promising member amongst solicitors practising in the Calcutta High Court. He was the first amongst his community to take to the profession of law and in a comparatively short time made his mark in the profession. He was a man of culture and his excellent qualities made him not only popular amongst the members of the legal profession but also amongst the general public.

Suggested Amendment of sec. 114, I. P. C.

We have great pleasure in publishing in this issue a very valuable discussion of the abetment sections of the Indian Penal Code by the Hon'ble Sir H. L. Stephen in the course of which he reviews the legitimate scope of secs. 34 and 114 of the Indian Penal Code. Having regard to the great importance of these provisions and the difficulty in interpreting them, a full and elaborate discussion thereof cannot but be of great assistance to the Judiciary and the Legislature. The points raised in this valuable correspondence are also of historical and academic interest and as such will prove useful to students of law no less than to members of the legal profession. We invite the attention of our readers specially to his Lordship's observations on sec. 114, I. P. C., which in his Lordship's opinion should be repealed and re-enacted on the lines suggested. This section always presents considerable difficulty in its practical application and it requires a trained mind to understand the elements necessary to bring an offender within its four corners. The suggestion would, however, require very careful and mature consideration having regard to the fact that the section has stood the test of judicial scrutiny for half a century.

Prize Court at Calcutta.

We understand that a Prize Court will be constituted in the Admiralty Jurisdiction of the High Court at Fort William in the Presidency of Bengal. The Hon'ble the Chief Justice will preside over the Court. This Court will be competent to take cognizance of all captures, seizures and reprisals of all ships, vessels and goods which have been seized within, or after seizure brought within, the jurisdiction of the Court since the outbreak of war. The power of the Court extends to the condemnation of all such ships, vessels and goods of the enemy States or enemy subjects. But this jurisdiction will have to be exercised "judicially" and in accordance with the "law of nations" and the "statutes, orders of His Majesty in Council, rules and regulations" relating thereto. The Parliamentary Statute of 1864 gives an appeal to the Judicial Committee of the Privy Council in respect of adjudication by all His Majesty's Prize Courts in the Empire. Any British subject or the subject of a neutral State will have a right of appeal to the Privy Council, if he is aggrieved by any order of the Prize Court.

Trading with resident enemy subjects.

The Government of India ought to notify to the public whether the resident German and Austrian subjects have been given permission to reside. In the absence of any information in this connection, business-men in Calcutta are at a fix as to their right to deal with the alien enemy subjects. The Proclamations issued do not prohibit trading intercourse with resident Germans or Austrians but only commercial intercourse with the German Empire generally as also in respect of goods consigned to them or in their possession which may have been received from the enemy country. We pointed out in our last issue that German goods already paid for by British subjects will be considered as British goods but not so German and Austrian goods in the possession of alien enemy subjects. But the Proclamations are certainly no bar to the sale of indigenous or British goods to resident enemy subjects for their use and consumption in this country. Further when the resident enemy subjects have not been expressly ordered to leave the country,

the implication of law is that all the incidents of licensed residence including the license to trade will attach to them. But sec. 83 of the Code of Civil Procedure contemplates the grant of express permission to reside, and if such permission is given, resident Germans and Austrians will not only be at liberty to engage in internal trade but even to sue in the British Indian Courts, and that introduces an element of uncertainty as to their liberty to engage even in internal trade. Trade can hardly be carried on without contracts and contracts with alien enemy subjects would be void. Trading with enemy subjects without express permission given to them to reside would thus be always risky. We have already said that obligations already entered into between British subjects and German and Austrian subjects prior to the declaration of war are not avoided altogether but only the right of suit during the war is suspended. But this is no bar to the British subjects claiming debts payable or obligations to be discharged by alien enemy subjects. Suits may be instituted against them for realization of debts or performance of their obligations.

Alien subjects if may be sued.

In our last issue we said that a great deal of complication may arise in the present state of war in respect of suits in our Courts against the alien enemy subjects. But in so saying we did not mean to imply that an alien enemy subject may not be sued at present in the Courts in British India. Although an alien enemy subject may not sue in our Courts without the sanction of the Sovereign, yet it must be noted that there is no bar to suits already instituted by them in our Courts proceeding during the pendency of the war. Only if processes have to be issued or any communications are to be held with the enemy country during the war, this cannot be done and the suits will have to be stayed. Next, if the alien enemy recovers a decree, the decretal amount may not be given to the alien enemy without reference to Government. There is a difference of opinion amongst text-writers as to the power of the Government to annex *choses in action*. But be that as it may, we have after careful consideration of the question of the right of a British subject to sue a resident alien enemy subject come to the conclusion that there is no legal bar to their being sued in this country. In fact, having regard to the provisions of the Limitation Act, it would certainly be the wiser course for British subjects who may have any debts owing from or claims preferable against any enemy subject to file suits against them. If owing to any complications such suits may not proceed, yet the bar of limitation will be saved by the filing of the plaints.

Limitation if should be suspended in respect of cause of action relating to enemy subjects.

All the same we would again urge upon the legislature in this country to make provision for the suspension of limitation in respect of suits by or against alien enemies during the pendency of war. As regards suits by alien enemies, it may be said, that we need not concern ourselves as to the bar of limitation running against them during the continuance of war which has been brought about by their own Sovereign. But we must not forget that in the ordinary course of commercial transactions there may be assignees for consideration of their claims as also endorsees of their bills, etc., amongst British subjects. If such assignees or endorsees have acquired title prior to the declaration of war we do not see any reason why the State should not protect them from the bar of limitation running against them. It is a very doubtful question whether even *bonâ fide* assignees or endorsees may be permitted to sue during the war. But on the conclusion of peace their rights would certainly revive. Although according to equity and justice the suspension of right of suit would necessarily imply a suspension of the law of limitation as well, yet for the protection of the rights of British subjects we consider it to be only reasonable to put in a saving clause in the Limitation Act to obviate all future controversy concerning the question.

Correspondence.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

DEAR SIR,

In delivering a recent judgment I had to consider the application of sec. 34, I. P. C., to the facts before me and in so doing I came across some points of historical and academic interest which may perhaps be of interest to members of the profession.

The case made by the prosecution which had to be put before the Jury may, for present purposes, be presented in the familiar style of an illustration thus: "A and B set out to murder C. Both fire pistols at him. A hits him and kills him. B misses him." Does B's act come under sec. 34? That section runs—"when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone." I held that as the act in question was the killing of C and as that was represented as having been done by A alone the section did not apply to the case. I am not now concerned to consider the merits of this decision from a legal point of view, but I believe that it is contrary to the view of the section generally held by the profession hitherto and it is certainly opposed to the statement of

its meaning contained in Mr. Mayne's note thereon in his well-known work. The note is as follows: "when several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is being committed, and ignorant of what is actually being done." For reasons that I need not repeat I think that this is wrong; but I believe that I have discovered the source of the error, and if I am right it is a curious example of the difficulty that attends the application of English law to India, even in the form of a most carefully prepared Code.

What I believe has happened is that the old English law as to parties to the commission of an offence has proved too strong for the purifying effect of the Penal Code; and that its complexity has proved so attractive to the most learned of our commentators, and I may add to our highest judicial officers, that they have read a perfectly simple enactment in a highly artificial way in order to retain at least a flavour of it.

I will therefore state as shortly as may be what I understand the English law to be, and then consider how the Indian Legislature adapted it to India.

Taking Russell on Crimes, ch. V, and Stephen's Digest, ch. IV, as my authority, the English law put very shortly is as follows:—

A principal in the first degree is the man who commits the crime with his own hands. A principal in the second degree is one who is present aiding and abetting; and (here comes in Mr. Mayne's explanation of sec. 34) he may be present though he is not really there, but only thereabouts watching for intruders or standing ready to assist.

An accessory before the fact is a man who procures, etc, or abets another to commit or in committing a crime, but is not there or thereabouts when it is committed.

An accessory after the fact is a man who helps the criminal to escape; he completes the group, but otherwise it is unnecessary to consider him for present purposes.

I omit any consideration of the non-application of these rules to misdemeanours or treason; but a glance at the cases in Russell (and their number might be indefinitely increased) will show how little our predecessors were open to the reproach of neglecting any technical points that possibly would be available for the defence of prisoners.

Such was the English law before 1861. But in that year the inconvenience of those clumsy distinctions that had slowly grown up since the time of Hale—it is curious for many inconveniences the English criminal law owes to his age, if not to him—was clearly recognised, and advantage was taken of the framing of the Consolidation Acts of that year to correct it. The correction contained in the Accessories and Abettors Act, 24 and 25 Vict., c. 241, is characteristic of English legislation in such matters as it abolishes the distinction and leaves the difference. It consists of an enactment to the effect that "accessories before the fact, principals in the second degree and principals in the first degree are each considered as having committed" the crime, and may be tried as if they had committed it. (Stephen, Art. 45.)

How did the Indian Legislature deal with this position? The Penal Code was after much consideration finally passed on the 6th October 1860. The English Accessories and Abettors Act, was, also after prolonged investigations, passed in the following August. The two are no doubt closely connected, though I am not able at the moment to trace the connection. In 1846, however, we find the Commissioners who were preparing the Penal Code studying the labours of a commission then performing similar work in England, and evolving in paragraph (8) of their report a rudimentary edition of our sec. 34. That paragraph clearly shows that they saw that the distinction between degrees of Principals must be abolished, and in the following paragraphs they consider various difficulties, which no doubt led them, or rather their successors, to their very short but sufficient method of dealing with Abettors. Ultimately in paragraph 662 to their postscript they are naturally pleased to find that the English Commissioners in dealing with Principals and the punishment of Accessories, propose to follow the same course that has recommended itself to them. These considerations lead me to suppose that the framers of the Penal Code, as we have it, meant to do what I think they in fact did, namely, to distinguish between a man who does a thing—the credit of the simplicity of the phrase is theirs—and the man who abets him, making the latter however punishable as though he were the former, and Ch. V of the Code is the result.

What then, it will be asked, is the use of sec. 34? The answer is to be found in sec. 3 of the Code of 1837, Macaulay's Criminal Code, and the Illustrations thereto. The section is practically the same as our sec. 34, though it is more obscurely expressed. The Illustrations are shortly (1) A digs a pit intending to cause some one's death. B covers it with turf with the same intention. Z falls in and is killed. Both A and B have committed culpable homicide. (2) A and B are gaolers having charge of Z ultimately. They both omit to furnish Z with food, intending to cause his death. Z dies of hunger. Both A and B have committed culpable homicide. The language of the section has been changed, and the Illustrations have been dropped; but I believe the law is as Macaulay planned it. That is, the man who does a thing is principal, and one who puts him on or helps him to do it is an abettor whether he is present or not; and there are no other parties.

But there remains another little puzzle, and

that is sec. 114. I need not set out its terms. But what I suspect is that the Commissioners could not help preparing a little resting place for the ghost they were laying. What they had in their minds was that a Principal in the second degree really differed from an Abettor, and must be provided for; they therefore intended to say that whereas an abettor was to be punished as if he had done the thing (the phrase will bear repetition); if he was present he was to be deemed to have done it, which, after all, was and is English Law. Practically I cannot see that this makes any difference, as the punishment for the thing is all that need be considered.

If therefore the section said what I think it was intended to say, I should think it superfluous. But it in fact says some thing else, and when the abetting consists in attempting to do what another man did, which is a most effective method of aiding, the section does not apply, because I think it must be impossible to attempt to do a thing if you are not there. The result is that it will often apply, as it did in my case, to charges which are of no importance in comparison to the abetting. The distinction between secs 109 and 114 really depends on the difference between being punished as if you had done a thing, and being deemed to have done it, which seems to me merely inconvenient.

I should therefore be glad to see sec. 114 repealed. But at the same time the principle laid down in Mr. Mayne's note seems to me quite a sound one and I should like to see sec. 114 replaced by an enactment that where several persons take part in the execution of a common criminal purpose, each is to be deemed to have committed every offence committed by any one of them in execution of the purpose. This is the English law according to Stephen's Digest, Art. 30, and we are of course familiar with the principle in sec. 149. The ground of such an enactment may be covered by secs. 107, 109, in fact I think it usually would be. But some such enactment would make the matter perfectly plain.

I remain,
Your obedient servant,
H. L. STEPHEN.

Review.

THE LAW OF CONSIDERATION AND OF COMPROMISE IN BRITISH INDIA. *By Jnanendra Nath Chaudhuri, B. L., Pleader. Rai M. C. Sarkar Bahadur & Sons, 75-1-1, Harrison Road, Calcutta. 1914.*

This little book is apparently the result of a close study of the English and Indian Law on the subject—or rather subjects—for the law of consideration has no more intimate connection with the law of compromise than with any other branch of the law of contract. Each of these topics is analysed, the difference between the English law of consideration and that law as enacted in the Contract Act is accurately pointed out, the peculiarities of the Indian procedure concerning compromises are set out and the case-law closely examined and digested. The author's researches will interest not merely legal practitioners, but also students of law. The spirit of enquiry and study by which they appear to be animated deserve cordial encouragement. The author has, not rarely, allowed himself to travel outside the range of his subject-matter, specially in dealing with the law of consideration. On the whole, however, he has succeeded in producing a compact little volume of essays, which is sure to prove useful to students and practitioners.

Notes of Cases.

CALCUTTA HIGH COURT

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before STEPHEN AND MULLICK, JJ. APPEAL FROM APPELLATE DECREE NO. 1329 OF 1911. RAMDAHIN SINGH AND ANOTHER, Defendants, Appellants, *v.* JADU NANDAN SINGH AND OTHERS, Plaintiffs, Respondents. 31st July 1914

Right to discharge water—Right ancillary to property—Easement.

The Plaintiffs owned some land on the south of that of the Defendants on a higher level and the water falling on the land of the Plaintiffs naturally flowed on to the land of the Defendants. The Defendants erected a *bund* on their land, so as to obstruct the water accumulated on the Plaintiffs' land from flowing towards the north through the Defendants' land. The Plaintiffs alleged that they were entitled to have the water on their land discharged through the Defendants' land; but they did not claim it as an easement. They claimed it as a right ancillary to their property which they had not parted with.

Held, that the suit was maintainable though the Plaintiffs did not claim the right to discharge their water and did not in fact discharge their water on to the Defendants' land by any definite channel.

That the Defendants should make some arrangements by which the water coming on to their land from the Plaintiffs' land might pass over their land in such a way as not to remain on the Plaintiffs' land.

Mr. C. R. Das and *Babu Surendra Nath Ghosal* for the Appellants.

Babus Ram Charan Mazumdar and *Raghu Nath Singh* for the Respondents.

A. T. M. *Decree modified.*

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

LORD MOULTON. LORD PARKER OF WADDINGTON. SIR JOHN EDGE. MR. AMEER ALI. 1914, Heard, 23 and 24, April. Judgment, 24, April.	THE PERFECT POTTERY COMPANY, LIMITED, Appellants, *v.* MRS. IDA L. ROSE, Respondent.

Contract with Company, terms of, in correspondence and Company's minutes, conflict between—Right of heir to enforce terms of sale.

R by letter offered to sell to the Appellant Company a patent for Rs. 10,000 paid in cash and Rs. 20,000 in paid up shares of the Company. The letter contained a provision that the Company would be entitled to retain and cancel those shares in the event of R, who was to serve as the Company's manager, by reason of death, resignation, etc., failing to complete 4 years' service. The Company in their minutes recorded resolutions which did not embody this condition and in express terms spoke of the transaction as a sale of the patent for Rs. 30,000:

Held—*That the only contract between R and the Company was that contained in the minute and that if this minute incorporated the terms of the letter, it did so in so far only as the latter was not inconsistent with the express terms of the minute.*

That on R's death within 4 years, R's widow was entitled to have fully paid up shares to the amount of Rs. 20,000 allotted to her.

The facts of the case sufficiently appear from the following judgment of the Judicial Commissioners (Mr. H. J. Stanyon and Mr. J. A. C. Skinner).

"The Plaintiff-Respondent is the widow and executrix of the late Mr. Rose, who was in the service of the Defendant Company, the Perfect Pottery Company, Limited, of Jubbulpore, as manager. He had previously been in the service of Messrs. Burn and Company, and in 1904, there were negotiations between him and the founders of the Perfect Pottery Company hereinafter called "the Perfect Pottery Company" or "the Company" which resulted in his leaving Messrs. Burn & Company, with a view to transferring his services and a patent he had acquired for a special kind of tile called the "Perfect tile" to the Perfect Pottery Company. The terms on which he would come to them were set out by him in a letter of the 31st December 1904 (Ex. D-1). He actually entered their service on the 1st February 1905. The Perfect Pottery Company was registered as a Company some time in 1905 and on 15th October 1905 (admittedly after its registration) the terms of Mr. Rose's employment were embodied in a resolution of the Company confirmed at their next meeting on the 2nd November 1905. On the 24th June 1908, whilst still in the service of the Perfect Pottery Company, Mr. Rose died. Part of the agreement between him and the Company was admittedly that the Company should purchase his patent for Rs. 30,000, of which Rs. 10,000 were to be paid in cash and Rs. 20,000 in shares of the Company which were not to be at his disposal until he had completed four years' service with the Company. And the difference which has led to this litigation is as to whether the 200 shares of Rs. 100 each became Mrs. Rose's property subject to a lien on them by the Perfect Pottery Company for his services for 4 years or whether they were only to become his property on the completion of 4 year

service; and as he failed to complete that term have not passed to him. An alternative plea open to the Perfect Pottery Company was, that having vested in Mr. Rose, the shares had in accordance with the terms of a contract between the parties been divested by his death. But it would obviously be for the Perfect Pottery Company to establish that there was such a contract, and their learned Counsel before us has admitted his inability to do so, and rested their case on the shares never having become Mr. Rose's property.

"The Plaintiff sues for the dividends that have accrued due since Mr. Rose's death, for a declaration that she is entitled to the shares and for the delivery of scrip and the lower Court has given her a decree to this effect.

"The material parts of Mr. Rose's letter of the 31st December, 1904, are the following :—

"'Gentlemen,

"'I beg to offer the patent 'Perfect Tile,' of which I am the patentee, as well as my services, to your Company on the following terms, conditions and considerations :—

"'(1) Your Company shall have the exclusive use in India of my said patent for the whole of the remaining period of the same.

"'(2) I will serve your Company as manager and engineer for 10 years on the following scale of pay and extra allowances payable monthly.' (Here follow details of pay and allowances, which need not be re-produced.)

"'(3) As soon as the Company start its Pottery Works, Rs. 10,000 (ten thousand) will be payable to me in cash and further Company's shares of Rs. 20,000 (twenty thousand) in value shall also be allotted me, of which I will be entitled to get all the dividends for five years and thereafter on my completing four years' services the said shares shall be given over to me to be disposed of just as I please. The directors of the Company will hold the said shares for four years as trustees for me personally, and on my death, resignation or disability to serve for that whole period may cancel the issue of the said shares by reducing the capital of the Company proportionately.

"'(4) The Company may dismiss me by handing over the said shares to me during the first five years and always by giving me six months' notice or six months' pay besides the said shares if the dismissal takes place during the first five years.

"'(5) Whatever sum of money becomes payable to Burn and Company according to my indenture with them, the same shall be paid by your Company and not by me.'

"The Appellant's learned Counsel urged on us that the Court below had not attached sufficient weight to his letter, and we accept his contention to this extent, *viz*, that the learned Judge was mistaken in regarding the Company's resolution of the 15th October 1905 as the sole record of the agreement with Mr. Rose and as excluding other evidence. In the absence of a formal written agreement between the parties, that resolution is in our opinion only an admission by the Company from which, along with the other acts and statements of the parties, the terms of the contract between them are to be deduced, and among such acts and statements we take into consideration the letter of the 31st December 1904, as an admission by Mr. Rose. But it is not contended by the Appellant's learned counsel that this letter is the sole record

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of the contract between the parties, nor could it be, as when it was written, the Company had not come into existence. And if it were, the case it would support is not that the shares never vested in Mr. Rose, but that they vested in him, were held by the Company in trust for him and were divested by his death, before he had completed four years' service, a case which the learned Counsel has admitted he cannot maintain.

"The material parts of the resolution of the 15th October 1905 are as follows :—

"'The agreement entered into with Mr. A. Rose, Manager of the Perfect Pottery Company, Limited, was dealt with and passed.

"'(*a*) Mr. Rose will draw his pay on the following scale, with allowances :—

(Details follow.)

"'(*b*) Mr. Rose invented the 'Perfect' tiles. The patent has been purchased from him for Rs. 30,000. Of this amount Rs. 10,000 to be paid to him in cash and the balance Rs. 20,000 in shares of the Company. The shares will become his property on the 5th year. During his four years he will get all the dividends.

"'(*c*) Besides the Rs. 30,000 the sum of Rs. 3,345 have been paid to Messrs. Burn and Company, according to Mr. Rose's indenture with them.'

"The statement that the shares will become Mr. Rose's property 'On the 5th year' supports the Appellant's contention, but on the other hand the patent is stated to 'have been purchased from him' and the Rs. 3,345 to have been paid to Messrs. Burn and Company, 'besides the Rs. 30,000' for the patent. And there is no condition of forfeiture by death within four years.

"That Mr. Rose attended and voted at meetings of the Company as a share-holder is shown by the proceedings. It has not been suggested that he held any other shares than those allotted to him in payment for his patent and Art. 48 of the Articles of Association prescribes that 'no share holder shall be entitled to vote or be present at any General Meeting whilst any money due from him to the Company in respect of any of his shares remained unpaid.' The patent remained in Mr. Rose's name with the Government, but the payments required to keep it up had admittedly been made by the Company. The Appellant's learned Counsel suggests that there was merely an agreement to sell the patent which Mr. Rose's death has avoided and that the Plaintiff is at liberty to take it back. But we are unable to accept this contention If it was correct, the Plaintiff would not only lose the shares, but would also be liable to lose the Rs. 10,000 received by Mr. Rose in cash in part-payment for it. The ultimate test is in our opinion whether if the Plaintiff had wished to abandon the shares and take back the patent against the wish of the Company she could have done so and it seems to us clear that she could not have, that the patent had been sold to the Company by a transaction binding on Mr. Rose and his representatives and equally binding on the Company, that part of the price of the patent was admittedly paid, so the property in it had passed to the Company under sec. 78 of the Contract Act; that the 200 shares were allotted to Mr. Rose in part-payment of the price, that the Company to secure his services retained a lien on them for four years, but that in the absence of any valid contract causing his death within the four years to work forfeiture of his rights, his representative was entitled to possession of them on the expiry of that period. And we d

not find anything in sec 28 of the Indian Companies Act that in our opinion affects the Plaintiff's claim to the shares, and accept the interpretation of that section suggested by the Respondent's learned Counsel, *viz.*, that it is intended to meet cases between a Company that is being wound up and its creditors. The appeal therefore fails. But inasmuch as Mr. Rose gave the Defendant company some excuse for contesting the case in the interests of the share-holders by the condition as to forfeiture by death in his letter of the 31st December 1904, and both parties are to blame for the omission to record the terms finally agreed on in a formal written agreement, we direct that each party bear his own costs in both Courts."

Hence this appeal.

Sir R. Finlay, K. C., and *Mr. G. R. Lowndes* for the Appellants submitted that upon the evidence it was established that the shares claimed by the Respondent were not to become the property of her husband unless and until he had completed at least four years' service. Further, no contract to issue the said shares without payment in cash having been filed with the Registrar under sec. 28 of the Indian Companies Act the Respondent was not entitled to claim the shares without payment in full. Their Lordships delivered judgment dismissing the appeal without hearing.

Mr. E. F. Spence and *Mr. Sholto O'Gilve* for the Respondent.

As to costs Mr. Spence submitted that the lower Court had improperly refused to allow costs of the suit to the Plaintiff although she had been successful. There was no cross appeal as to costs to His Majesty in Council, but that was because the solicitors for the Appellants had agreed that the question of costs should be heard and decided by their Lordships without the cross-appeal.

Sir R. Finlay left the matter in their Lordships' discretion.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—In this case their Lordships are of opinion that the only contract between Mr. Rose and the Company was that contained in the minute of the 15th October 1905. The question which their Lordships have to decide is how far this minute incorporates the terms of the document which has been referred to as D-1? It is to be observed that so far as it contains any express terms, those terms differ from those contained in D 1. The most, therefore, that can be argued, is that D-1 is incorporated, except so far as it is inconsistent with the express terms of the minute.

Now one of the express terms is, that there is a sale of the patent for Rs. 30,000, to be paid partly in cash and partly in paid-up shares, and in their Lordships' opinion, the clause contained in D-1, which enables the company to retain and cancel these shares in certain events is inconsistent with there being such a sale.

For these reasons their Lordships think that the decision of the Court below was correct. In their opinion the Plaintiff is entitled, in the events which have happened, to have shares to the amount of Rs. 20,000 allotted as fully paid.

With regard to the suggestion which has been put forward that shares have already been allotted which are not fully paid, their Lordships need not express any opinion.

Their Lordships will humbly advise His Majesty to dismiss this appeal with costs.

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Their Lordships think that there was no sufficient reason for depriving the Appellant of her costs in the two Courts below. Therefore, the decree of the Court of the Judicial Commissioner will be varied to the extent of giving her these costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Bull & Bull* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 242 OF 1912.

FLETCHER, J. RICHARDSON, J. 1914, Heard, 12, June. Judgment, 25, June.

MOHINI MOHAN MISSER and others, Plaintiffs, Appellants,

v.

SURENDRA NARAIN SINGH and others, Defendants, Respondents.

Suit for damages for wrongfully obtaining an injunction, if lies, when injunction temporary and when permanent—Civil Procedure Code (Act V of 1908), sec. 95—Limitation Act (IX of 1908), Sch. I, Art. 42—Limitation—Suit for damages for procuring an erroneous decision if lies—Pleadings—Want of reasonable and probable cause, allegation of, what sufficient.

No suit lies for damages against a Defendant for maliciously and without reasonable and probable cause obtaining a perpetual injunction which has been subsequently dissolved on appeal.

A temporary injunction granted in such a suit is ipso facto *dissolved by the Court's decree granting a perpetual injunction.*

In a suit for damages in respect of the temporary injunction limitation would therefore run from the date when the temporary injunction was dissolved by the decree granting perpetual injunction.

Per FLETCHER, J.—*Nothing in the Limitation Act can give a party a right of suit, unless such right exists independent of the Limitation Act.*

NAND KUMAR SHAHA *v.* GOUR SUNKUR (5) *is questionable authority in so far as it decides that a Plaintiff can maintain a suit for damages against a Defendant for maliciously and without probable cause obtaining an interlocutory injunction.*

An allegation by the Plaintiff that the Defendants were actuated by malice and that their suit for perpetual injunction ultimately proved unsuccessful when the decree of the High Court in their favour was set aside by His Majesty in Council was not a sufficient allegation of want of reasonable and probable cause.

Want of probable cause is not to be inferred because of mere evidence of malice.

TURNER *v.* AMBLER (9) *referred to.*

Per RICHARDSON, J.—*Sec. 95, C. P. C., seems to contemplate the possibility of a suit being brought to recover compensation in respect of a temporary injunction applied for on insufficient grounds or in a suit instituted without reasonable or probable cause.*

It is at least doubtful whether such a suit is maintainable in the absence of an undertaking to pay compensation.

A party is not liable in damages for procuring an erroneous decision.

DHURMO NARAIN *v.* SREEMUTTY DOSSEE (10) *referred to.*

This was an Appeal against the decree of Babu Ram Lall Das, Subordinate Judge of Purnea, dated the 18th of April 1912.

The material facts will appear from the judgment.

(5) 13 W. R. 305 (1870).
(9) 10 Q. B. 252 (1847).
(10) 18 W. R. 440 (1872).

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Mr. S. P. Sinha and *Babu Jogendra Nath Mukherjee* for the Appellants.

Dr. Rash Behary Ghose, *Babu Golap Chandra Sarkar*, *Dr. Dwarka Nath Mitra* and *Babu Rishendra Nath Sircar* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an Appeal by the Plaintiffs against the judgment of the learned Subordinate Judge of Purnea, dated the 18th March 1912. The suit was instituted to recover from the Defendants Rs. 1,91,932-8 6, as damages for malicious prosecution of a Civil suit brought against the Plaintiffs. On the 1st of December 1896, the executor of the father of the Defendant No. 1 instituted a suit in the Court of the Subordinate Judge of Purnea against the present Plaintiffs for the purpose of obtaining an injunction restraining the present Plaintiffs from erecting an indigo factory on the land let for agricultural purposes, and on the same date an application was made *ex parte* to the Subordinate Judge for an interlocutory injunction restraining the Defendants till the trial of the suit from proceeding with the erection of the buildings. The learned Subordinate Judge on that application granted the interlocutory injunction prayed for. An appeal was preferred against that order to the District Judge who dismissed the appeal.

That suit came on for hearing before the Subordinate Judge on the 30th of September 1899. The learned Judge decreed the suit and granted a perpetual injunction restraining the erection of an indigo factory on the land. The present Plaintiffs appealed against that decree to the District Judge who on the 16th of August 1900 reversed the decision of the Subordinate Judge and dismissed the suit. The present Defendants who were then the Plaintiffs in that suit, the original Plaintiff having previously died, preferred an appeal to this Court against the decision of the District Judge. On the 1st of June a Division Bench of this Court (Banerjee and Pargiter, JJ.) reversed the decision of the District Judge and restored the decree passed by the Subordinate Judge. The present Plaintiffs then appealed to His Majesty in Council and on the 1st of June 1907, the decree passed by this Court was set aside and the judgment of the District Judge restored.

The proceedings in this Court are reported in I. L. R. 31 Cal. 174 (1) and before the Judicial Committee in I. L. R. 34 Cal. 718 (2).

The proceedings having terminated in favour of the present Plaintiffs they have brought this present suit to recover damages for malicious prosecution of the suit for an injunction. The learned Subordinate Judge has dismissed this suit on the ground that it is barred by limitation. The first question for our decision is, is such an action as the present maintainable? The rule in England is very clear that a suit such as the present cannot be maintained. As was observed by Bowen, L. J., in the case of the *Quartz Hill, etc., Mining Co.* v. *Eyre* (3): "In the present day and according to our present law the bringing of an ordinary action however maliciously and however great the want of reasonable and probable cause will not support a subsequent action for malicious prosecution." This general rule is no

(1) *Surendra Narain Singh* v. *Hari Mohan Misser*: s. c. 9 C. W. N. 87 (1903).

(2) *Hari Mohan* v. *Surendra Narain*: s. c 11 C. W. N. 794 (1907).

(3) 11 Q. B. D. 674, 690 (1883).

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doubt subject to certain exceptions in cases where the proceedings involve "either scandal to reputation or the possible loss of liberty to the person." But the exceptions would not include a suit such as the present. This general rule, I think, must apply to India except in so far as the same has been modified by statute. Sec. 95 of the Code of Civil Prosedure, 1908, provides "(1) where in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section, (*a*) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or (*b*) the suit of the Plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the Defendant may apply to the Court and the Court may upon such application award against the Plaintiff by its order such amount not exceeding Rs. 1,000 as it deems a reasonable compensation to the Defendant for the expense or injury caused to him." The section also enacts that "an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction." This section in effect takes the place of the undertaking in damages which is usually required in England from a Plaintiff as a condition of a grant of an interlocutory injunction in a pending suit in his favour, except that under sec. 95 the damages are limited to Rs. 1,000. The history of such undertaking is given by Jessel M. R. in the case of *Smith* v. *Day* (4).

I now come to the case that has been principally relied upon by the Plaintiffs in this appeal, namely, the case of *Nand Kumar Shaha* v. *Gour Sunkur* (5). That case was a reference by a Small Cause Court Judge. The questions referred for the opinion of this Court were, *first*, whether a fresh suit for compensation on account of damages incurred in consequence of obtaining improperly an injunction under sec. 92 of Act VIII of 1859 can be entertained when the question had been once brought forward for decision before an Appellate Court, but rejected on a distinct ground and, *secondly*, if the suit can be admitted on the ground of its not being decided on its merits by the Appellate Court, is the cause of action to be considered as having accrued from the 18th of August 1868, the date of the decision of the Munsif or from the 23rd of November 1869 when the cross-appeal by the Plaintiff was dismissed? The learned Judges (L. S. Jackson & Glover, JJ.) in answering the questions referred to them remarked that sec. 96 of Act VIII of 1859 (which for the present purpose is the same as sec. 95 of the present Code) would not debar the Small Cause Court from entertaining the suit. They do not however express any opinion on the question whether the cause of action set up by the Plaintiff was or was not a good cause of action although no doubt their judgment implies that the cause of action was sufficient. No authority is cited in the course of the judgment and the counsel who argued the case before us were unable to cite to us any other authority either in England or in India in which a Plaintiff has recovered damages against a Defendant who had obtained maliciously and without probable cause an interlocutory injunction. I must confess that the case of *Nand Kumar Shaha* v. *Gour Sunkur* (5) appears to be a questionable authority in so far as it decides that a Plaintiff

(4) 21 Ch. D. 421 (1882).

(5) 13 W. R. 305 (1870).

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can maintain a suit for damages against a Defendant for maliciously and without probable cause obtaining an interlocutory injunction. *Nand Kumar Shaha's* case (5) was decided by this Court on the 30th of March 1870. In the Limitation Act of 1871 first appears Article 86 fixing a period of limitation in which a suit must be brought to recover compensation for damages caused by an injunction wrongfully obtained, the article in the present Act of 1908 being Article 42. The reason for the insertion of Article 86 in the Act of 1871 was obviously the decision in *Nand Kumar Shaha's* case (5). But of course nothing in the Limitation Act can give a party a right of suit unless such a right exists independent of the Limitation Act [*Hurrinath* v. *Mothoor Mohun* (6)]. Another case that has been relied upon is the case of *Chunder Cant Mookerjee* v. *Ram Coomar Coondo* (7). But all that case decided was that a suit will lie for bringing a suit in the name of a third party maliciously and without reasonable or probable cause whereby the party against whom the action is brought sustains damage. This had already been decided by the Court of Common Pleas in the case of *Cotterell* v. *Jones* (8).

No case has however been cited before or authority shown to us to suggest that if a party maliciously and without probable cause brings a suit for a perpetual injunction and succeeds at the trial, but the judgment is reversed on appeal, he is liable in damages for the injury caused by the injunction. Besides, the decision of the Court of first instance granting the injunction would indicate that the suit was instituted under such circumstances as would induce a prudent man to act. The want of probable cause is not to be inferred because of mere evidence of malice [*Turner* v. *Ambler* (9)].

The result therefore is that there is no case in the books of a suit for damages against a Defendant for maliciously and without reasonable or probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. The only case in which a suit of a similar nature was maintained with reference to an interlocutory injunction is *Nand Kumar Shaha's* case (5), the authority of which I think is questionable. But assuming that case to be a binding authority for that proposition the interlocutory injunction in the present case ceased and came to an end when the Subordinate Judge at the trial on the 30th of September 1899 granted a perpetual injunction. The present suit was not instituted until the 13th of May 1910. Under Article 42 of the Indian Limitation Act, 1908, time begins to run from the date when the injunction ceases. Any right of suit that the Plaintiffs might have with reference to the obtaining of the interlocutory injunction is therefore barred by limitation. It is further to be noticed that nowhere in the plaint in this suit is it stated that the suit for an injunction was instituted or prosecuted without reasonable or probable cause. It would appear however that the Plaintiff's allegations in support of want of reasonable and probable cause are that the Defendants were actuated by malice and that the suit for an injunction ultimately proved unsuccessful, when the decree of this Court was set aside by His Majesty in Council.

(5) 13 W. R. 305 (1870).
(6) L. R. 20 I. A. 183 (1893).
(7) 22 W. R. 138 (1874).
(8) 11 C. B. 713 (1851).

(5) 13 W. R. 305 (1870).
(9) 10 Q. B. 252 (1847).

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Such an allegation however is not a sufficient allegation of want of reasonable or probable cause. The fact that the Subordinate Judge granted the injunction and a similar view was taken by a Division Bench of this Court, although their opinion ultimately proved mistaken, shows that it could not be said that there was a want of reasonable or probable cause in instituting and prosecuting the suit (see the judgment of Couch, C. J, in *Chunder Cant Mookerjee* v. *Ram Coomar Coondoo* (7).

In the result I agree with the conclusion arrived at by the learned Subordinate Judge though for different reasons. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree that if relief is sought by the plaint on the ground that the previous suit, which was a suit for a perpetual injunction, was instituted maliciously and without reasonable and probable cause, that is not a good cause of action. Para. 15 of the plaint, however, points rather to the issue of the interlocutory injunction as the cause of action on which the Plaintiffs rely. The interlocutory injunction is treated as though it subsisted up to the date of the order of His Majesty in Council. I agree that the interlocutory injunction was *ipso facto* dissolved by the decree of the first Court granting a perpetual injunction and that assuming that damages may be claimed by suit for "wrongfully" obtaining such an injunction, the present suit as a suit for damages is barred by limitation under Art. 42 of the Schedule of the Limitation Act. As to the word "wrongfully," sec. 95 of the Civil Procedure Code of 1908 seems to contemplate the possibility of a suit being brought to recover compensation in respect of a temporary injunction applied for on insufficient grounds or in a suit instituted without reasonable and probable cause. It is at the least doubtful whether such a suit is maintainable in the absence of an undertaking to pay compensation [*Dhurmo Narain* v. *Sreemutty Dossee* (10)]. But if it be maintainable, it would no doubt be governed in regard to limitation by Art. 42. The conduct imputed to the Defendant in such a suit would be in its nature tortious or wrongful. It is idle to say that the suit could not have been instituted until the determination of the appeal to the Privy Council. The words of Art. 42 are clear. Time runs from the date when the injunction ceases."

In point of substance the damages which the Plaintiffs say they have suffered were due principally to the permanent injunction granted by the Court of first instance and the High Court. In view of the result of the appeal to the Privy Council, those decisions must no doubt be regarded as erroneous, but as the learned Subordinate Judge points out, a party is not liable in damages for procuring an erroneous decision. A successful Appellant is entitled under sub-sec. (1) of sec. 144 of the Code to such restitution "as will, so far as may be, place the parties in the position which they would have occupied" but for the decree which has been varied or reversed. Sub sec. (2) lays down that no separate suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub sec. (1). I do not know whether the Plaintiffs could have obtained any relief under these provisions I am disposed to think not. The removal of the permanent injunction restored the *status quo ante* so

(7) 22 W. R. 188, 146 (1874).

(10) 18 W. R. 440 (1872).

far as it could be restored. But, however that may be, at any rate the Plaintiffs cannot obtain by suit any relief which they could have obtained under sec. 144 by application. They cannot in this suit obtain any relief by way of restitution.

The result is that the plaint, whatever construction be put upon it, discloses no cause of action except possibly a cause of action to which the bar of limitation applies.

On the facts, so far as they appear, it would be very difficult to say that the previous suit was instituted without reasonable and probable cause or that the temporary injunction was applied for on improper or insufficient grounds. But as I understand we do not decide the appeal with reference to that consideration.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1220 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 11 and 12, March.
1914,
Judgment, 15, May.

LAKHAN JENA and others, Defendants, Appellants,
v.
ARJUN NAIK, Plaintiff, Respondent.

Dandidari *right, if a monopoly or a legal right to be recognised by Courts of Justice—Such right if personal or if can be transferred—Transfer if must be by registered instrument—Estoppel, application of rule of, to employees and contracting parties—Assignee of right having enjoyed profits if can deny assignor's title.*

At a public auction held at the instance of Government the Plaintiff as the highest bidder purchased the road-side lands on the bank of a river together with the dandidari *right for one year. It appeared from the lease granted to him by Government that he became entitled to occupy the lands for one year and to exercise the calling of a broker in the market held thereon during that period. The Defendants took an assignment from the Plaintiff of the* dandidari *right and they commenced at once to exercise the calling of a broker in the market-place by virtue of the Government license which was made over to them, but they withheld payment of the money they had agreed to pay. The Plaintiff sued for recovery of the consideration with damages for unlawful detention of his money:*

Held—*That the term* dandidar *literally means a measurer and is applied to signify a broker who negotiates the sale of paddy and other produce in a market-place and receives as remuneration for his service a commission from the seller and the buyer who may choose to employ him*

That the contention of the Defendants that the alleged dandidari *right tended to create a monopoly and should not be recognised as a legal right by any Court of Justice was untenable. The principle that every arrangement which places a restriction upon a man's right to exercise his trade or calling tends to create a monopoly and is void as against public policy has no application to the present case. There is nothing illegal or contrary to public policy in Government allowing a market to be held on its land and taking measures to restrict the admission of brokers.*

That the dandidari *right was not a right personal to the grantor from Government and could be transferred. The very fact that the right was granted by Government to the highest bidder affords some indication that the personal element does not enter into consideration when the grant is made.*

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That the dandidari *right was not transferable only by a registered instrument.*

That the Defendants were at least licensees under the Plaintiff and as they had exercised their calling without interruption or interference they at any rate were not entitled to contend that the Plaintiff had no title or that they themselves had acquired none from him.

The rule of estoppel which binds landlords and tenants, mortgagors and mortgagees; bailors and bailees applies to employees and contracting parties generally who cannot accept the benefits of the contract and yet, when called upon to perform their duties under it, repudiate it as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void. The assignee or the licensee of any right accepted and acted under is accordingly estopped to deny the authority from which the right proceeds.

This was an Appeal from a decision of Babu Narendra Krishna Datta, Subordinate Judge, Cuttack, dated the 9th of February 1911, confirming that of Babu Nirmal Chandra Mitter, Munsif, Puri, dated the 30th of April 1910.

The facts of the case will appear from the judgment.

Babus Provash Chandra Mitter and *Susil Madhab Mullick* for the Appellants.

Babus Bepin Behari Ghosh and *Bankim Chunder Mukerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Defendants in a suit for recovery of money due on a contract. The circumstances under which the Courts below have concurrently sustained the claim of the Plaintiff may be briefly recited. In 1909, at a public auction, held at the instance of Government, the Plaintiff purchased for a sum of Rs. 445 the road-side lands on the bank of the river Bhargavi, situated on the ninth mile of the Jagannath Road, together with what is called the *dandidari* right for the year 1909-1910. The term *dandidar* literally means a measurer, and is applied to signify a broker who negotiates the sale of paddy and other produce in a market-place and receives as remuneration for his service a commission from the seller and the buyer who may choose to employ him. The Plaintiff, as the highest bidder, was accepted as purchaser of the lands and of the *dandidari* right for the period mentioned ; and it is clear from the lease granted to him by Government on the 6th May 1909, that he became entitled to occupy the lands for one year and to exercise the calling of a broker in the market held thereon during that period. The case for the Plaintiff is that on the 25th April 1909, the Defendants took an assignment from him of the *dandidari* right for a consideration of Rs. 622 8, that they commenced at once to exercise the calling of a broker in the market-place by virtue of the Government license which was made over to them, and that although they have profited by the transaction, they have withheld payment of the money they had agreed to pay. The Plaintiff consequently commenced this action on the 19th July 1909 for recovery of the consideration with damages for unlawful detention of his money. The defence was a denial of the alleged transaction in every particular. The Court of first instance found in favour of the Plaintiff on the merits, and decreed the suit for the amount claimed as consideration

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money. Upon appeal, the Subordinate Judge has confirmed this decree. He has taken the same view of the facts as the primary Court and has also overruled the contention of the Defendants that the right could be validly transferred to them only by a registered instrument, as, in his opinion, the transaction was not a sale but a sub-lease. On the present appeal, the decree of the Subordinate Judge has been assailed substantially on three gounds, namely, *first*, that the Plaintiff has no title, as the alleged *dandidari* right tends to create a monopoly and should not be recognised as a legal right by any Court of Justice; *secondly*, that the *dandidari* right, if recognised in law, is a right personal to the grantee from Government, and cannot be transferred; and, *thirdly*, that if the *dandidari* right be deemed transferable, a valid transfer can be effected only by a registered instrument. This position has been controverted by the Respondent as wholly untenable, and, it has further been urged on his behalf that it is not open to the Defendants to impeach the title of the Plaintiff.

In support of the first point, reference has heen made to the cases of *Sheikh Kalu* v. *Ram Saran Bhagat* (1) and *Somu Pillai* v. *Municipal Council, Mayavaram* (2), and it has been urged that every arrangement which places a restriction upon a man's right to exercise his trade or calling tends to create a monopoly and is void as against public policy. This principle has clearly no application to the case before us. The Government allows a market to be held on its land, and takes measures to restrict the admission of brokers. We cannot see that there is anything illegal or contrary to public policy in this action. The principle recognised by the House of Lords in *Rossi* v. *Edinburgh Corporation* (3), namely, that it is the common right of all His Majesty's subjects to open their shops and to sell what they please, which can be restrained only by the Legislature, is of no assistance to the Appellants. The broker who receives a license, authorising him to exercise his calling in the market, cannot force himself upon any seller or purchaser; he is at liberty to enter the market and to exercise his calling, if anybody should employ him. We are not prepared to hold that this is in any way open to objection.

In support of the second point, reference has been made to *Hill* v. *Tupper* (4) to show that the right to exercise the calling of a broker is a personal right, not assignable in law. The case mentioned does not lend any support to this contention: it merely rules that where a Canal Company has granted to a person the sole and exclusive right of putting pleasure boats for hire on their canal, the grantee does not acquire such an interest as would enable him to maintain an action in his own name against a person who has disturbed his right. This principle is clearly of no assistance to the Appellants. On the other hand, the very fact that the right is granted by Government to the highest bidder affords some indication that the personal element does not enter into consideration when the grant is made. Further, there is evidence to show that the right is frequently transferred and the transferee is allowed to exercise the right under the license in the same manner as the transferor.

(1) 9 C. L. J. 216: s. c. 13 C. W. N. 388 (299) (1909).
(2) I. L. R. 28 Mad. 520 (1905)

(3) [1905] App. Cas. 21, 26.
(4) 2 H. & C. 121; 133 R. R. 605 (1863).

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In the present case, the Courts below have found that the Appellants as transferees have exercised the right without interruption or hindrance by the officers of the Government. There is consequently no force in the second contention

In support of the third point, it has been urged that the right which the Plaintiff purported to transfer to the Defendants was intangible and could have been transferred only by a registered instrument. There is no force in this contention, because the Defendants are at least licensees under the Plaintiff, and as they have exercised their calling without interruption or interference, they at any rate are not entitled to contend that the Plaintiff has no title or that they themselves have acquired none from him. This leads us to the important ground taken on behalf of the Respondent in support of the decree of the Subordinate Judge.

It is well-settled that the rule of estoppel which binds landlords and tenants, mortgagors and mortgagees, bailors and bailees, applies to employees and contracting parties generally, who cannot accept the benefits of the contract, and yet when called upon to perform their duties under it, repudiate it as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void. The assignee or the licensee of any right accepted and acted under is accordingly estopped to deny the authority from which the right proceeds. This is well illustrated by cases where right under a patent has been transferred and it has been held that the assignee or licensee of the patent apparently valid and in force, who has acted under it and received profits from the sale of the patented article, is estopped to deny the validity of the patent in an action by the patentee to recover royalties or to obtain an account. Reference may be made, amongst others, to the cases of *Lawes* v. *Purser* (5), *Noton* v. *Brookes* (6), *Crossley* v. *Dixon* (7), and *Kinsman* v. *Parkes* (8). In the case last mentioned, the Defendants, under the agreement from the patentee, manufactured and sold the patented article, actually received profits therefrom, and when called upon to account, questioned the validity of the patent. The Court overruled the defence, and held that they could no more be allowed to deny the title of their grantor or licensor and retain the profits to their own use, than an agent who has collected a debt for his principal could insist on his keeping the money upon an allegation that the debt was not justly due; even if the patent was assumed to be invalid, that did not render the sales of the machine illegal, so as to taint with illegality the obligation of the Defendants to account. Similarly in *Sharp* v. *Taylor* (9), where a vessel engaged in an illegal trade carried freight which came into the hands of one of the part owners, and on a bill filed by the other part-owner for an account, the Defendant relied on the illegality of the trade, the defence was overruled as not available. It is worthy of note that this rule of estoppel was applied in *Noton* v. *Brookes* (6), even though it was argued that the invalidity of the patent would make the agreement sought to be enforced a contract for the grant of a monopoly and consequently void. In the case before us, it has been found that the Defendants, as assignees or licensees from the Plain-

(5) 6 E. & B. 930; 106 R. R. 868 (1856).
(6) 7 H. & N. 499; 126 R. R. 540 (1861).
(7) 10 H. L. C. 293; 138 R. R. 160 (1863).
(8) 18 Howard 289.
(9) 2 Phillip, 801; 78 R. R. 298 (1849).

tiff, have exercised their calling and have made profits which would otherwise have accrued to the Plaintiff himself in due course, and yet when called upon to pay the consideration they had promised, they urge as a defence that the Plaintiff has acquired no valid title from Government. This defence can only be characterised as disingenuous and is clearly not available to the Defendants.

The result is that the decree of the Subordinate Judge is affirmed and this Appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 325 OF 1913

MOOKERJEE, J. BEACHCROFT, J. 1914, Heard, 7 and 8, January. Judgment, 8, January.	FULKUMARI BIBEE, Appellant, *v.* BUDH SINGH DHUDHURIA and anr., Respondents.

*Guardians and Wards Act (VIII of 1890), sec. 17—Infant son of pre-deceased outcasted son residing with mother in the family of mother's sister—Mother, appointing her sister guardian by Will—Grandfather nominating a nephew as guardian, but latter unwilling to admit him in family circle—Infant's preference for aunt—Court's discretion in appointing guardian—Welfare of minor, chief consideration—Home influence, value of—*Purdanashin *lady if unfit to be guardian of infant of 15 years.*

I, who had been outcasted, died in April 1899 leaving an infant son who in 1914 was about 15 years old, a widow who died in 1913 and his father B who was appointed guardian of the person and property of the infant, in July 1899. B being unable owing to caste difficulties to keep the infant in his custody acquiesced in the appointment in December 1905 of the infant's mother as guardian of his person, he himself continuing to be the guardian of the infant's property. The infant and his mother took up residence with the latter's sister F, and before her death she made a Will clearly expressing therein her wish that her sister F should after her death be the infant's guardian. On her death B applied for the appointment of a nephew of his as the guardian of the person of the infant, and F also made a similar application. The uncle and not the aunt was appointed by the District Court. On appeal, the High Court ascertained on enquiry from B as well as his nominee that neither of them was willing to take the infant into his family circle, and their idea was to place him in charge of a tutor. The infant himself on being examined by the High Court expressed his preference for the aunt. It was found by the District Judge that the education of the infant in her aunt's house had been satisfactory:

Held—*That it was desirable for the welfare of the minor that the aunt and not the uncle should be appointed guardian of the infant's person, and that her being a* purdanashin *lady did not make her unfit to be so appointed as it was undesirable that the infant should at his age be removed from the influences of home life. But it was ordered and the aunt gave assurance that the grandfather and the uncle should have free access to the infant.*

The primary point for consideration in such a case is what in the circumstances of the case is for the welfare of the infant.

In appointing a guardian the Court will pay great attention to the wishes of the father or mother of the infant unless such a course would be disadvantageous to the infant and regard is always paid to the

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wishes of the minor if he be of years of discretion.

This was an Appeal from an order of E. Panton, Esq., District Judge, Murshidabad, dated the 5th July 1913.

The facts of the case will sufficiently appear from the judgment.

Dr. Rash Behary Ghose and *Babu Brojo Lal Chuckerbutty* for the Appellant.

Mr. Sinha, *Babus Hemendra Nath Sen*, *Ram Chandra Majumdar*, *Biraj Mohan Majumdar* and *Surendra Kumar Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal is directed against an order for the appointment of a guardian of the person of an infant by name Ranjit Singh, one of the grandsons of Rai Budh Singh Dhudhuria of Azimgunj. The rival claimants for the office of guardian are the first cousin of the father of the infant, Raja Bijoy Singh Dhudhuria, who has been proposed for appointment by the grandfather, and Fulkumari Bibee, the sister of the mother of the infant, who was nominated for appointment as guardian by the mother in a Will executed by her on the 7th June 1912. The District Judge has given preference to the uncle and has appointed him guardian of the person of the infant. Against that order this appeal has been preferred by the aunt, and the uncle as also the grandfather have been joined as parties Respondents.

To appreciate the circumstances under which the question of the appointment of a guardian of the person of this infant has come before the Court, it is necessary to recite briefly the history of the family. Inder Chand Dhudhuria, the father of the infant, and one of the sons of Rai Budh Singh Dhudhuria, went to England in 1889. On his return to this country, caste difficulties arose, and the ultimate result was that he was outcasted. The members of the community, however, subsequently relented and agreed to limit the excommunication to Inder Chand himself and to all children that might be born after his visit to England. The infant now before the Court was born about the year 1898. The result of the excommunication of Inder Chand was that he had to live with his wife and children and separate from his father. This state of things continued up to the 9th April 1899, when Inder Chand died. Shortly after his death his father was appointed guardian of the person and property of the infant on the 8th July 1899. It is clear, however, from the materials on the record that the grandfather was not able to keep the infant in his own custody, as the pressure of caste difficulties was insurmountable. Consequently, on the 18th December 1905, with the acquiescence, if not the actual assent, of the grandfather, Indra Kumari, the mother of the infant, was appointed guardian of his person. The grandfather, however, continued to be the guardian of the property of the infant and it is not disputed that up to the present moment he is such guardian. Indra Kumari died on the 1st June 1913. A year before her death, she had executed a Will, on the 7th June 1912, which was registered on that very day. No probate has yet been obtained of this Will, but its genuineness has not been questioned in the present proceedings and it has been received in evidence by consent of all the parties and accepted in proof of the wishes of the mother in respect of the appointment of a guardian of her infant soon after her death. On this

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subject, the Will is perfectly clear in its terms. The mother expressed a decided preference for her sister as the fittest person to be appointed guardian of the person of her infant son. She stated this explicitly, and by this instrument she nominated her sister Fulkumari Bibee as her successor in the guardianship of the person of her minor son Ranjit Singh. Immediately, upon her death, the matter was inevitably brought into Court, and an application was made by Fulkumari Bibee for appointment as guardian of the person of the infant. But she had been anticipated, and the grandfather had already expressed a desire that his nephew Rajah Bejoy Singh Dhudhuria should be appointed guardian. It is worthy of note, however, that Rajah Bejoy Singh himself has never made an application in this behalf. The attitude he has consistently taken throughout the proceedings, both here and in the Court below, is that he is not unwilling to accept the office of guardian. He is ready to be burdened with its responsibility more out of a feeling that he should meet the wishes of his uncle, than from a sense of attachment towards his nephew. The District Judge, as already stated, has decided in favour of the uncle as against the aunt. He has attached no weight to the wishes of the mother in this respect. He has also held substantially that the wishes of the minor who is now about 15 years old should not have any weight in the decision of this matter. The question for consideration before the Court, consequently, is whether the uncle or the aunt should be appointed guardian of the person of the minor.

The principle upon which the question should be decided is laid down in sec. 17 of the Guardians and Wards Act. Sub-sec. (1) of that section provides that in appointing the guardian of a minor the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. Sub sec (2) provides that in considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes if any of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. Sub sec. (3) provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. The primary point for consideration consequently is, what in the circumstances of this case is for the welfare of the minor. As observed by Mr Justice Davar in the case of *Re Gulbai and Lilbai* (1) in making orders appointing guardians for the persons of minors, the most paramount consideration for the Judge ought to be what order, under the circumstances of the case, would be best for securing the welfare and happiness of the minor. With whom will they be happy? Who is most likely to contribute to their well-being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents, if they had been alive? In fact, the main question for the Court to consider in the case of the unfortunate minors, who have lost their natural guardians, is whom, amongst the relations, or for the matter of that, friends of the minors, can you select, who will supply, as nearly as possible, the place of their lost parent or parents? The

(1) I. L. R. 32 Bom. 50 (1907).

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interest, well-being and happiness of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. The same principle has been laid down by the Allahabad High Court in the case of *Bindo* v. *Shamlal* (2). Indeed the question of true welfare of the minor is of such paramount consideration that the recognised rights of guardianship under the law to which the minor is subject must, if necessary, be assigned a relatively subordinate position: *Totaram* v. *Ram Charan* (3), *Mathu Virapa* v. *Lingammate* (4), or, as has sometimes been said, propinquity must yield to fitness: *Akima* v. *Azeem* (5), *Sohna* v. *Khalak Singh* (6). Besides it is clear from the decision in *Kristo Kissore* v. *Kedar Moyee* (7), the uncle, merely because he is a paternal uncle, is not as a matter of right entitled to supersede the aunt on the sole ground that she is the maternal aunt. The fundamental point to be considered is, what is for the welfare of the particular minor, and that leads us at once to the question, what are the circumstances of the present case?

It is beyond dispute that ever since the return of Inder Chand to this country and his excommunication from society, he lived separate from his father with his wife and son (the infant now before the Court). After the death of Inder Chand, the grandfather found himself unable, it may be owing to the insurmountable pressure of social difficulties, to take back his widowed daughter-in-law and his infant grandson into his family circle. His nephew, Rajah Bejoy Singh, whom he now proposes for appointment as guardian of the person of his infant grandson, has never taken the remotest interest in the minor. The result was that Indra Kumari was driven to seek the society of her sister; and, although a suggestion was faintly made in this Court at one stage that Indra Kumari lived serparate, not merely from her father-in-law but also from her sister, it was indisputably proved from an affidavit which had been filed on the 25th August 1911 by Rai Budh Singh himself, that Indra Kumari and her infant son had resided for years with Fulkumari. After Indra Kumari had been appointed guardian, she found it difficult to maintain her child and an application was made by her on the 19th June 1911, to the District Judge for an order upon her father-in-law, who was the guardian of the property of the infant, for payment of expenses incurred in connection with the maintenance of the child. This application was opposed by the grandfather and in an affidavit filed on the 25th August 1911 Rai Budh Singh pledged his oath that the then Petitioner (his daughter-in-law) was living with her minor son in the house of Babu Norpat Singh, the husband of her sister, as members of the same family and that she had no separate establishment, nor was there any necessity for it. This is in agreement with other statements found on the record and was confirmed by the infant who was examined in this Court. The position, therefore, has been that for many years past and certainly during the last 10 years the infant has been treated as an outcaste by the family of his father; his grandfather and his uncle have both disowned him, and he has been brought up in the family of the sister of his mother. That sister of his mother is now willing to take

(2) I. L. R. 29 All. 210 (1906).
(3) 7 All. L. J. 1149 (1910).
(4) 2 Mad. W. N. 56.
(5) 9 W. R. 334 (1868).
(6) I. L. R. 13 All. 78 (1889).
(7) 2 C. L. R. 583 (1878).

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charge of him. The application is resisted by the grandfather, who is himself unable to take charge of the boy and puts forward his nephew as a desirable candidate for the office of guardian. We put it to the learned Vakil for the grandfather whether he was willing to look after his infant grandson himself and to take him back into his family circle. The answer was a decided negative. We put it to the learned Vakil for the uncle who has been proposed for appointment as guardian, whether the uncle was prepared to take his nephew into his family circle. The answer was an equally emphatic negative, and it was added that if the uncle was appointed guardian, the infant would be kept in a house at Berhampore in charge of a tutor. The effect of this statement was realized a little later, and it was then suggested on behalf of the grandfather that if the uncle was appointed guardian of the person of the infant, the infant might be kept in a house at Azimgunj. It is manifest, however, that neither the grandfather nor the uncle is willing to take the infant into his family circle. Here it may be added that the uncle who has been proposed for appointment as guardian is a separated uncle, and it is not disputed that the grandfather and the uncle are not members of the same joint-family. In view of all these facts, it is clearly not for the welfare of the infant that the uncle should be appointed guardian of his person.

Apart from these circumstances, however, there are two other factors for consideration. As already stated, the mother has nominated her sister for appointment as guardian, and the selection was obviously in the best interest of the minor. Her wishes in this respect should not be summarily disregarded, for though it may be conceded that the wishes of a deceased parent are by no means conclusive, considerable weight must be attached to the preference indicated by the mother: *Hall* v *Stoter* (8), *Re Kaye* (9). As was observed in *Ex parte Mountfort* (10), in appointing a guardian the Court will pay great attention to the wishes of the father or the mother of the infant, and the Court will do so unless as stated in *Hartley* v. *Smith* (11) and *Re Wood* (12), such a course would be disadvantageous to the infant. It has not been established in this case that the appointment of the aunt as guardian of the person of the infant would be to his disadvantage ; on the other hand, the circumstances stated all point to the conclusion that it would be to his advantage

There is a further circumstance to be considered, namely, the wishes of the minor himself, to which regard is always paid, if he be of years of discretion [*Ex parte Edwards* (13), *Ex parte Birchell* (14), *Pollord* v. *Rouse* (15)] The minor frankly stated in this Court that for the last ten years he has been brought up in the family of his aunt, that he has found in her family circle a comfortable and affectionate home, that his uncle has never taken the remotest interest in him, and, that consequently he does not feel attracted towards him in the least degree. To summarise, the welfare of the infant, tested from the point of view of the mode of life it has been his lot to live during

(8) 1 Y. & C. Ex 556 (1835).
(9) L. R. 1 Ch. App 387 (1866).
(10) 15 Ves 447 (1809).
(11) 9 Jurist N. S. 97 (1863).
(12) 16 W. R. (Eng.) 164 (1867),
(13) 3 Atk. 519 (1747).
(14) 3 Atk. 813 (1754).
(15) I. L. R. 33 Mad. 288, 293 (1910).

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the last ten years, the emphatically expressed wishes of his mother and his own decided preference justify the appointment of the maternal aunt in preference to the paternal uncle and the reasons which weigh in favour of such appointment become conclusive, when we remember that the uncle, is practically a stranger to the infant, is by no means keen to undertake the responsibilities of guardianship and is, in any event, unable to take his nephew into his family circle and to exercise personal supervision over him.

It has been contended, however, that as the boy is now 15 years old, it is not desirable that he should have a *purdahnashin* lady as guardian of his person. We are unable to accept this contention as sound. It is, in our opinion, undesirable that at this stage the boy should be taken away from the healthy influences of home life. In so far as the education of the boy is concerned, the District Judge recorded an opinion on the 22nd May 1912 that so far as he was able to judge, his education had been satisfactory and that there was no necessity for change in the arrangements. There is no conceivable reason why under the guardianship of his aunt the infant should not be properly educated, if suitable direction is given by the District Judge for the appointment of a tutor. We are further of opinion that it would be desirable to compel the guardian of the property of the infant to spend more money for his education than has been done in the past and it is obvious that as he continues to make progress in his studies, tutors better qualified and more experienced than those who have acted in the past, will be required to look after him.

It has finally been suggested that the effect of the appointment of the aunt as guardian of the person of the infant might be to accentuate the estrangement between him and the members of his father's family, and that the ultimate result might be not quite beneficial so far as the worldly prospects of the infant are concerned. In fact, it has been broadly hinted that the estrangement might be of such a character as to make it impossible for the grandfather to leave more property to his infant grandson. We trust that the effect of the order which we propose to make will not be what is anticipated by the learned Vakil for the grandfather, and that the grandfather will accept, without feelings of resentment towards the infant, the order about to be made to secure the welfare of his grandson. There is no conceivable reason, however, why, although the aunt is appointed guardian of the infant, the grandfather and the uncle should not have free access to the child, and on behalf of the Appellant an assurance has been given in this Court that such access will be freely allowed. Should, however, any practical difficulty or inconvenience arise in this respect, the District Judge will give suitable directions.

We may add that we are not unmindful that in the matter of appointment of a suitable guardian, a Court of Appeal is always reluctant to interfere with the discretion of the Court of first instance, except for strong reasons [*Re Kaye* (9)]. In the present case, however, upon an examination of all the circumstances, we are constrained to take the view that the order made by the lower Court is not for the true welfare of the minor. We fully appreciate that the grandfather may regard it as a loss of family prestige

(10) L. R. 1 Ch. App. 387, 389 (1866).

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that the Appellant, a lady of a different family, should be appointed guardian of the person of even that infant grandson of his, whom he has been constrained by stress of circumstances to treat as an outcaste. But we cannot take into account the feelings of the grandfather to the detriment of the infant.

The result is that this appeal is allowed, the order of the District Judge set aside, and the Appellant appointed guardian of the person of the infant Ranjit Singh. The costs of the Appellant both here and in the Court below will come out of the estate of the infant; the costs of the Respondents will be borne by themselves.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3056 OF 1912.

JENKINS, C. J. WOODROFFE, J.	KAILASH CHANDRA PODDAR,
1914.	Defendant, Appellant,
Heard,	*v.*
9 & 10, March.	GOPAL CHANDRA PODDAR,
Judgment, 10, March.	Plaintiff, Respondent.

Compromise decree challenged on the ground of absence of consent—Application for review dismissed—Fresh suit, if lies

Where a party to a suit applied for review of a decree passed upon a compromise on the ground that he had not consented to the compromise, and failed.

Held—*That a suit to set aside the decree on the same ground was not maintainable.*

RAM GOPAL *v.* PRASANNA KUMAR (1) *followed.*

GULAB KOER *v.* BADSHAH BAHADUR (2) *distinguished, the relief sought in that case having been based on fraud.*

This was an Appeal preferred on the 18th September 1912, against a decree of Babu Debendra Mohan Sen, Subordinate Judge of Zilla Faridpur, dated the 23rd July 1912, reversing a decree of Babu Sashi Jiban Sen, Munsif at Bhanga, dated the 8th May 1911.

The facts of the case were as follows :—

Plaintiffs Nos. 1 and 2, the two brothers, brought a suit against the Defendants for recovery of *khas* possession of certain lands.

That suit was compromised on a petition of the Plaintiffs and the Defendants, and a consent-decree was made by the Munsif in favour of the Defendants by which they were entitled to get settlement of some lands of the Plaintiffs at a certain rent Some days after that Plaintiff No. 1 made an application for review on the ground that he had not consented to the compromise, but that his pleader without his authority and against his instructions had signed the compromise petition. The Munsif, however, rejected the application for review holding that the pleader had authority to sign the compromise petition and the Plaintiff No. 1 had consented to the compromise. Thereupon the Plaintiffs instituted this suit for setting aside the consent-decree on the ground that the compromise and the consent-decree were fraudulent. The Defendants pleaded that the suit was not maintainable and was barred by *res judicata* by virtue of the decision in the review proceeding.

The Munsif on the authority of *Gulab Koer* v. *Badshah Bahadur* (2)

(1) 2 C. L. J. 508 : s. c. 10 C. W. N. 527 (1905).

(2) 10 C. L. J. 420 : s. c. 13 C. W. N 1197 (1909).

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held that the decision in the review proceeding did not operate as *res judicata*; so he decreed the suit in favour of Plaintiff No. 1, holding that he had not consented to the compromise, but as against Plaintiff No. 2 who had consented to the compromise he dismissed the suit with the result that the Defendants were declared entitled to get a settlement of an undivided half of the Plaintiffs' lands. The Plaintiffs appealed and the Defendants filed cross objections. The Subordinate Judge dismissed the cross-objections, but decreed the appeals, holding that the Defendants could not get a settlement of the undivided half of the Plaintiffs' land. The result was that the Plaintiffs' suit was fully decreed.

The Defendants appealed to the High Court.

Babu Brojendra Nath Chatterjee for the Appellants contended that the decision in the review proceeding was *res judicata* on the question whether Plaintiff No. 1 had consented to the compromise petition: *Ram Gopal* v. *Prasanna Kumar* (1). The case of *Gulab Koer* v. *Badshah Bahadur* (2), assuming it to have been correctly decided, was distinguishable. The Court there held that sec. 13, C. P. C. of 1882, does not apply to a review proceeding, but it only applies to a suit. But what is a review proceeding? It is but a re-hearing of the whole suit. Besides, on general principles when a question has been decided by a competent Court, whether in a proceeding or in a suit, the same question should not be allowed to be re-agitated between the same parties. What would have been the result if the review had succeeded?

[*Babu Brojendra Nath Chatterjee* was stopped.]

Babu Brojo Lal Chakravarty for the Respondent being called upon submitted that the proper procedure for setting aside a consent-decree on the ground of fraud was a suit and not a review. In a review all the questions that properly arise for setting aside the consent-decree, could not be enquired into and decided. Hence it has been held in the case of *Gulab Koer* v. *Badshah Bahadur* (2), that the finding in the review could not operate as *res judicata*. When the review is rejected, the aggrieved party has no remedy; therefore the decision in the review should not operate as *res judicata*. Sec. 13, C. P. C. of 1882, does not apply to such a proceeding; if a decision in a review proceeding is held to operate as *res judicata*, it would be extending the purview of sec 13. The case of *Gulab Koer* v. *Badshah Bahadur* (2) is not distinguishable. There might be a question whether the review lay at all.

[JENKINS, C. J.—But you applied for review?]

But the other side did not object; moreover the Defendants did not appeal from the decision of the Munsif.

[*Babu Brojendra Nath Chatterjee.*—We filed cross-objections in which the question of *res judicata* was distinctly raised.]

Decisions in all actions do not operate as *res judicata*, for instance, decision in a suit under sec. 9 of the Specific Relief Act does not operate as *res judicata* in a title suit.

The compromise was not valid, because

(1) 2 C. L. J. 508: s. c. 10 C. W. N. 527 (1905).

(2) 10 C. L. J. 420: s. c. 13 C. W. N. 1197 (1909).

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it included lands other than those in suit. The case of *Gulab Koer* v. *Badshah Bahadur* (2) is the later decision and it gives fully the reasons why a decision in a review proceeding should not operate as *res judicata*. Reads the judgment in *Gulab Koer's* case (2).

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The present Plaintiff sued the Defendants, and a compromise was alleged to have been effected. A decree was passed in accordance with that compromise, and it is not suggested that there was any failure to observe the provisions of Order XXIII. The present Plaintiff No. 1 subsequently came to Court not by way of appeal from an order made under order XXIII, but for a review of the decree, and his application was based upon the allegation that he had not consented. He adopted the proper procedure in so applying. The result of his application, however, was unfavourable to him, and it was dismissed. Subsequently this suit was brought, and the Applicant for review as well as his co Plaintiff in the former suit are the Plaintiffs in this suit. There is the same allegation of *no consent*, and it is further suggested that there was fraud. Fraud has been negatived, so that the only ground of relief is the absence of consent. In these circumstances, it appears to me that this suit should have been dismissed; for, I think the only question on which a decision has been given in the suit in favour of the Plaintiffs was one which was decided adversely in the former litigation.

This view is in accordance with the decision in *Ram Gopal* v. *Prasanna Kumar* (1), which we treat as a decision entitled to respect, and we therefore follow that decision notwithstanding what has been said in *Gulab Koer* v. *Badshah Bahadur* (2). We may point out that in this last named case the relief sought was based on fraud and so it has no application to the present case.

The result is that the appeal must be allowed, and the suit dismissed with costs throughout.

Appeal allowed.

(2) 10 C. L. J. 420 : s. c. 13 C. W. N. 1197 (1909).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 869 OF 1912.

MOOKERJEE, J. BEACHCROFT, J. 1914, 4, February.

BAIDYA NATH ROY and another, Defendants, Appellants, *v.* NANDA LAL GUHA SARKAR, Plaintiff, Respondent.

Regulation XI of 1825, sec. 4, sub-secs. (1) *and* (5)—Lakhiraj *land, accretions to*—Lakhirajdar *if entitled to hold same rent-free—Suit to recover possession from superior tenure-holder and raiyat who took settlement from latter—Mesne profits.*

The holder of a rent-free holding is entitled to possession of all lands forming accretions thereto, but he is not entitled to hold the same rent-free.

MEA JAN *v.* AKRAM (1), GOURHARI *v.* BHOLANATH (2), GOLAM ALI *v.* KALI KRISHNA THAKUR (3), CHOORAMONEE DEY *v.* HOWRAH MILL COMPANY (4), RAMMONEE

(1) 2 C. L. J. 508 : s. c. 10 C. W. N. 527 (1905).
(2) 10 C. L. J. 420 : s. c. 13 C. W. N. 1197 (1909).

(1) 8 C. L. J. 541 (1907).
(2) I. L. R. 21 Cal. 233 (1894).
(3) I. L. R. 7 Cal. 479 (1881).
(4) I. L. R. 11 Cal. 696 (1885).

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v. OOMESH CHUNDER (5) AND RAMGUTTY NAG *v.* BURODA CHURN (6) *referred to.*

Where such a person sued to recover the accreted land from the holder of the superior interest and from a raiyat who in good faith had taken settlement of the land from the latter :

Held—*That the Plaintiff was not entitled to eject the raiyat.*

The principle of BENODE LAL PAKRASHI *v.* KALU PRAMANIK (7) *applies equally to firm and alluvial lands.*

As against the superior holder, the Plaintiff who, it was found, had never paid him any rent or offered to do so was not given a decree for mesne profits, the former's claim for rent being set off against the latter's claim of mesne profits.

This was an Appeal from a decision of Babu Atul Chandra Batabyal, Subordinate Judge, 24-Parganas, dated the 21st December 1911, reversing that of Babu Gopal Chandra Biswas, Munsif, Basirhat, dated the 8th April 1911.

The facts of the case will appear from the judgment

Babu Shama Charan Roy for the Appellants.

Babus Baidya Nath Dutta, Siva Prasanna Bhattacharjee and *Hit Lal Guha* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Defendants in a suit for declaration of title to immoveable property and for recovery of possession thereof with mesne profits. The case for the Plaintiff, is that the land in dispute forms an accretion to a homestead which belonged to his maternal uncle Raghu Nath Dutt who died in 1885 and that since the death of his maternal aunt in 1898, he has become entitled to hold possession thereof. He further asserts that the homestead was rent free *mahatran* land and that he is consequently entitled to hold the accretion as a rent-free tenure. The first Defendant is the *putnidar* of the village and the second Defendant is a raiyat under him. Their case is that the land does not form an accretion to the homestead of Raghu Nath Dutt and that the Plaintiff has no title thereto. The second Defendant further pleads that he had been in occupation for many years as a tenant under the first Defendant. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision On the present appeal by both the Defendants, the decree of the Subordinate Judge has been assailed substantially on three grounds, namely, *first*, that the Plaintiff is not entitled to hold the land as rent-free *mahatran* ; *secondly*, that if the Plaintiff has any title to the land, he can hold it only on payment of rent to the *putnidar* and *thirdly*, that the second Defendant is a raiyat with right of occupancy and is not liable to be ejected In our opinion, the decree made by the Subordinate Judge is erroneous and must be set aside.

In so far as the first, question, namely, that of the title of the Plaintiff, is concerned, the Subordinate Judge has found that the disputed land forms an accretion to the homestead of his maternal uncle Raghu Nath Dutt, which constituted a rent free *mahatran* tenure. It is not open to the Defendants to challenge these findings in second appeal. But the question remains, whether the Plaintiff is entitled

(5) [1858] Beng. S. D. A. 1836.
(6) 1 W. R. 124 (1864).
(7) I. L. R. 20 Cal. 708 (1893).

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to hold the accretion rent-free on the ground that the parent tenure is held rent-free by him. In our opinion, there is no foundation for the claim of the Plaintiff. Sub sec. (1) of sec. 4 of Regulation XI of 1825 provides that when land may be gained by gradual accretion, whether from the recess of a river or of the sea, "it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by Zamindar or other superior landholder or as a subordinate tenure by any description of under-tenant whatever, provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed and shall not, in any case, be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II of 1819 or of any other Regulation in force. There was a second proviso to the clause, to the following effect, which was repealed by sec. 2 of the Bengal Tenancy Act of 1885. "Nor if annexed to a subordinate tenure held under a superior landholder shall the under-tenant, whether a *khud-kast* raiyat holding a *maurasi istimrari* tenure at a fixed rate of rent per bigha or any other description of under-tenant liable by his engagements or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be jointly liable." On behalf of the Plaintiff it has been argued that as cl. (1) of sec. 4 of Regulation XI of 1825 stands after the omission of the second proviso, the Plaintiff is not bound to pay any rent in respect of the accreted land and is entitled to hold the same rent-free in the same manner as the parent tenure. This contention is clearly fallacious. The second proviso was omitted because provision was made in sec. 52 of the Bengal Tenancy Act for the ascertainment of additional rent payable for additional land in the occupation of the tenant. It is true that the terms of sec. 52 are not directly applicable to the case before us. But we are entitled, indeed bound to act under cl. (5) of sec. 4 of the Regulation. That clause provides that in all other cases, namely, in all cases of claims and disputes respecting land gained by alluvion, or by dereliction of a river or sea, which are not specially provided for by the rules contained in the Regulation, the Courts of Justice in deciding upon such claims and disputes shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not, by general principles of equity and justice." "In the case before us, no evidence has been given of any established local usage applicable to the matter. We have thus to determine the rights and obligations of the parties on general principles of equity and justice. The question consequently reduces to this: Does the circumstance that the Plaintiff holds the parent tenure rent-free entitle him to hold the accreted land rent-free? In our opinion, the question should be answered in the negative. It is plain from the proviso to the first clause of sec. 4 that in case of accretion, the proprietor himself who holds direct under the Go-

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vernment becomes liable to assessment of additional revenue; and the view cannot possibly be maintained on any intelligible principle of equity and justice that the proprietor should be liable to pay additional revenue to Government, but that a subordinate holder under him should be entitled to hold the land without payment of rent to him. If this view were not maintained, the result might be that where a proprietor had made a rent-free grant of a small portion of land included within his estate, the rent-free holder might become entitled by accretion to hold a large quantity of land rent-free, while the proprietor might become liable to the Government to pay additional revenue therefor No rational principle has even been faintly suggested on which a result like this can be defended. It has been argued, however, that the contention of the Plaintiff is supported by a number of judicial decisions and our attention has been drawn to the case of *Mea Jan* v. *Akram* (1) in which Mr. Justice Geidt held that the person to whose land the accretion is formed is entitled to hold the land on the same terms as those on which the parent tenure is held. This proposition was formulated in a case in which the question in controversy was, whether a non-occupancy raiyat was entitled to claim possession of the land which had accreted to his holding, and it was ruled that he was entitled to hold the accreted land as a non occupancy raiyat. The question which arises before us, namely, whether a rent-free holder is entitled to hold the accreted land rent-free, was not in controversy in the case before Mr. Justice Geidt. The same observations apply to the case of *Gouthari* v. *Bholanath* (2), where it was ruled that a raiyat who had a right of occupancy was entitled to the benefit of sec. 4, cl. (1) of Reg. XI of 1825. An examination of the judgment of this Court in the cases of *Golam Ali* v. *Kali Krishna Thakur* (3) and *Chooramonee Dey* v. *Howrah Mill Company* (4) shows that the view we take is not opposed to the principle which underlies these decisions. In fact, in the decision last mentioned, Mr. Justice Mitter held that the rent payable in respect of accreted land might not always be on the same footing as rent payable in respect of the original holding and he pointed out that if in fixing the rent of the original holding a lower standard than the full letting value was adopted in consideration of any bonus paid, it would be unjust to the landlord to fix the rent of the accretion at the rate of rent fixed in respect of the original tenure. This observation applies obviously with much greater force to a case like the present, where we are unaware of the reason why rent was not assessed in respect of the land comprised in the original holding. In our opinion, it is plain that although the Plaintiff is entitled to possession of the accreted land, he is not entitled to hold the same rent-free. He is only entitled to a declaration that he holds the accreted land as a tenant under the first Defendant and is liable to pay rent in respect thereof, the amount to be assessed in a suit properly framed for the purpose. The view we take is in accord with that adopted in the cases of *Rammonee* v. *Oomesh Chunder* (5) and *Ramgutty Nag* v *Buroda Churn* (6).

In so far as the second point is con-

(1) 8 C. L. J. 541 (1907).
(2) I. L. R. 21 Cal 233 (1894)
(3) I. L. R. 7 Cal. 479 (1881).
(4) I. L. R. 11 Cal. 696 (1885).
(5) [1858] Beng. S. D. A. 1886.
(6) 1 W. R. 124 (1864).

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cerned, it has been argued that as the Plaintiff is not entitled to hold the land rent-free, and as he has not only never paid rent to the first Defendant, but has never even offered to do so, he should not be allowed a decree for mesne profits. In our opinion, this contention is just and should prevail. The claim for mesne profits may well be set off against the legitimate claim of the first Defendant to rent. This will govern the rights of the parties up to the date of this judgment. If hereafter the first Defendant interfere with the possession of the Plaintiff, he will be liable for mesne profits.

In so far as the third point is concerned, it has been argued that the second Defendant is not liable to be ejected. This contention is manifestly sound. The Plaintiff has contended that the second Defendant did not specifically state in his written statement that he held as a raiyat under the first Defendant in good faith. Some weight may be attached to this circumstance, but the facts make it plain that the second Defendant is a *bonâ fide* raiyat under the first Defendant. The Subordinate Judge has found that the *chur* formed about the year 1887. Since then, the widow of the original holder Raghu Nath Dutt never took possession of the land. The first Defendant settled the land with tenants and allowed the second Defendant to take possession as a raiyat. The title of the Plaintiff accrued on the 2nd April 1898 on the death of his maternal aunt and the present suit was not commenced till the 2nd April 1910, that is, on the very last day of the period of limitation prescribed by the statute. The position consequently is that the second Defendant has been allowed to remain in occupation of the land for many years and there is really no room for the idle suggestion that he is not a *bonâ fide* raiyat under the first Defendant. There is also no reason why the rule laid down in the case of *Benode Lal Paktashi* v. *Kalu Pramanik* (7) should not be applied to the case of alluvial land. As Mr. Justice Banerjee pointed out in *Peary Mohan Mondal* v. *Radhika Hazra* (8) the principle which underlies that decision is that a tenant who enters upon the land and holds under a *de facto* proprietor *bonâ fide* is entitled to be treated as a raiyat, although the *de facto* proprietor subsequently turns out to be not the real owner. That doctrine is applicable quite as much to firm land as to alluvial accretions. We are clearly of opinion that all the grounds taken by the Appellants must prevail.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge set aside. The Plaintiff will have a decree declaring his right to hold the disputed land as a tenant under the first Defendant upon payment of such rent as may hereafter be assessed in an appropriate proceeding. He will also have possession of the land by receipt of rent from the second Defendant as raiyat under him. As the suit thus stands dismissed against the second Defendant, the Plaintiff will pay his costs both in the Court of first instance and the Court of appeal below. As between the Plaintiff and the first Defendant, each party will bear his own costs in both the Courts below. The Appellants are entitled to their costs in this Court from the Plaintiff-Respondent.

Appeal allowed.

(7) I. L. R. 20 Cal. 708 (1893).
(8) 5 C. L. J. 9 at 14 (1904).

(CRIMINAL REVISIONAL JURISDICTION.)

REV. No. 466 OF 1914.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
23, April.

MADHO CHOWDHURY, Complainant, Petitioner,
v.
TURAB MIAN and ors., Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 247—Complaint by servant on behalf of master—Acquittal under sec. 247 on death of such Complainant—Complaint of same offence by another servant—Previous acquittal if bar to Magistrate's taking cognizance of second complaint—Indian Penal Code (Act XLV of 1860), sec. 426—Maiming an animal.

A servant on behalf of his master filed a complaint that an elephant belonging to his master had been maimed by the accused. The Magistrate receiving the complaint issued process under sec. 426, I. P. C. On the date fixed for the disposal of the case, finding that the Complainant was dead, the Magistrate acquitted the accused under sec. 247, Cr. P. C. Thereupon another servant (the Petitioner) complained to the Sub-Divisional Magistrate of the same offence of maiming his master's elephant, but the Sub-Divisional Magistrate dismissed the complaint under sec. 203, Cr. P. C., on the ground that the previous acquittal was a bar to his taking cognizance of it:

Held—*That the previous acquittal was wholly without jurisdiction and was no bar to the Magistrate's taking cognizance of the second complaint.*

This was a Rule granted on the 23rd of March 1914 against the order of the Sub-Divisional Officer of Beguserai, dated the 12th of February 1914, dismissing under sec. 203, Cr. P. C., the complaint brought by the Petitioner against the accused.

The facts of the case will sufficiently appear from the judgment.

Babu Abani Bhusan Mukerjee for the Petitioner.

Babu Harihar Proshad Singh (for *Dr. Sarat Chandra Bysak*) for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This was a Rule calling upon the District Magistrate of Monghyr and also upon the Opposite Party to show cause why the order of acquittal under sec. 247 and the order of dismissal of the complaint of the Petitioner Madho Chowdhury under sec 203 should not be set aside and the case proceeded with

It appears that an elephant of the zemindar got loose into a chilly field belonging to one Turab Mian. The accused are then said to have attacked the elephant with spears and *lathis* and maimed the animal. Apparently, the learned Magistrate, who heard the complaint did no think that the animal had been maimed, but he issued process under sec. 426 When the day came for disposal, the servant of the zemindar, who had made the complaint, was dead, and the Magistrate adopted the rather extraordinary course, although he knew that the servant was dead, of acquitting the accused under sec. 247, Cr P. C In the meantime, another servant of the zemindar, the present Petitioner, had complained to the Sub Divisional Officer of the same offence of maiming his master's elephant The Sub Divisional Officer dismissed this case under sec. 203, Cr. P. C., on the ground that the previous acquittal was a bar to his taking cognizance of it.

We must point out in the first place that the previous acquittal can be no bar, because it was wholly without jurisdiction, and if it is a bar, it is now going to be removed.

We make the Rule absolute.

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We set aside the order of acquittal under sec. 247 and the order of dismissal under sec. 203, and direct that there should be a further enquiry, and in making that enquiry, it should be ascertained before process is issued what the nature of the injury to the elephant is, for it will largely depend upon that, whether the jurisdiction falls under sec. 426, 427 or 429 and that would affect the course of the proceedings at the trial.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 490 & 491 OF 1914.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
23, April.

ADHAR CHANDRA DEY, Petitioner,
v.
SUBODH CHANDRA GHOSH, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 345—Compromise effected out of Court by parties, pending hearing of rule issued by High Court, if can be given effect to under sec. 345, Cr. P. C.

The Petitioner was the complainant in a case and the accused in the counter-case. The Petitioner's complaint was dismissed by the Magistrate and in the other case he was convicted under sec. 352, I. P. C. He moved the High Court and obtained a Rule in each case, in one for a further enquiry into his complaint and in the other for a reduction of the sentence passed on him. Pending the hearing of the Rules both cases were compromised by the parties out of Court:

Held—*That at the hearing of the Rules the parties had no* locus standi *to ask the Court to treat the compromise as one coming under sec. 345, Cr. P. C.*

This was a Rule granted on the 27th of March 1914, against the order of the 4th Presidency Magistrate, Calcutta, dated the 13th of March 1914, convicting Petitioner under sec. 352, I. P. C., and sentencing him to a fine of Rs 50.

The Petitioner was the complainant in a case and the accused in the counter-case. The Petitioner's complaint was dismissed by the Magistrate and in the other case he was convicted under sec. 352, I. P. C. He moved the High Court and obtained a rule in both cases, in one for a further enquiry into his complaint and in the other for a reduction of the sentence passed on him Pending the hearing of the rules, both cases were compromised by the parties out of Court.

Mr. P. N. Dutt, Babus Dijendra Kumar Ghosh and *Haripada Chatterji* for the Petitioner.

Babus Manmatha Nath Mukerji and *Mritunjoy Chatterji* for the Opposite Party.

Mr. F. N. Dutt.—Both cases have been compromised and in the case in which there was a conviction there would be an acquittal under sec. 345.

[HOLMWOOD, J.—Can you compromise the case here?]

Your Lordships have all the powers of an Appellate Court and the section says that compromise can be made pending an appeal.

[HOLMWOOD, J.—In one case we held that it was doubtful whether this can be done.]

Babu Manmatha Nath Mukerji.—Your Lordships dissented from a Punjab case [*Nidhan Singh* v. *The King Emperor* (1)], but your Lordships allowed the matter to be compromised.

The best thing would be to send the cases to the Magistrate and we can file our application there.

[HOLMWOOD, J.—But the Magistrate has

(1) 5 P. L. R. 252 (1904).

already convicted the accused. The Rule is on the ground of sentence. On such a rule you can't claim an acquittal saying that you have compromised the matter.]

Mr. Dutt.—I am not asking for an acquittal on the Rule. But I am asking your Lordships to give effect to the compromise.

[HOLMWOOD, J.—It will be on record that you have compromised. In the Rule for reduction of sentence the sentence will be reduced as much as possible and the Rule against the order dismissing the complaint will be discharged.]

If the compromise is not given effect to, the case for further enquiry will have to be proceeded with.

[HOLMWOOD, J.—You have stated that there is a compromise and we hold you to it. The rule for further enquiry will be discharged.]

The JUDGMENT OF THE COURT was as follows:—

Two Rules come before us on behalf of Adhar Chandra Dey, one to show cause why the sentence passed upon him should not be reduced and the other on behalf of the same man in the capacity of complainant to show cause why the order of dismissal of his case should not be set aside and a further enquiry ordered. Upon the parties coming before us and stating that they have compromised the matter out of Court, we can give effect to this compromise, as far as we can, by reducing the sentence to a mere nominal fine of one rupee and directing that no further enquiry be made into the counter-charge. The parties certainly have no *locus standi* to ask us sitting here neither as a Court of Original Jurisdiction nor as a Court of Appeal to treat the compromise which they have made of their own free will as one coming under sec. 345, Cr. P. C. No stigma can possibly attach to the Petitioner on account of this petty fine for an equally petty assault.

The Rule 490 is made absolute in the terms we have indicated, and the Rule 491 is discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 599 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
Heard,
21, May.
Judgment,
25, May.

SHERATI SHEIKH, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 494—Prosecution against one of two accused withdrawn—Such accused, if competent witness—Confession and prior statements of such accused if should be produced for cross-examination and contradiction.

The Petitioner along with one M was placed on his trial under sec. 411, I. P. C., but the prosecution against M was withdrawn, under sec 494, Cr. P. C., although no formal order of discharge was recorded. M was thereupon examined as a witness for the prosecution. It appeared that M had made a confession to a Magistrate and this confession was subsequently verified by the same or another Magistrate to whom M made further statements. The confession and these further statements were not placed on the record and copies of these were refused to the Petitioner:

Held—*That notwithstanding the omission to record a formal order of discharge M ceased to be on trial with the Petitioner as soon as the prosecution against him was withdrawn, and that being so he became a competent witness; but for the purpose*

SHERATI SHEIKH *v.* THE KING-EMPEROR.

of cross-examination and, if necessary for contradiction, the prior statements of the witness should have been made accessible to the accused.

This was a Rule granted on the 8th of April 1914 against an order of Mr. M. K. Barmon, Deputy Magistrate of Tangail, dated the 26th of January 1914, convicting the Petitioner under sec. 411, I. P. C, and sentencing him to undergo rigorous imprisonment for three months and to pay a fine of Rs. 40, which order was, on appeal, affirmed by C. H. Moseley, Esq., Additional Sessions Judge of Mymensingh, on the 9th of March 1914.

The facts of the case will appear from the judgment.

Babu Monmotha Nath Mukerjee for the Petitioner.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this case one Sherati Sheikh was convicted on the 26th January 1914 under sec. 411 of the Indian Penal Code and sentenced to rigorous imprisonment for three months and to a fine of Rs. 40.

It appears that in the first instance the Petitioner and one Mojum Khan were placed on their trial together and that on the 6th November, with the consent of the Court, the Public Prosecutor withdrew from the prosecution of Mojum Khan under sec. 494 of the Criminal Procedure Code.

Mojum Khan was thereupon examined as a witness, and it is largely upon this evidence of an accomplice, that the Petitioner has been convicted.

It appears also that prior to the trial Mojum Khan had made a confession [illegible] Magistrate and that his confession was subsequently verified by the same or another Magistrate to whom presumably therefore the confessing prisoner made further statements. The confession and these further statements have not been placed on the record, and on this ground copies were refused to the Petitioner.

On his behalf it is then contended before us, *first*, that no formal order of discharge having been recorded in the case of Mojum Khan, his evidence was inadmissible; and, *secondly*, that the Petitioner has been prejudiced by the failure of the prosecution to produce the confession and further statements of the said witness.

The first contention is based on the case of *Banu Singh* v. *King-Emperor* (1), but in the present case it is clear that notwithstanding the inadvertent omission to record a formal order of discharge the accomplice ceased to be on trial with the present Petitioner as soon as the prosecution against him was withdrawn and that being so he became a competent witness. The matters urged against the value of his testimony do not render it inadmissible.

There can however be no question that for the purposes of cross-examination and if necessary contradiction, the prior statements of the witness should have been made accessible to the accused, and we are at a loss to understand why the Public Prosecutor should have withheld them and why the trying Magistrate failed to compel their production.

We therefore set aside the conviction of and sentence imposed upon the Petitioner and direct that he be re-tried, the re-trial to take place before some other competent Magistrate at Tangail if available, if not at the District head-quarters.

Rule made absolute.

(1) I. L. R. 33 Cal. 1353 (1906).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 808 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
18, June.

KANCHAN MULLIK, and ors., Petitioners,
v.
KING-EMPEROR, Opposite Party.

Appeal in criminal cases—Duty of Appellate Court.

Where it appeared from the judgment of the Sessions Judge in appeal that he practically called upon the Appellants before him to establish to his satisfaction that the first Court had come to a wrong finding :

Held—*That this was not the standpoint from which an appeal in a criminal case was to be approached. In an appeal from a conviction and sentence it is for the Appellate Court as for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the Appellants has been established beyond all reasonable doubt.*

This was a Rule granted on the 18th of May 1914, against an order of Babu U. C. Ray Choudhury, Deputy Magistrate of Khulna, dated the 13th of Ma ch 1914, which was on appeal modified by H. A. Stree', Esq, Sessions Judge of Khulna, on the 25th of March 1914.

The Judgment of the Sessions Judge was as follows :—

"The Civil Court proceedings which led to the occurrence, out of which this appeal arises, have been sufficiently set forth in the judgment. It is alleged that on the 1st January last the peon was prevented by an armed unlawful assembly, of which accused were members, from attaching the judgment-debtor's crops. Later on that day and again on the next day the accused themselves reaped and removed the crops.

"The accused say that the peon actually reaped the crops and has brought this false case in collusion with the Defendant.

"The prosecution have examined 9 witnesses and defence 2 (out of 5 in all) to prove the rival occurrences. The lower Court with the witnesses before it has believed the former, and unless reasonable ground is given me for differing, I must accept that finding of fact. The following criticisms of the prosecution evidence are offered :—

"(1) The witnesses are decree-holder's tenants and P. W. 5 has been convicted in a similar affair.

"(2) The witnesses except No. 2 and the peon prove only the obstruction and not the subsequent reaping of the paddy that day.

"(3) The police have not been called to corroborate the peon's statement that he asked them for help.

"(4) Admittedly over 20 persons were present on the side of decree-holder and accused about 12 in number as alleged could not have driven them away.

"(5) Harmuz accused is not named in peon's report of January 2nd. He is only 13/14 years old and could not have been there.

"(6) On 23rd December last the brother of judgment-debtor and his brother in-law filed a claim before the Munsif and had nothing to gain by this action ; they did not complain after the peon reaped the paddy, because they thought it would be taken to Court.

"None of these contentions leads me to discredit the prosecution story. Decree-holder is the local landholder and local witnesses must be his tenants. The convictions under sec. 144 can rest on the two witnesses corroborated by the reports of the peon at the time. He seems to be speaking the truth and his visit to

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the police is not contradicted. P. W. 2's ignorance of the fact is not a contradiction. If the accused were armed, as it appears, the peon would naturally come away and the decree-holder's party would be powerless without him. Harmuz is mentioned in the report of the 1st, in respect of which occurrence he has been sentenced. Though a boy, he is judgment-debtor's son. The peon would have been more likely to name J. W. (?), if he wished to insert wrong names. I agree with the Magistrate's reasons for rejecting the evidence of *alibi* given by the 'private tutor' who has not passed the Entrance Examination. But I do not suppose that he took any active part in the occurrence and a fine of Rs. 100 is clearly excessive. The filing of the claim case shews only that the judgment-debtor's relations were not likely to allow the paddy to be cut pending decision, and supports the case against them.

"It is to be noted that the allegation that the peon cut the paddy was never suggested in cross-examination, nor made by the accused when examined on 5th February. It first appears in an affidavit on the 7th before the Civil Court and is clearly an after-thought.

I find, therefore, that accused with others obstructed the peon on the 1st January last and formed an unlawful assembly with the common object charged. The substantive sentences passed on Ferasot and Kanchan are not excessive; but the addition of Rs. 100 fine in the case of each Appellant (Rs. 300 in all) is I think unnecessary having regard to the fact that there was no fight. I remit the sentences of fine passed against Ferasot and Kanchan and reduce the fine in the case of Harmuz to Rs. 25 under each section (Rs. 50 in all). In default he will suffer one month's simple imprisonment under each section. The convictions of all Appellants under secs. 144 and 186 and sentencess passed, with above modifications, are confirm d and the Appeal dismissed.

"Appellants will surrender to their bail."

Maulvi S. K. Fazlul Huq for the Petitioners.

The JUDGMENT OF THE COURT was as follows :—

In this case the Petitioners were convicted under secs. 186 and 144, I. P. C., and sentenced—Petitioners Nos. 1 and 3 to three months' rigorous imprisonment and to pay a fine of Rs. 50 under each section and Petitioner No. 2 Harmuz Ali who is said to be a boy of 13 or 14 years of age to pay a fine of Rs. 25 under each section. The sentences of imprisonment on the Petitioners Nos. 1 and 3 were to run concurrently. They obtained a Rule from this Court calling upon the District Magistrate of Khulna to show cause why the order complained of should not be set aside and such other or further order made as to this Court might seem fit and proper on the ground that at the hearing of the appeal by the learned Sessions Judge the learned Sessions Judge approached the consideration of the case from a wrong standpoint. On turning to his judgment we find that he opens his judgment as follows—"The prosecution has examined 9 witnesses and the defence 2 (out of 5 in all) to prove the rival occurrences. The lower Court with the witnesses before it has believed the former, and unless reasonable ground is given me for differing, I must accept that finding of fact." That is to say, he has practically called upon the Appellants before him to establish to his satisfaction that the first Court has come to a wrong

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

Enemy subjects and trading license.

We understand that the Government of Bengal has issued a press Communique intimating to the public, what we already announced in these columns, that the effect of the declaration of war was to annul all contracts and to dissolve all partnerships between British and enemy subjects (Austrian and German). But the Government is apparently disposed to allow the firms so dissolved to be reconstituted and commence business under the management of British subjects. As regards the other question raised by us regarding the grant of privilege to the resident enemy subjects to trade in their individual capacity, we are told that permission can only be given under His Majesty's authority and that each application for such license will be considered on its own merits. This makes it clear that the fact of residence of the enemy subjects in India does not necessarily carry with it the privilege of engaging even in internal trade on their part. The Government is surely justified in taking the general situation and individual cases into consideration and to limit or restrict privileges to enemy subjects as considerations of public safety may require. The net result of the Communique is that British subjects may enter into transactions with enemy subjects for the supply of the necessaries of life, but they may not engage in any general trading transaction with those who have not been given any trading license.

Calcutta Prize Court and enemy vessels.

The proceedings in the Calcutta High Court in the matter of Prizes have resulted in orders transferring the custody of enemy vessels to British authorities and their detention in such custody during the pendency of war. The executive have a right to impress such vessels into service and to put them to such use as they may desire. We said in these columns that *bonâ fide* enemy merchant-vessels which had entered Calcutta port before the declaration of war were not liable to confiscation. The Government has acted wisely in not pressing for an order for the confiscation of such vessels. Although what we have stated before is the general principle of the law on the subject, yet we are of opinion that if Germany has detained English vessels in German ports under similar circumstances, our Prize Court here would be justified in passing orders of detention or even confiscation by way of reprisal. The case of *Fox and others* is an authority for such orders by way of a retaliatory measure. But evidently Germany has not yet intimated to Great Britain what she is going to do with the ships lying in German ports and under such circumstances the only proper order for the Court would be to sanction their detention. As to their being impressed into public service, that is also within the legitimate rights of a belligerent Power. But if the vessel is lost or damaged, when under such service, it will be open to the ship-owner to claim compensation or damages at the conclusion of peace.

Indian Troops and European War.

It is likely that Indian troops will be employed to fight the German and Austrian troops in the continent of Europe. International jurists have long debated about the propriety of employing Asiatic or African troops against a European power. But this controversy has been considerably narrowed down since the Russo-Japanese war. The only limitation that is now seriously urged is in respect of employment of undisciplined savages not under any regular command against civilized troops who have to observe the laws of civilized warfare. During the sack of Pekin it was admitted on all hands that the Indian troops showed far greater respect for the life, property and honour of the men and women of the Chinese people than any other troops of the allies. While the conduct of Indian troops was above reproach that of the Germans was the worst of all. The employment of Asiatic troops under regular officers against European troops can no longer be seriously objected to since the employment of Turcos by the French in the Franco-German war

in 1870, and the employment of Algerian troops by the same power in the present war.

Red Cross and its privileges in war.

We also accord our most hearty welcome to the proposal of raising an Ambulance Corps in Bengal for service in Europe. A few words explaining the legal status of red-cross men in modern warfare will not be here out of place. The red cross of the ambulance badge is not a religious badge but was adopted by way of compliment to Geneva where the first conference for the succour of the sick and wounded was held. A red cross on a white flag or a similar badge on the cap or arm will protect one from being fired at by the enemy. The ambulence camp, field and other hospitals over which a red cross flies are similarly protected. Red-cross people cannot be taken prisoners of war. Only the enemy may impress them for ambulance work but must pay them on the same scale as they pay their own men for similar service and at the conclusion of the war must send them back to their own Government or home at the captor's own expense. But in spite of all these privileges the work that they have to perform requires no less courage and power of endurance than that of a soldier. To sum up, the position of a red-cross man is not merely that of a non-combatant but in the eye of the International law he is a neutral.

Purchase of German War-ships by Turkey.

The alleged sale of the German war-vessels *Goeben* and *Breslau* to Turkey raises a very interesting issue in International law. There is prohibition, no doubt, against a neutral State selling any war-vessels or warlike stores to any belligerents during hostilities, but there is no precedent, so far as we are aware, of a neutral State purchasing such articles from a belligerent. If Turkey would change the names of the two vessels, hoist her own flag, man them with her own crew and intern the German crew and preserve neutrality with the *Entente* powers cannot very well take any exception to Turkey acquiring these vessels by purchase from Germany. Turkey may further plead in justification that her two war-vessels which were in the English dockyards and were to have been delivered to her shortly, having been appropriated by England recently owing to exigencies of war, which England was clearly within her rights to do, Turkey could not let go this opportunity of acquiring two other war-vessels in their place. Turkey may plead that she requires these two war-vessels for maintaining her balance of power amongst her neighbouring neutral States.

But whether the purchase of the war-vessels is a *bona fide* purchase will be tested by the subsequent conduct of Turkey and the part that may be played by these vessels in the present war. If it be but a colourable purchase, we need hardly say that there could be no justification for Turkey giving an asylum to these belligerent vessels in her neutral waters. By the Hague Convention of 1907 belligerent war-ships are forbidden to make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war materials or armaments or supplementing their crew. They may only add to their supplies up to the peace standard and ordinarily, when no repairs are required to make them seaworthy, they are required to leave within 24 hours. They may obtain just enough supply of fuel or provision for the crew, if these have run short, to take them to the nearest home port and they are not to be given any second supply of coal within the next three months of such supply. It may no doubt be said that Russia and France violated these principles during the Russo-Japanese war. In 1904 part of the Russian fleet went round the Cape and part of it went through the Suez Canal. Although the Russian fleet had floating coal depôts with them, yet it is well-known that the war-ships also coaled within neutral territorial waters. Further, the fleet made a long stay both at Madagascar and French Cochin China. But in answer to this it may be said that this was done prior to the Hague Convention of 1907.

Further, it must be said in favour of France that during the actual conflict between Russia and Japan, the right of asylum in respect of Russian war-vessels was strictly and rigorously enforced by her against Russia. The cruiser *Diana* in August 1904, after an engagement off Port Arthur, took shelter in a damaged condition in the French Port Saigon. Thereupon the French Government had the *Diana* disarmed and her crew interned. The same was also done with regard to the Russian war-vessels *Csarewitch* and *Askold* on their entering Kiochow. The Russian destroyer *Roshitelni* which at the same time escaped from Port Arthur took shelter in the Chinese harbour of Chifu. Two Japanese gun-boats captured her in Chinese neutral waters and Japan justified the capture on the ground that she had not been disarmed by China and that when a neutral Power did not fulfil her obligations as a neutral power the belligerent prejudiced thereby is justified in putting the offending warship or any portion of the enemy's military or naval force or war equipments out of harm's way. Such acts, in this view, would not amount to breach of neutrality. But the more approved course for the belligerent is to put pressure on the offending neutral State for the fulfilment of her obligations in this respect by approved measures of reprisal, short of war, such as blockade and the like.

War-ships and asylum in neutral waters.

We shall show now that the rules adopted at the Hague Convention in 1907 are not mere abstract formulæ but are based on approved practice of all the world powers. The rule of 24 hours' stay and limitations as to obtaining supply of coal, provision and repairs are well illustrated by the following instances which occurred during the Russo-Japanese war. The Russian cruiser *Terek* went into the port of Batavia in June 1905, being greatly in need of coal and provisions. The Dutch Government adhering to the practice gave permission to the Russian vessel to obtain as much supply of coal and provision as was necessary to proceed to some Russian port but warned her against the transgression of the 24 hours' limit of time. *Terek* after coaling for 24 hours found that the supply of coal would not be sufficient to carry her to any Russian port and applied to the Dutch Government for an extension of time for further supply of coal. This was refused and the cruiser was disarmed and detained by the Dutch Government at Batavia till the termination of war. The Chinese Government similarly on the representation of Japan after the outbreak of hostilities in February 1904 ordered the Russian war-ship *Mandjur* to leave Shanghai within 24 hours. As the Russian vessel tarried, she was eventually disarmed, the vital parts of her machinery being taken out and breach blocks of her guns removed and her crew sent back to Russia under a pledge not to engage in hostilities against Japan during the war. The United States Government acted similarly with regard to the Russian auxiliary cruiser *Lena* which came into San Francisco harbour in September 1904 after an engagement with Japanese fleet with her boiler and engine damaged. As such repairs would enable her to engage in an action, it was refused and she was disarmed and her crew put under parole in the United States till the termination of war. The Russian war-ships *Askold* and *Grozovoi* which in August 1904 sought refuge at Shanghai was similarly treated by the Chinese Government after an appeal by Japan to the European powers and issue of an ultimatum to China. The disarmament of *Diana* by the Franch has already been noticed. Lastly even Germany, who in the present war is arbitrarily violating the ordinary canons of International law and obligations in respect of neutral estates, in August 1904 when the Russian war-ships *Czarevitch* and *Novik* with several smaller vessels took shelter in Kiochow, ordered the *Novik*, which was seaworthy, to leave within 24 hours, and the other vessels which were unseaworthy were disarmed and their crew interned till the end of the war.

Correspondence.

To the Editor, "Calcutta Weekly Notes."

Sir,

In an undefended mortgage suit for the recovery of about Rs. 4,000 the Plaintiff's attorney demanded and the mortgagor had to pay over Rs. 2,400 to the said solicitor on account of his costs only—costs amounting to more than sixty per cent. of the value of the claim—although the proceedings had throughout been without any contest or opposition. Of this about Rs. 400 represented the taxed costs of the suit and Rs. 2,000, the costs subsequent to the decree. In the Court of a Subordinate Judge the costs of execution of a similar mortgage-decree would not exceed Rs. 100. In the Original Side, if the bill of the solicitor was a legitimate one, it is twenty times as much; for costs subsequent to the decree realized by the solicitor in the case mentioned amounted as stated to no less than Rs. 2,000.

The situation is simply distressing in more respects than one. Under the rules of the Original Side, the judgment-debtor is absolutely helpless, and is placed completely under the mercy of the solicitor of his adversary. He is bound to pay without any question whatever amount the Plaintiff's solicitor may be pleased to demand from him as costs.

The unfortunate judgment-debtor in this particular case tendered through his attorney the whole of the amount due to the Plaintiff on account of principal and interest and tendered also Rs. 1400, as costs and offered to pay the balance of costs, if any, on the bill being taxed. The money was refused and additional costs of Rs. 300 were claimed and realized, because there was a delay of two or three days. Evidently, therefore, the judgment-debtor has no right to claim any enquiry, before payment, as to the fairness or otherwise of the costs claimed from him. Even the right to get a copy of the bill he is required to pay to the last farthing evidently does not exist. For the solicitor in this case even refused to furnish a copy of the bill though requested by the solicitor of the Defendant to do so.

Can helplessness of litigants go any further? The root of the evil lies in the unique and extraordinary privilege which entitles a solicitor to charge separate fees for every separate bit of work that he might choose to do on behalf of his client and record in his day-book. Unlike other lawyers remuneration of solicitors is not payable in a lump for all work done in connection with any suit or proceeding. The main grievance of the poorer litigants of the Original Side is the method and the scale of remuneration of solicitors and the absence of the *ad valorem* scale of payment with a maximum fixed such as is prevalent everywhere

in every Court in the Province including the Appellate Side of the High Court.

If vakils and District Court pleaders can manage undefended mortgage-suits in the Mofussil with a fee of 2½ per cent. only, why force litigants to pay over 50 per cent. for identically the same work to the solicitors in the Original Side of the Calcutta High Court?

Introduce the system of *ad valorem* payment of costs with a maximum and the agitation for a City Court so far from being supported would be strongly opposed by a considerable section of the intelligent public.

Yours faithfully,
A VICTIM.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[ON APPEAL FROM THE CENTRAL PROVINCES.]

THE LORD CHANCELLOR.
LORD MOULTON.
LORD SUMNER.
SIR JOSHUA WILLIAMS
SIR CHARLES FITZPATRICK.
1914,
21st July.

TAKHAT SINGH,
v.
THE KING-EMPEROR.

Special leave to appeal in a Criminal case cannot be granted where the ground of appeal raises the question of credibility of evidence alone.

This was an application for special leave to appeal. The Petitioner was tried with seven other persons for offences under secs. 302 and 307 of the Indian Penal Code before the Sessions Judge at Jubbulpore and two Assessors. The Sessions Judge disagreeing with both the Assessors acquitted two persons, namely Gulab and Sukke and convicted the rest including the Petitioner. The Petitioner was sentenced to death on the charge of murder, and to transportation for life upon the second charge. On appeal the Judicial Commissioners, by their judgment dated the 30th March 1914, affirmed the order of conviction and sentence against the Petitioner and others excepting one Raghubir Prasad. As to this accused there was a difference of opinion and the case was therefore referred to a third Judge with the result that Raghubir Prasad was acquitted. The case for the prosecution rested almost entirely on the testimony of a witness Bhau Singh who identified the accused. The story told by this witness was not accepted by one of the Assessors, and the other Assessor did not accept it in so far as it implicated the Petitioner and Raghubir Prasad and Gulab. The Sessions Judge did not accept it in so far as it implicated Gulab and Sukke, and the Judicial Commissioners did not accept it in so far as it related to Raghubir, Prasad, Gulab and Sukke.

After filing the petition for special leave, the sentence of death against the Petitioner was commuted into that of transportation for life.

Sir Robert Finlay, K. C. (with him *Mr. A. M. Dunne*) for the Petitioner appeared in support of the petition for special leave. He submitted that the conviction was based on the very unsatisfactory evidence of Bhau Singh, whose testimony was not believed by the Courts below in relation to three persons. There was no difference between the case for the prosecution against Raghubir Prasad and the Petitioner, and he submitted that there was no reason why, upon the evidence of the same witness, the Petitioner should be convicted when Raghubir Prasad was acquitted.

Their Lordships rejected the petition.

The LORD CHANCELLOR remarked that the argument on behalf of the Petitioner turned upon a pure question of fact and the credibility of evidence, and that it did not come within the rule in *Dillet's* case.

Messrs T. L. Wilson & Co., for the Petitioner.

B. D. *Leave refund.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WOODROFFE and COXE, JJ. APPEAL FROM APPELLATE DECREE No. 2826 OF 1912. SADHU CHARAN DUTTA, Defendant No. 1, Appellant *v.* HARA NATH DUTTA AND OTHERS, Respondents. 11th August 1914.

Appeal—Preliminary decree—Final decree, no appeal preferred against.

The appeal was against a preliminary decree for partition. Before the filing of the second appeal, a final decree wes passed and there had been no appeal filed against the final decree.

Held, that as the preliminary decree which was passed had been affirmed by the final decree and the final decree was itself not made the subject of appeal, no appeal lay.

Khirodamoyi Dasi v. *Adhar Chandra Ghose* (18 C. L. J. 321) followed.

Ram Nath Singh v. *Basanta Narain Singh* (17 C. W. N 868) distinguished.

Babus Gunada Charan Sen and *Surendra Nath Das Gupta* for the Appellant.

Dr. Sarat Chandra Basak and *Babu Bepin Chandra Bose* for the Respondents.

A. T. M. *Appeal dismissed.*

KANCHAN MULLIK *v.* KING-EMPEROR.

finding. This is not the standpoint from which an appeal in a criminal case is to be approached. In an appeal from a conviction and sentence it is for the Appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the Appellants has been established beyond all reasonable doubt. We are therefore of opinion that the order of the Appellate Court must be set aside and we accordingly set it aside and direct that the appeal be re-heard. At the re-hearing of the appeal it will be for the consideration of the Sessions Judge whether the cumulative sentences in the case of Harmuz Ali ought or ought not to be affirmed. In these terms we make the Rule absolute.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MOULTON.
LORD SUMNER.
LORD PARMOOR.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 24, February & 2, 3 & 4, March.
Judgment,
16, July.

RAJA SRINATH ROY and ors., Appellants,
v.
DINABANDHU SEN, since deceased, and others, Respondents.

Jalkar-*rights—Tidal navigable river, grant of exclusive fishery in—Shifting of river from its bed—Grantee's right if confined to water on soil of river at date of grant—Right to "follow the river"—English law of waters, deviation from, if justified by special circumstances of Lower Bengal—English common law when to be adopted—Right to the soil, if affected—Fishery, right of, in overflooded* jheel *whose—River's encroachment, if must be gradual to permit extension of fishery rights—Government grant of exclusive fishery—Proof, when original grant not forthcoming, by secondary evidence and evidence of user—Foreign law, extension to India, to be permitted under what safeguards—Rule of law affecting property rights established by Courts in Bengal, if should be upset in the absence of proof that rule unjust or flagrantly inexpedient.*

The Indian Courts have in many respects followed the English law of waters. But they have never gone to the point of holding that the exclusive right of fishing in tidal navigable waters granted by Government to private owners is so indissolubly bound up with its ownership of the soil subjacent to those waters that no matter how the waters may subsequently change their course, while still remaining part of the same river system within the up-stream and down-stream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them.

It must now be taken as decided in Bengal that the grantee in such a case can follow the shifting river for the enjoyment of the exclusive right of fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant—the right being made to depend on the identity of the river in which it is enjoyed and not being confined to such waters of the river only as are superimposed on the very land once owned by the grantor of the right.

Even enclosed jheels *belonging to riparian owners on becoming covered by the shifting river become subject to the grantee's* jalkar *right.*

Held—*That this deviation from the English law is justified by the special circumstances of Lower Bengal.*

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day

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regard must be had to the physical, social and historical conditions to which that rule is to be adapted.

The Judicial Committee would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of jalkar, *and unless they could be shown to be manifestly unjust or flagrantly inexpedient they would not supersede them.*

The rule which in the United Kingdom connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal.

English tenures and Bengal Zamindari rights unduly assimilated at one time, have never fully corresponded to one another. Above all, the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness.

Jalkar *rights in navigable waters in Lower Bengal settled with a grantee under a Revenue Settlement by the Government are derived from the Crown—the freehold of the bed of navigable rivers being deemed to be in the Crown.*

Indian decisions on jalkar *have followed English analogy closely in holding that when the bed of a river thus forms part of the public domain the public at large is* primâ facie *entitled to fish, and also that a sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil, though the flooded landowner must, if the water in the new course be in fact navigable (that is capable of being traversed by a boat at all seasons), submit to have his land traversed by the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation.*

The right of the owner of the fishery to "follow the river" ought not to be limited to cases where the river's encroachments are gradual as in the case of alluvial accretions to land, the analogy not being in pari materia.

The evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear.

In the case of grants of more than a century old, as the original grants are in practice but rarely forthcoming, resort must be had to secondary evidence of them or to the inference of a legal origin to be drawn from long user.

HORI DAS MAL *v.* MAHOMED JAKI (1) *approved.*

This was an Appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 11th March 1908, on an appeal from a judgment and decree of the Court of the Additional Subordinate Judge of Faridpur, dated the 30th June 1905.

The main question for determination in this appeal was as to whether the Plaintiffs-Appellants were entitled to a decree for possession of a *jalkar* or fishery in one of the channels of the Ganges or Padma River in the district of Faridpur.

(1) I. L. R. 11 Cal. 434 (1885).

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The facts relating to this litigation are shortly as follows :—

The Appellants are the proprietors in possession of a Zamindari known as Pargana *char* Mukundia standing in the name of a former proprietor Ram Kristo Roy, formerly Tauzi No. 110 of the Dacca Collectorate and now No. 4900 of the Faridpur Collectorate.

Amongst the items constituting this estate was included a *jalkar* mahal or fishery described as the River Balabanta Bil Baor.

On the 9th Aghran 1279 (23rd November 1872), a predecessor-in-interest of the Appellants granted a *patni* lease of the said *jalkar* to Grish Chandra Guha and Bepin Chandra Guha.

In 1882 the Appellants purchased the two-thirds share of the said Grish Chandra Guha in the said *patni* lease of the said *jalkar* at an auction sale in execution of a decree obtained by the former against the latter and have been in possession thereof since their said purchase.

The *pro formâ* Defendants-Respondents, are the owners of the remaining shares in the said *patni* lease.

This *jalkar* had been in the ownership and possession of the Appellants and their predecessors-in-title from time immemorial and it was settled as a distinct mahal as part of their said estate *char* Mukundia at the time of the Permanent Settlement and had been held and enjoyed as such since that time.

The Balabanta River was at the said date a local name for the main stream of the Ganges or Padma River. It was admitted at the trial on behalf of the Respondent No. 1, and it was the fact that the Balabanta was a tidal navigable river, the name itself denoting a strong running stream and the words Bil Baor denoting marshes and lakes.

The boundaries of the *jalkar* as given in the *Chauhaddibandi* paper for the year 1202 (1795) were not now traceable, as the names therein referred to have long since disappeared.

The *jalkar* was an extensive and valuable one, and from the year 1797 there were repeated attempts by the proprietors, *ijaradars* and tenants of Pargana Bikrampur, which was situate lower down the river and on the opposite bank to *char* Mukundia, to encroach on the rights of fishery settled with and possessed by the owners of the latter estate. Such attempts led to affrays and litigation in which the extent of the *jalkar* rights of the Zamindars of *char* Mukundia under their settlement was raised and determined.

The Bikrampur contention was that the main stream of the river opposite Pargana Bikrampur belonged to the *jalkar* of that estate and did not fall within the *jalkar* of *char* Mukundia, the down-stream limit of which they alleged was at *char* Nawabganj higher up the river.

The *char* Mukundia contention was that their *jalkar* rights extended along Pargana Bikrampur to a point further down the main stream, *i.e.*, to *char* Shahabdin on the left bank and to Harina on the right bank in Pargana Jalalpur, localities far beyond the limits of Pargana *char* Mukundia.

In 1797 a suit was instituted by the *Talukdars* of the said *jalkar* in the river Balabanta; they being tenants of the *char* Mukundia estate against tenants of the Bikrampur estate for the recovery of possession of the above disputed portion of their said *jalkar* claiming that its down-

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stream limit was *char* Shahabdin and Harina as above stated.

On the 17th February 1797, a decree was made in their favour and possession of the said *jalkar* was ordered and given to the Plaintiffs therein, the down-stream limit being definitely fixed and marked as above stated.

In 1816 the then Zamindars of *char* Mukundia instituted a suit against the Zamindar of Bikrampur for possession of the said *jalkar* mahal. The section of the main stream of the river in dispute was the same as before and the question turned again on the position of the down-stream limit of the *jalkar* of the Balabanta River.

The suit was decreed on the 11th September 1816, on the basis of the limit fixed in the previous suit, it being found and held that possession had been granted to and held by the Plaintiffs in the said suit up to the limit aforesaid.

In 1843 the Zamindar of Bikrampur filed a suit against the then Zamindar of *char* Mukundia to set aside the decisions in the previous suit and to recover possession of the *jalkar* in the said section of the river.

On the 28th June 1843, the said suit was dismissed with costs ; it was found and held *inter alia* that possession of the said disputed *jalkar* by the then Defendant and his predecessors Zamindars of *char* Mukundia from before 1797 had been proved and that the suit and claim were barred by limitation.

No suggestion was ever made that the River Balabanta was not a part of the main stream of the Ganges or Padma.

On the 27th February 1859, the Collector of Faridpur under Regulation II of 1819 directed an assessment for the Government Revenue purposes of the *jalkar* of the River Padma from Haziganj, the up-stream, to Harina, the down-stream limit.

On the 23rd March 1860, the then proprietor of *char* Mukundia filed a petition of objection to the said assessment on the ground that the said *jalkar* of the River Balabanta, commonly called Padmabati, had been in existence from before the time of the Decennial Settlement and had been already assessed.

On the 11th January 1861, by a *rubokari* of the Collector of Faridpur the assessment claimed was rejected on the ground that the said *jalkar* had been included as a mahal in the Zamindari *char* Mukundia from before the Decennial Settlement, that the Balabanta and the Padma are the same river, and that no fresh assessment could be made.

On the 30th April 1861, the order of the Collector was affirmed on appeal by the Commissioner of the Division.

The said *jalkar*, bounded as aforesaid, had been throughout leased by the Zamindars of *char* Mukundia to tenants and *ijaradars* and then to *patnidars*, and had been possessed and held by them. The River Balabanta had always been known and described as another name for that section of the Ganges or Padma.

The river has since the Decennial Settlement changed its bed and its channels at many periods. Its course has necessarily altered from time to time in consequence of the river dividing itself and forcing its way through new channels.

Many years ago the main river branched off into a very considerable stream in that locality, which joined it again a little lower down. It was known as the Bhubaneswar, but the name was also used and came to be known as denoting the main stream of the Ganges or Padma.

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In 1894 the *ijaradars* of the Appellants' *jalkar* instituted two suits against certain tenants of the Respondent No. 1, one of the parties being the father of the present Defendant No. 10, in the present suit, for damages for wrongful interference with their possession of a channel or stream flowing out of the main river within the limits of their fishery rights and forming a part of their *jalkar*. The said stream flowed between the *char* lands of, amongst others, the Appellants and the Respondent No. 1.

The suits were defended, in fact on behalf of and in the interests of the said Respondent, and amongst other defences raised, it was contended that the said disputed stream was not within the Appellants' *jalkar* inasmuch as it did not form a part of the main stream of the River Padma.

On the 17th May 1895 the suit was decreed in favour of the Plaintiffs, it being held that the stream was within the area of the Appellants' said *jalkar*, and that the River Balabanta was the Padma.

On the 20th November 1896, and 28th April 1897, the said judgment was affirmed on appeal and on review.

It was held that the area in which the *jalkar* was claimed was a part of the Padma proved to be the same as the Balabanta; that there was ample proof of the Plaintiffs' possession of the *jalkar* up to the time of the trespass; that a *jalkar* in the Padma must necessarily be a shifting thing incapable of being confined within permanent boundaries; that the Padma does not form part of and has not been thaked with any estate, and that a *jalkar* in it is not a landed interest determined by the boundaries of the estate, and is a separate right enjoyable wherever the bed of the tidal and navigable Padma is.

In 1304 (1897) a further portion of the said stream opened out also within the area and limits of the Appellants' *jalkar* rights which flowed from the main river into the Bhubaneswar and so again joined the Ganges or Padma a little lower down.

The Appellants exercised and claimed to exercise their *jalkar* rights therein. The Respondent No. 1 through his tenant and others interfered with and prevented them from so doing, and claimed that the Appellants' *jalkar* rights did not extend to a certain section of the said stream inasmuch as he the Respondent No. 1 was the riparian owner of the land on each side.

On the 18th September 1903, the Appellants instituted the present suit in the Court of the Additional Subordinate Judge of Faridpur against the Respondent No. 1 and his tenants joining as *pro formâ* Defendants their said co-sharer *patnidars* of the said *jalkar*.

The Appellants prayed *inter alia* for a declaration of their rights, for a decree for possession of the said disputed portion of their said *jalkar*, as specified in their plaint, for an injunction, mesne profits, and costs.

On the 27th January 1904, the Respondent No. 1 filed his written statement in defence.

Amongst other contentions he denied the Appellants' rights in the *jalkar* of the River Balabanta as claimed; he denied that Government had settled the said *jalkar* with the Appellants' predecessors or that the River Balabanta was the same as the Ganges, Padma, or Bhubaneswar or that the Appellants or the said *patnidars* had ever possessed the said *jalkar* and he alleged that the disputed *jalkar* did not appertain to the Appellants' *jalkar* but to the said Respondents' estate No. 5307

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and he prayed that the suit should be dismissed with costs.

On the 5th February 1904, issues were framed for trial.

The only material issues for the purposes of this report are the 9th, 11th and 12th.

9th.—Whether the Plaintiffs have ever obtained a special grant over the *jalkar* in suit.

11th.—Was there any such navigable river as Balabanta as alleged by the Plaintiffs? Does the disputed *jalkar* appertain to Balabanta River and Bil Baor and are the Plaintiffs entitled to it, though it may now be on land outside their Zamindari?

12th.—Have the Plaintiffs any right over the *jalkar* in suit? Have they acquired any right to it by adverse possession? Have they acquired any prescriptive right over it? Are these rights inconsistent?

It was admitted by the Respondent No. 1 that the Appellants are the proprietors of Zamindari *char* Mukundia.

On the 16th and 25th May 1904, orders were made appointing a Commissioner to make a local investigation.

On the 15th September 1904 and 24th February 1905, he made his reports.

The trial of the case lasted from the 25th April to the 24th May 1905, and much evidence, oral and documentary, was adduced on both sides.

The Respondent No. 1 alone appeared and defended the suit.

On the 30th June 1905, the Additional Subordinate Judge delivered judgment and made a decree in favour of the Appellants with costs.

He held that the Appellants had established their title to the said *jalkar* in the River Balabanta, which was the same [illegible] he Ganges or Padma and had proved [illegible] inuous possession thereof from before the time of the Permanent Settlement; that the disputed *jalkar* was in fact partly within and partly without the limits of the land of the Appellants' Zamindari; that their *jalkar* rights constituted a separate mahal; that the disputed stream was within the limits and formed a part of their said *jalkar* and that the Appellants had been in possession thereof until dispossessed by the Defendant No. 1 and his tenants.

The Respondent No. 1 on the 17th August 1905 appealed to the High Court at Calcutta against the said judgment and decree.

On the 11th March 1908, the High Court delivered judgment, set aside the decree of the lower Court, dismissed the Appellants' suit, and decreed the appeal with costs.

It held that the disputed *jalkar* was in a stream flowing over land of the Defendant No. 1; that it was a branch of the Padma, and not of the Balabanta or Bhubaneswar River; that it came into existence only eight years previously, and that therefore no prescriptive rights therein could arise; that no express grant to it had been proved, and that therefore the Plaintiffs had established no title thereto; that it was outside the land of the Plaintiffs' Zamindari; that the Thak proceedings of 1859 negatived the existence of any *jalkar* rights of the Plaintiff outside the limits of his Zamindari; that the decree of the 11th September 1816 expressly excluded the Ganges or Padma River from its declaration as to the Plaintiffs' rights of *jalkar* in the Balabanta River; that the proceedings and decrees in evidence were not binding upon the Defendant No. 1 and his tenants and that the Plaintiffs' suit failed and must be dismissed.

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The High Court (Harington & Holmwood, JJ.) in the course of its judgment observed as follows :—

"In this state of facts it appears from the Defendants' evidence, which is strongly corroborated by the amin's map and also receives support from some admissions in cross-examination of the Plaintiffs' witnesses, that in 1897 a stream known as the Shaitan *khal* broke through some marshy land in the Government *char* Nawabganj, and cutting through the Plaintiffs' and the present Defendants' *chars*, joined the old bed of the Bhubaneswar, a little above the down-stream limit of the Plaintiffs' *jalkar*, as alleged in the judgment of 1843.

The question that arises in this case is - Can the Plaintiff claim a *jalkar* right to the fishery in this stream as part of his *jalkar* Balabanta Bil Baor?

The stream in dispute had its origin from the main stream of the Padma above the up-stream limits of the Plaintiffs' *jalkar*, and this seems to distinguish the case from those where a river in which the zamindar has a franchise or incorporeal right of fishery, changes its course and is diverted to a bed outside his zamindari.

In the case of *Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (2) it was laid down that a private right of fishery in a tidal navigable river must, if it exists at all, be derived from the Crown and established by very clear evidence, as the presumption is against any such private right.

In the Full Bench case [*Hori Das Mal* v. *Mahomed Jaki* (1)] it is laid down that the Crown has power to grant the exclusive right of fishery in tidal navigable rivers to private individuals. Such a right, however, must ordinarily be proved either by proof of a direct grant from the Crown or by prescription.

Now, in this case there is absolutely no direct evidence of any grant of a *jalkar* in a tidal navigable river. The descriptions of the *jalkar* in the *Hastbud* papers, the quinquennial papers and the Thak Survey Register of 1862 go very much the other way.

The proceedings of 1816 seem to show that the navigable river Padma was excluded from the *jalkar*, and it is not till 1843 that we get a distinct claim to the *jalkar* mahals of the river Padma, etc., though even in these proceedings there is no claim to fish in a tidal navigable river. On the contrary, the judgment recites that the river has washed away the boundaries of the *jalkar* mahal, which seems inconsistent with the river being included in the *jalkar*.

It is true that the Plaintiffs and their predecessors appear to have established a right by prescription against certain proprietors, north and east of the present Defendants, but they have established no such prescription against the Defendants inasmuch as they admit that they were dispossessed some four years after the stream broke into the Defendants' land from the north-west. That stream was a branch of the Padma and not of the Balabanta or Bhubaneswar river, and it broke out of the Padma above the Plaintiffs' *jalkar*.

It seems to us that whatever declarations the Plaintiffs may have obtained in the Courts, and whatever kabuliyats may have been given to them by fishermen in respect of other streams flowing through other zamindaris, the present Defendants cannot be bound by any such declarations in the absence of an express grant and of prescriptive user in a stream which had only been in existence 8 years before suit, during 4 years of which period the Plaintiffs had apparently lost possession. The learned Subordinate Judge in the Court below appears to have absolutey disregarded the entry of the boundaries on the Thak map Register of 1862, and to have relied on the rough sketch map filed by the Plaintiff, instead of the carefully prepared but cumbrous map of the Commissioner. We have, however, carefully analysed this map in every point, and we find that it does not support the case as made on the Plaintiffs' map.

And this divergence is of very great importance inasmuch as the Plaintiff alleges that the whole of Defendants' *char* was diluviated by the main stream, and that it is the formation of a *char* in front of the Plaintiffs' and Defendants' estate, that has formed the new channel, which is, therefore, part and parcel of the main stream. The amin's map entirely negatives this, and shows that the stream in dispute is a tortuous stream whose very name goes to corroborate the evidence that it broke in suddenly from the Padma on the north, and does not re-join the Padma at all, but falls into the old bed of the Bhubaneswar, which in its turn joins the Padma many miles lower down and far beyond the down-stream limits of the Plaintiffs'

(1) I. L. R. 11 Cal. 434 (1885).
(2) I. L. R. 4 Cal. 53 (1878).

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alleged *jalkar*. In dealing with the documents he assumes that the Balabanta *jalkar* is an ascertained grant to fish in a tidal and navigable river, and thus begs the whole question. He refers to the leases and evidence of possession of this *jalkar* by the Plaintiffs, and from this finds prescription against the present Defendants, and an omission on their part to seriously contest that the Plaintiffs had such a *jalkar*. That the Plaintiffs had a *jalkar* outside Defendants' land, the Defendants are not concerned to deny; the whole question is—Was that *jalkar* a grant of an incorporeal right from Government over a network of tidal navigable rivers, or was it a right pertaining to their pargana *char* Mukundia only. He says the *jalkar* has been found by the Commissioner to be partly on the land of the Defendants. What *jalkar?* He does not seem to distinguish between two *jalkar* rights of a totally distinct character, *viz.*, the *jalkar* by special grant over the network of tidal rivers, and the territorial *jalkars* appertaining to the respective estates of the parties. Finally, he bases his decision as to the *jalkar* appertaining to the Plaintiffs' *jalkar* by accepting completely the Plaintiffs' erroneous map and their incredible evidence thereon. Nothing was said to us as to the curious statement in the Subordinate Judge's judgment that the Commissioner found that the *jalkar* in respect of which the Plaintiffs' *ijaradars* sued the father of the Defendant No. 10 and Defendant No. 1's naib was identical with the *jalkar* in suit. We have been through the whole of the Commissioner's report and connected papers, examined the evidence of Sridhar Chakravarti, the naib in question, given on several different occasions, and we cannot find one word about any such case, nor is there any documentary evidence of it on the record. Had there been such a case, it would have been most important evidence. We can only imagine that it was not referred to at the Bar, because no trace of it appears on the record.

In connection with the amin's report it is an important circumstance that the *jalkar* on the Dacca bank of the river Padma appears from his map to belong to the Nawab of Dacca, and he complains in his report that the officers of the Nawab protested against his taking evidence from the Plaintiffs' side, which might affect their master's rights. This indicates that other proprietors of the lands abutting on the river Padma do not admit the existence of the very extensive rights claimed by the Plaintiffs.

We cannot, on the meagre and unsatisfactory evidence before us, presume an improbable grant of rights of such an extensive nature. Having regard to all these facts and circumstances it appears to us that the case must be decided on the principles laid down by Brett, J., in the case of *Mathura Nath* v. *Shib Chander* (35). Where the *jalkar* has been asserted as one held in connection with a zamindari, the only possible meaning of this expression, according to the Judges who decided that case, is that it was one dependent on the zamindari and included within it. The fact that the revenue of the fishery was separately set out in the settlement of the estate, made by Government with the predecessor-in-title of the Plaintiffs, would be no indication that the *jalkar* was separate and independent from the estate. The mere separate specification of the amount of revenue calculated on the basis of the profits realised from fisheries with the estate, is no proof that there was a separate grant of a fishery independent of the estate; nor is it reasonable to suppose that a person having independent rights to a fishery, irrespective of his estate, would consent to have his separate estate in that fishery, and the revenue due in respect of it amalgamated with his rights and the revenue of his landed estate, which was what was done both in the release proceedings of 1861 and the Thak proceedings of 1862 The only evidence which goes beyond these matters are the judgment of 1843 against the Bikrampur zamindars, and the assertions of Mr. Wise and his sub-lessees and successors of such a right against other zamindars in the neighbourhood.

The assertions of Mr. Wise are no evidence against the Defendants.

The decision in the case in 1843 does not bind the Defendants who were not parties to the suit, and do not claim through any persons who were parties, for the stream now in dispute has only recently made its appearance in the Defendants' zamindari. As against the Defendants, therefore, this is no question of limitation or prescription.

The Respondents, to succeed against the Appellants, must prove a distinct grant of a fishery extending beyond the limits of their pargana. There is no direct evidence of any such grant. The entry in the Thak map of 1862 negatives the contention that the boundaries of the fishery ex-

(35) 12 C. W. N. 884 (1907).

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tended beyond the limits of Joar Bistupur, which, in its turn, is within the territorial limits of pargana *char* Mukundia. We, therefore, find that the Plaintiff has failed to establish his case of a *jalkar* such as that claimed by him in the Defendants' zamindari, and we allow the appeal, and setting aside the judgment and decree of the Subordinate Judge, order that the Plaintiffs' suit be dismissed with costs in both Courts."

Hence this Appeal.

Mr. L. DeGruyther, K. C., and *Mr. A. M. Dunne* for the Appellants submitted that the Appellants had established their title to the *jalkar* in the Balabant or Ganges or Padma river, and in the newly formed navigable channel of the river over the Respondents' land. The *jalkar* was settled with the Appellants as a distinct mahal at the time of the Permanent Settlement, and they have held and enjoyed the exclusive right of several fishery therein for over 100 years. No grant or other documents from the Government were now forthcoming but from long user legal origin ought to be presumed in favour of a grant of the fishery to the Appellants.

The boundaries of the fishery although originally fixed could not now be traced, but the Appellants' documentary evidence fully established that the *jalkar* extended beyond the zamindari of the Appellants. (Counsel referred to the *robokari* of the Court of Collector of Faridpur, dated 11th January 1861, and several proceedings in litigation.) The various names of the Ganges were only local names of one and the same river. The High Court was wrong in holding that the newly formed channel was not part of the Balabant or Bhubaneswar river. The main objection of the Respondent was that the Appellants could not exercise the right of fishery over the Respondent's land. But it was settled law in India that a fishery could be exercised upon the land of another. The right in a tidal and navigable river vested in the Government, and the Appellants being grantees from the Government were entitled to the right of fishery in the river and all its channels, so long as they retained their navigable character. Ever since 1807 it had been held that if a tidal and navigable river changed its bed, the owner of *jalkar* rights in the old channel was entitled to enjoy them in the new one. The fact that the land of the new channel did not belong to the Government at the time, or belonged to some other riparian owners, did not affect the right of fishery.

Reference was made to the following authorities: *Ishurchund Rai* v. *Ramchund Mokhurja* (3), *Gopeenath Roy* v. *Ramchunder Tuřkalunkar* (4), *Lukhee Dassee* v. *Khatima Beebee* (5), *Nubkishen Roy* v. *Uchchootanund Gosain* (6), *Ramanath Thakoor* v. *Eshan Chunder Bonnerjee* (7), *Gureeb Hossein Chowdhree* v. *Lamb* (8), *Krishnendro Roy Chowdhry* v. *Maharanee Surno Moyee* (12), *Tarini Churn Sinha* v. *Watson & Co.* (13), *Jogendra Narayan Roy* v. *Crawford* (15), *Bhaba Prasad* v. *Jagadindra Nath Rai* (16), *Forbes* v. *Meer Mahomed Hossein* (21).

Mr. G. R. Lowndes (with him *Sir Robert Finlay, K. C.*) for the Respondents submitted that the Appellants had failed.

(3) 1 S. D. A. Rep. 221; 1 Morley's Digest p. 561 (1807).
(4) 1 Mac. Sel. Rep. 228 ; 2 Sev. Rep. 467n (1808).
(5) 2 S. D. A. Rep. 51 (1813).
(6) 2 Sev. 465n (1856).
(7) 2 Sev. 463 (1863).
(8) S. D. A. Vol. XX (1859), pp. 1857, 1861.
(12) 21 Suth. W. R. 27 (1873).
(13) I. L. R. 17 Cal. 963 (1890).
(15) I. L. R. 32 Cal. 1141 (1905).
(16) I. L. R. 33 Cal. 15 (1905).
(21) 12 B. L. R. 210, 216 (P. C.) (1873).

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to establish the right of fishery in the waters in suit. There was no satisfactory evidence to show that the Appellants had any rights of fishery outside their own zamindari. The doctrine of lost grant has not been applied to the Mofussil in India. See Introduction of Morley's Digest, p. 11, where it is said that the common law of England did not apply to India, and the presumption of last grant is a common law principle : *Gardner* v. *Hodgson's Brewery Co.* (36). The grant of the Appellants was in the Bhubaneswar and not in the Padma. In any case, even on the principle of lost grant, the Appellants had no right to follow the river over the Respondent's land. The origin of the right of fishery proceeds from the fact that the Crown was the owner of the beds of all tidal and navigable rivers. The presumption is that the grant of several fishery carries with it the ownership of the bed of the river. Here the land belonged to the Respondent. There could be no right of fishery where the grantor was not the owner of the subjacent soil : *Hindson* v. *Ashby* (37), Halsbury's Laws of England, Vol. XIV, pp. 574, 579. The new channel was not formed by gradual accretion, but by sudden irruption. In the case of sudden irruption, it was settled law in England that the several fishery in the old channel would not continue in the new channel. *Mayor of Carlisle* v. *Graham* (17), *Foster* v. *Wright* (19), *Hindson* v. *Ashby* (37), *In re Hull & Selby Railway Co.* (20), *Mercer* v. *Denne* (34), *Malcomson* v. *O'Dea* (38), *Gann* v. *Free Fishers* (39). It was true that the common law of England as such did not apply to India, but it was submitted that there was no essential difference between England and India in the matter of fishery. The principle had been extended to British Columbia, and a number of English decisions, had been applied to India as well. English principles in matters relating to alluvion and diluvion had been applied to India. In the case of non-tidal rivers also English principles have been applied to India. [See *Baban Mayacha* v. *Nagu Sharvucha* (40).] There was no reason why the English principles of fishery ought not to be extended to India. The distinction between sudden irruption and gradual erosion was recognised in India and it was reasonable to apply the principles of English law. *Maharanee Sibessury Dabee* v. *Lukhy Dabee* (9), *Tarini Churn Sinha* v. *Watson & Co.* (13). In the cases cited for the Appellant some related to fishery in ponds and in the others the English principles were recognised. There was nothing to shew that there was any law or custom relating to fishery in India previous to British occupation. Reg. II of 1825 dealt with the private owner of fishery. The Respondents were the owners of the bed of the new channel, and they remained owners even after the land had been covered with water. *Mussamat Imam Bandi & Wajid Ali Khan* v. *Hurgovind Ghose* (41) and *Felix Lopez* v. *Muddun Mohun Thakoor* (42). Further, there were certain ponds over

(17) L. R. 4 Exch. 361 (1869).
(19) 4 C. P. D. 438, 448 (1878).
(20) 5 M. and W. 327, 329, 332 (1839).
(34) [1904] 2 Ch. 534.
(36) [1903] A. C. 229.
(37) L. R. [1896] 2 Ch. 1, 12.
(9) 1 Suth. W. R. 88 (1864).
(13) I. L. R. 17 Cal. 963 (1890).
(38) 10 H. of L. Cas. 593, 618 (1863).
(39) 11 H. of L. Cas. 192, 217 (1865).
(40) I. L. R. 2 Bom. p. 19 (1876).
(41) 4 Moo. I. A. 403 (1848).
(42) 13 Moo. I. A. 467 (1870).

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the Respondents' lands in which they had the right of fishery: But since the formation of the new channel, the ponds were merged in it, and it was unjust to deprive the Respondents of their right of fishery therein. The Respondent could not be said to trespass against the Plaintiffs by fishing over the waters in their own lands in places where they used to fish before.

Mr. DeGruyther in reply:—The common law of England has absolutely no application to Bengal, which is essentially different from England. When a navigable river flows over a man's land, the owner's rights remain in abeyance although the owner has the right of being relieved from the payment of Government revenue. The enjoyment of fishery was a profit *à prendre*—an incorporeal right—apart altogether from the land, and the Crown was entitled to grant it to the Appellants.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—In this action the Plaintiffs claimed, as proprietors of a several fishery in certain tidal navigable waters in Eastern Bengal, a decree, for possession of an exclusive fishery in a portion of a river-channel, of which the principal Defendants own both the bed and the banks. They succeeded before the Additional Subordinate Judge of Faridpur and failed on appeal to the High Court at Calcutta. Hence this appeal to their Lordships' Board.

There is a section of the river system of the Lower Ganges, between Dacca on the left bank and Faridpur on the right, where the great stream divides and for many miles runs in two channels roughly parallel with one another. The general course is to the south-east. The northern of the two channels is much the larger, but the southern, the smaller of the two, is itself wide. Both channels are tidal and navigable.

The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high water level and many square miles in extent. Lands so thrown up are called "*chars*," and it is by *char*-lands formed at some unknown though probably not remote date that the northern and southern channels in question are at present divided.

In the year 1897 a channel was broken through the Defendants' *char*-land in question. Though relatively small, even this stream was of considerable size; it is navigable for small craft, and is certainly within the ebb and flow of the tide. This new branch probably followed a line of depressions already existing, one end of which was actually an arm running up from the northern river.

The Plaintiffs claim the exclusive fishery in this new navigable channel as falling within the up-stream and down-stream limits of their several fishery, and allege that the Defendants are trespassers when they fish in it. The Defendants justify their claim to fish in a portion of this channel as part of the rights of owners

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of the subjacent soil and of persons claiming under them.

That the Plaintiffs are entitled to some fishery right in the river waters generally, not far distant from the site in question, never was much disputed, and was admitted by the Respondents before their Lordships' Board, but they dispute its origin and its extent. They say that this branch is of origin so recent that no title by prescription or adverse possession arises as against themselves; that they are not affected by evidence of prescription against third parties; that even a several fishery, duly created in the main stream by the Government of India in right of the Crown, would not extend to this new branch, still less would rights acquired in the main stream by prescription against other riparian proprietors be exercisable in it; that the evidence neither establishes such bounds for the alleged exclusive fishery up-stream and down-stream as would bring this branch between them, nor shows that in fact any *jalkar* right was ever created by Government at all. In substance the Trial Judge found for an actual Government creation of the Plaintiffs' right, as well as for the boundaries claimed by them. The High Court concluded against the Plaintiffs on the question of the extent of their *jalkar* rights without determining their origin.

The evidence of the origin of the Plaintiffs' rights, is documentary, and does not depend on the credibility of witnesses. *char* Mukundia is the name of the Plaintiffs' pargana. They produced among many other documents (i) an *Ekjai Hastbud* in respect of it for the year 1790, which showed that it then included a mahal *jalkar*; (ii) a *hakikat chauhaddibandi* of the lands and *jamas* of that pargana for the year 1795, which showed that the name of the *jalkar* mahal was River Balabanta and Bil Baor with specified boundaries, of which the Kole Churi of Alipur alone can now be traced by name, (iii) *dowl* kabuliyats of 1793 and 1799, specifying the amount of the *dowl-jama* of the *jalkar*, and (iv) an *Issumnavisi Mauzawari* of 1821 mentioning the *jalkar* in the River Balabanta as a mauza of pargana *char* Mukundia. They put in (v) a *robokari* of the Court of the Collector of Faridpur dated 11th January 1861, by which the Government recognised that this *jalkar* had been included as a mahal in the zamindari pergana *char* Mukundia (formerly Tauzi No. 180 in the Dacca Collectorate, and now No. 4000 in that of Faridpur), since before the Decennial Settlement. It named the up-stream and down-stream limits, and stated that the Balabanta river, in which it was enjoyed, was the same as that known in 1861 as the Padma, that is the larger and more northerly of the two branches of the Ganges above described. The more southerly has been known for some fifty years as the Bhubaneswar.

Some evidence, not very distinct, was given at the trial, apparently for the purpose of showing that no grant from the Government was any larger to be found among the papers belonging to the Plaintiffs' zamindari, but no point seems to have been made then or since that the proper searches had not been made. Although, on the other hand, when Government has created a separate estate of *jalkar* at the period in question, it is usual to find some entry of it in the Decennial Settlement papers, no evidence was forthcoming to show that *jalkar* grants made prior to the Decennial Settlement or that settlements with zamindars made at the time of it must necessarily

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have taken the form of pattas or some other muniments which should now be in the zamindar's possession, or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user [Garth, C. J., in *Hori Das Mal* v. *Mahomed Jaki* (1)]. The Trial Judge was satisfied that the Plaintiffs had proved a Government grant or settlement about the end of the eighteenth century. He was overruled by the High Court, not on the ground that no such grant was proved, but that it was not shown to have been a grant of a several fishery of wide extent. The High Court thought that in reality it was only appurtenant to the Plaintiffs' actual pargana and was limited by its riverine bounds.

Their Lordships accept the rule laid down in the case of *Hori Das Mal* v. *Mahomed Jaki* (1) [following the English rule in *Fitzwalter's* case (2)] that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that, in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the Plaintiffs' predecessors-in-title, or ettle with them so as in effect to grant a *jalkar* right of several fishery in certain of the waters of the portion of the Ganges system in question.

The next point is one of metes and bounds. This depended partly on the above-named documents, partly on the records of certain litigation with the neighbouring zamindars of pargana Bikrampur and persons holding under them in 1816 and 1843, put in as part of the history of the fishery and of the claims made to it, partly on the testimony of living *patnidars*, *ijaradars*, fishermen, and so on, and the local investigations of an amin deputed by order of the Court. The amin's reports and maps were accepted in both Courts, and by both parties on the present appeal. The Plaintiffs' case depended on fixing by means of the above materials, supplemented by a series of maps from 1760 onwards, four points roughly forming a parallelogram, within which their alleged *jalkar* rights lay, the western or up-stream boundary and the eastern or down-stream boundary in each case extending from points north of the northern or larger channel, the Padma, to points south of the southern or smaller channel, the Bhubaneswar, and the *locus in quo* of the dispute falling between them. The Defendants contended, that in so far as any certain points were proved at all, the materials relied upon only showed that the fishery did not extend into any part of the Padmā, but was limited by the right or southern bank of the main stream and thus excluded it. They pointed out that the Faridpur Collectorate was bounded by the right bank of the Padma, the whole breadth of the main stream being in the Collectorate of Dacca, and they argued that the *robokari* of 1861, which was the strength of the Plaintiffs' case proved at most a recognition of a fishery right, which stopped short of those waters in which it was now essential to the Plaintiffs to make good their claim.

(1) I. L. R. 11 Cal. 434 (1885).
(2) 3 Keble 242 (1686).

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A sufficient answer is made by the Plaintiffs. They obtain early evidence of the actual position of the points forming their boundaries north of the main stream from proceedings in suits decided in their favour between themselves or their predecessors-in-title and the owners of the Bikrampur zamindari, who claimed some *jalkar* rights in the main Padma also, and by means of such proceedings in 1797, 1816 and 1843, by means of other similar proceedings in litigation with some of the present Defendants in 1894, 1896 and 1897, and also by a long succession of *ijara* kabuliyats and pattas, which they put in evidence, they prove *de facto* possession, as under their *jalkar* rights, of the whole fishery in both streams betwe n their upper and their lower limits. It is an intricate task to trace the various spots mentioned from map to map, because of the periodic diluviation of trees and houses, though these are the least transient of the landmarks available. Matters are also complicated by variations in the names of the rivers, Bhubaneswar, Krishnapur, Narina, Padma and Balabanta or Balbanta. The result, however, is sufficiently clear. Further, the decision recorded in the *robokari* of 1861 was appealed to the Commissioner of the Division at Dacca, who at that date exercised appellate jurisdiction in such matters over the Collectorate of Faridpur, and he affirmed the decision below. As this decision proceeded on the footing that the *jalkar* claimed extended over the waters of the Padma, and was a valid *jalkar* included in the Permanent Settlement, it may be reasonably inferred that the Commissioner of Dacca took note that the parties entitled to the *jalkar* claimed rights within his Collectorate, and finding nothing in the Dacca records to the contrary, affirmed the decision below for Dacca as well as for Faridpur.

The Trial Judge, following a long and considerable body of decisions in Bengal, held that, if the Plaintiffs' rights in this stream or streams out of which the new branch opened were once established, they would extend to the waters of the new branch as soon as it was formed, a principle which is conveniently called "the right to follow the river." It does not appear that this current of authority was challenged or doubted either before the Trial Judge or the High Court; certainly its authority was binding upon both. The Defendants' case simply was that in fact neither the Plaintiffs nor their predecessors-in-title could be shown ever to have enjoyed or to have been entitled to any *jalkar* right except that lying within the boundaries of their zamindari and appertaining thereto. The High Court appears to have arived at a conclusion in favour of the Defendants' argument mainly in consequence of the view taken of the true meaning of the judgment of 1816, and of the significance of the Thakbast map of 1862, and a marginal note upon it. It is not necessary to examine the language of the judgment of 1816 in detail, but their Lordships are unable to hold that it excluded the main or northern stream from the Plaintiffs' fishery, either expressly or by implication. The language is obscure, but, as their Lordships read it the Plaintiffs' construction of it was right. The Thak map was pressed beyond its legitimate effect. It was concerned only with that portion of the "fishery which fell within pargana Bikrampur, and was inconclusive."

The question of the effect of deltaic changes in a river's course upon the ex-

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clusive right of fishing in it appears in Indian decisions as long ago as the beginning of the last century. It was laid down in 1807 that if a river changes its bed the owner of *jalkar* rights in the old channel continues to enjoy them in the new one [*Ishurchund Rai* v. *Ramchund Mokhurja* (3)]. The converse case occurred in the following year. A land-owner sued the owner of *jalkar* rights in a tidal river for taking possession of a *jheel* formed on his land by the overflow of the river. The channel of the river had not altered, the *jheel* formed no part of it, and was only connected with it at the river's highest stage. Accordingly, it was held that the owner of the fishery, having no right over the Plaintiffs' land, had no right to the fishery in waters thus formed upon his land. [*Gopeenath Roy* v. *Ramchunder Turkalunkar* (4)]. This assumed some right of following the river and placed a particular limit upon it. It will be observed so far that whatever may have been the basis for the right of *jalkar* in the river, the right of fishing in the *jheels* was treated as belonging to the owner of the subjacent soil, a right which was shortly after, in 1813, held to be severable from the ownership of the soil, so that the bare grant by the landowner of the right of fishing in *jheel* did not in itself convey any property in the soil [*Lukhee Dassee* v. *Khatim* *Beebee* (5)]. Why the owner of *jalkar* right in the river has or may have an enjoyment of that right co-extensive with the waters of the river which permanently form part of it, though they have changed their course, is not stated. Not improbably it rested on local custom, for the Bengal Alluvion and Diluvion Regulation (No. XI of 1825) is careful in a cognate matter to keep local custom alive. At any rate the principle was well established as early as 1808 that a right of fishery follows the river whatever course it may take, for the ground on which in *Gopeenath's* case (4) the High Court allowed the appeal from the Court below, which had acted on this principle, is simply that in point of fact the *jheel* in question, though formed by the river's overflow, was no longer so connected with it as to form part of the river. This was long considered to have been the effect of these decisions. Mr. Sevester's note upon them in Vol. 2, p. 467, of his Reports is, "A general right of fishery in a river, when not otherwise defined, is restricted to the channel of the river and water considered to form part of it, not extending to adjacent lakes or other pieces of water occasionally supplied by overflowings of the river but not actually connected with the channel of it." The rule was so applied in 1856 [*Nubkisken Roy* v. *Uchchootanund Gosain* (6)]; and in 1863 [*Ramanath Thakoor* v. *Eshan Chunder Bonnerjee* (7)] In the former it was held that the right of *jalkar* in the river was confined to the river and streams flowing into or from it, exclusive of *jheels* not connected with the channel but extending to water-courses which though not immediately within the great channel of the river adjoin or flow into it or are supplied therefrom; "their right consists of the flowing stream and the adjuncts flowing from or into it." In the latter the limitation of the river's adjuncts flowing from or into it was held not to extend to

(3) 1 S. D. A. Rep. 221, 1 Morley's Digest, p. 561 (1807).

(4) 1 Mac. Sel. Rep. 228; 2 Sev. Rep 467n (1808).

(5) 2 S. D. A. Rep. 51 (1813).

(4) 1 Mac. Sel. Rep. 228; 2 Sev. Rep. 467n (1808).

(6) 2 Sev. 465n (1856).

(7) 2 Sev. 463 (1863).

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adjacent sheets of water with which the river communicates only when in flood. "We think," says the Court, "the grant of *jalkar* must be construed as *primâ facie* confined to the rivers and sheets of water communicating therewith to which the Plaintiff might get access without trespassing on the land." It is true that these two decisions do not specifically deal with the case of the changed channel of a deltaic stream, but they do clearly lay down rules for defining the area of the waters in which the *jalkar* right is to be enjoyed, which carry it beyond the limits of actual navigability though confining it to waters which are adjuncts of the navigable stream. They make the right depend on the identity of the river in which it is enjoyed and do not confine it to such waters of that river as are superimposed on the very land once owned by the grantor of the right. The current of decision was not unruffled by doubts. The Court observes in 1859 in *Gureeb Hossein Chowdhree* v. *Lamb* (8): "the part of the country through which the Megna flows is intersected with innumerable creeks into which the tide from the main river flows. The right of fishing in these tidal creeks belongs of right to the owner of the property into which they flow," but this case is explained by the fact that the part of the river in question was almost if not quite an arm of the sea. An opinion was indicated in 1864, though not absolutely necessary to the decision, in *Maharanee Sibessury Dabee* v. *Lukky Dabee* (9) that the extension of rights of fishery, in consequence of an expansion of the river in which they were enjoyed, ought to depend, as questions of alluvion would, upon the rapidity of the expansion. If sudden, it would work no change in the ownership of the submerged soil, and so cause no extension of the *jalkar* right; it would do both if it took place by gradual and imperceptible advances. The Court here inclined to connect the right of fishing indissolubly with the right to the soil subjacent to the waters in which the fishery right was enjoyed. In 1866 came the somewhat contradictory decisions. The Court in *Nobinchunder Roy Chowdry* v. *Radha Pearee Debia* (10) scouted as "preposterous" a claim to follow the diverted waters in which the Plaintiff had the fishery, but this was without discussion of the authorities, and the claim was alleged not against the owner of the soil over which the diverted waters flowed, but against the owner of the fishery in the waters of another river into which the Plaintiff's river had burst and discharged itself. In the second case, *Gobind Chunder Shaha* v. *Khoja Abdool Gunnie* (11), the Plaintiff and Defendant, joint owners of land of a fishery, had made a partition of the land but not of the fishery, and the Plaintiff sought to oust the Defendant from fishing over the land, which now belonged exclusively to him but had been overflowed by a change in the course of the waters. Sir Barnes Peacock in dismissing the suit observes: "still the fishery existed in that part of the river out of which the fish was taken, although by a change in the course of the river it ran over the portion of the land which was allotted to the Plaintiff under the *butwara* partition." Again, in 1873 [*Krishnemiro Roy Chowdhry* v. *Maharanee Surno Moyee* (12)] the Court somewhat reluctantly followed the rule, which it

(8) S. D. A. Vol. XX (1859), pp. 1857, 1861.
(9) 1 Suth. W. R. 86 (1864).

(10) 6 Suth. W. R. 17 (1866).
(11) 6 Suth. W. R. 41 (1866).
(12) 21 Suth. W. R. 27 (1873).

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deemed to be settled, that the owner of the fishery where the river's channel has changed has "a right to follow the current," that he "may not only follow the river to any channel which it may from time to time cut for itself, but may continue to enjoy together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends." Upon the facts of that case it is the latter part of this proposition that it directly involved in the decision. The whole question was learnedly reviewed by Mr. Lal Mohun Doss in 1891 in his Tagore Lectures on the Law of Riparian Rights, who (pages 372, *et seq.*) while admitting a settled current of authority in India to the contrary, urges the very arguments and conclusions of the now Respondents and relies on the same authorities. Nevertheless, after this discussion had brought the question again before the Courts and the profession, the High Court in a critical decision affirmed the long-standing rule. This was in 1890 in the case of *Tarini Churn Sinha* v. *Watson & Co.* (13). The questions were directly raised: "Can a right of *jalkar* in a public navigable river exist apart from the right to the bed of the river, or must it necessarily follow that right?" "Do the Defendants lose their vested right by a change in the river's course, though the river still is navigable and subject to public right?" This case raised the very question which has been in debate before their Lordships, for the change in the river's course was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachment. The answer given by the Court was in favour of the owner of the right of fishing in the river. It purported to follow a converse decision in *Grey* v. *Anund Mohun Moitra* (14), and decided that "so long as the river retains its navigable character, it is subject to the rights of the public, and the fishery remains in the person who was grantee from the Government." In *Grey's* case (14) a change of channel had left an old bed either dry or containing only pools disconnected with the river and it was held that what the river had abandoned albeit part dry land and part *jheels*, became private property. Thenceforth it belonged to the riparian owners who could claim settlement of it from Government, and the reason given is that "the right of the Defendant" (the owner of the fishery), "being granted out of and part of the Government's right to the river, no longer exists when the Government's right is itself gone." Thus it will be observed that in *Tarini's* case (13) the Court conceived itself to be reducing the subject to symmetry by deciding that while on the one hand the owner of the fishery rights in the river lost them where there was permanent recession of the river, he increased them where there was permanent advance of the river. In the latter case the Court disregarded the conception of Government right to the river as being an incident of Government right to the subjacent soil, and treated the Government right and the right of its grantee in respect of the fishery as subsisting in the river wherever that river might flow, and not as subsisting in flowing water only where and so long as it flowed over soil vested in the Government. This view has since been treated as established. That the *jalkar* right in the river extends over a piece of water formed

(13) I. L. R. 17 Cal. 963 (1890).

(13) I. L. R. 17 Cal. 963 (1890).
(14) W. R. [1864] 108.

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originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and just after floods, was decided in 1905 in *Jogendra Narayan Roy* v. *Crawford* (15). The ground of the decision is that such water is still part of the river system, and when that is so in fact the right of fishing persists in respect of it. This is the case of retrocession. So too in the case of *Bhaba Prasad* v. *Jagadindra Nath Rai* (16) in the same year the principle is thus expressed: "the *jalkar* rights were settled with the Plaintiffs' predecessor many years ago. The Plaintiffs by virtue of the settlement conferred "upon them are entitled to exercise the right of fishery in the said river wherever it flows within the limits prescribed in the settlement itself." Both these cases purport to follow *Tarini's* case (13), which was a case of an advance of the river into a newly formed channel, and the rest of a long line of settled authorities. It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Their Lordships were strongly and ably pressed to disregard, or at least to qualify, these decisions. The points made were (*a*) that in principle the right to grant a several fishery in tidal navigable waters is so essentially connected with the right to the soil and the bed of the channel, that no fishery right can exist where the grantor of the several fishery never has owned the subjacent soil; (*b*) that in any case the acquisition of fresh waters can go no further and can proceed no otherwise than the acquisition of fresh soil by alluvion, and therefore that an expansion of waters within which a *jalkar* right exists can only carry with it an extension of the *jalkar* right if it has taken place by imperceptible encroachments upon the land, and not by sudden irruption; and (*c*) that it would be grossly unjust to hold that the natural misfortune which swamps a landowner's soil by a river's encroachment should be accompanied by a legal ouster from such enjoyment as the natural disaster has left him. In extension of the last point it was argued that the disputed site in fact covered the sites of former enclosed *jheels* which belonged to and had been enjoyed by the Defendants, and that no trespass could be committed as against the Plaintiffs in any view by fishing where the Defendants had formerly been accustomed and entitled to fish in waters overlying their own land. This question of fact, which seems not to have been passed upon by the Courts below, was not sufficiently made out, but even if it were, it appears to be covered by the general argument.

For these contentions reliance was placed on the *Mayor of Carlisle* v. *Graham* (17), where Kelly, C. B., says: "We are called upon to decide the question which now arises for the first time: Is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new

(13) I. L. R. 17 Cal 963 (1890).
(15) I. L. R 32 Cal. 1141 (1905).
(16) I. L. R. 33 Cal. 15 (1905).

(17) L. R. 4 Exch. 361, at pp. 367-368 (1869)

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channel thus formed belong to another subject, transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, and if any, in what part of it? In the case of *Murphy* v. *Ryan* (18), O'Hagan, J, in delivering the judgment, of the Court, says, 'but whilst the right of fishing in fresh-water rivers in which the soil belongs to the riparian owner is thus exclusive, the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris* and so to belong to all the subjects of the Crown, the soil of the sea and its arms and estuaries and tidal waters being vested in the Sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner and by the Sovereign in a public river respectively.' And this is the true principle of the law touching a several fishery in a tidal river. If therefore the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law, a several fishery cannot be acquired even in a tidal river if the soil belong not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the right of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all right whatsoever in the Crown or in the public."

With this case has to be considered also *Foster* v. *Wright* (19). There the proprietor of a right of fishing in the Lune, at that part neither tidal nor navigable, was held entitled to "follow his river" when the river had so far shifted its course as to flow over another's land, and the person, to whom the land which came to form its new bed had previously belonged, was held to be a trespasser when he fished in its new channel. The change of bed had been gradual, perceptible and measurable over considerable periods of time, but from week to week imperceptible. It was held that the imperceptible changes had had the effect of producing an accretion to the land of the owner of the fishery, and that "the river had never lost its identity nor its bed, its legal owner." (p. 446): "he has day by day, week by week become the owner of that which has gradually and imperceptibly become its present bed, and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the Defendant or his predecessors-in-title." The *Mayor of Carlisle* v. *Graham* (17) was distinguished on the ground that in that case the river-bed was a new bed, not formed by the gradual shifting of the old one but totally new, the old bed remaining recognisable in its old site but deserted. The Eden became a river with two beds: the Lune was at all times a

(18) 2 Ir. Rep. C. L. 143 at p. 149 (1868).

(17) L. R. 4 Exch. 361, at pp. 367-368 (1869).

(19) 4 C. P. D. 438 (1878).

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river with only one though an ambulatory one. As counsel in *Foster* v. *Wright* (19) boldly argued for the right to "follow the river" in its Indian sense saying (p. 440), "even a sudden and violent change in its course would not have taken away" the Plaintiff's right, and as the adoption of that *à fortiori* view would have made all consideration of gradual accretion immaterial, the decision must be regarded as one which negatives the contention of the Respondents in the present case. As with the river Lune, so the part of the river Eden which was in question in the *Mayor of Carlisle* v. *Graham* (17) is one which does not appear to be subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter. The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidal Severn, of which Hale writes (Hargrave's Law Tracts, p. 16), "that river which is a wild unruly river, and many times shifts its channel, especially in that flat between Shinberge and Aure is the common boundary between the manors on either side, *viz.*, the *filum aquae* or middle of the stream, and this is the custom of the manors contiguous to that river from Gloucester down to Aure." There is in this part of the Severn an ancient several fishery, enjoyed by the Lords of Berkeley under Charters of Henry I, Richard I, and John, which must be much more analogous to the *jalkar* in the present case than cases in the rivers Eden or Lune. A somewhat similar instance in Scotland is mentioned by Lord Abinger in *In re Hull and Selby Railway Company* (20), but the question of the right to follow the river does not appear to have arisen for decision in these cases.

It was admitted that the common law of England as such does not apply in the Mofussil of Bengal, but the argument was that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India. Their Lordships have given these arguments careful consideration, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of *jalkar*, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The Indian Courts have in many respects followed the English law of waters. Sometimes their rules are the same; sometimes only similar. *Jalkar* may exist not only as a right attaching to riparian ownership but also "as an incorporeal hereditament, a right to be exercised in the tenement of another [*Forbes* v. *Meer Mahomed Hossein* (21)], as a *profit à prendre in alieno solo* [*Lukhee Dassee* v. *Khatima Beebee* (5)]. In navigable waters such rights are granted by the Government of India or, what is equivalent to a grant, settled with the grantee under the Revenue Settlement by the Government, and are thus derived from the Crown [*Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (22)]. The freehold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is

(17) L. R. 4 Exch. 361, at pp. 367-368 (1869).
(19) 4 C. P. D. 438 (1878).

(5) 2 S. D. A. Rep. 51 (1818).
(20) 5 M. & W. 327 (1839).
(21) 12 B. L. R. at p. 216 (1873).
(22) I. L. R. 4 Cal. 53 (1878).

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vested in the Government of India in right of the Crown [*Doe. dem. Seeb Kristo* v. *E. I. Co.* (23); *Nogender Chunder Ghose* v. *Mahomed Esof* (24)]. Where the bed thus forms part of the public domain, the public at large is *primâ facie* entitled to fish. Thus the English analogy has been closely followed. Again, the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable [that is, capable of being traversed by a boat at all seasons, *Chundar Jaleah* v. *Ram Churn Mookerjee* (25); *Mohiny Mohun Dass* v. *Khaja Assanoollah* (26)], the flooded landowner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None the less he remains the owner, and should the waters permanently retire, his full rights as owner revive unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part.

Still, there is one step which the Indian law has never taken, far as it has gone in the adoption of English rules. Often as the opportunity for so doing has arisen, it has never been held that the capacity of the Government of India to grant to or settle with a private owner the exclusive right of fishing in tidal navigable waters is so indissolubly bound up with its ownership of the soil subjacent to those waters that no matter how those waters may subsequently change their course, while still remaining part of the same river system within the up-stream and down-stream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them, as it may vest from time to time. It is one thing to presume the soil of the bed of a tidal navigable river to be vested in the Crown and to hold that the Government of India in right of the Crown can grant the fishery in the superincumbent waters in severalty, and quite another to hold that the several fishery when once thus created is for ever enjoyable only in waters that continue to flow precisely over ground which was in the Crown at the date of the grant. "Whether the actual proprietary right in the soil of British India," says Garth, C. J., in the case of *Hori Das Mal* v. *Mahomed Jaki* (1), already cited, "is vested in the Crown or not (a point upon which there seems some diversity of opinion) I take it to be clear that the Crown has the power of making settlements and grants for the purposes of revenue of all unsettled and unappropriated lands, and I can see no good reason why they should not have the same power of making settlements of *jalkar* rights and of lands covered by water as of land not covered by water. In either case the settlement is made for the purpose of revenue and for the benefit of the public." Again, the rights of the Crown are thus stated in *The Collector of Maldah* v. *Syed Sudurooddeen* (27):—"The right to resume land is one based on the right

(23) 6 Moo I A. 267 : 10 Moo. P. C. O. 140 (1856).

(24) 10 B. L. R. 406; 18 Suth. W. R. 113 (1872).

(25) 15 Suth. W. R. 212 (1871).

(26) 17 Suth. W. R. 73 (1872).

(1) I. L. R. 11 Cal. 434 (1885).

(27) 1 Suth. W. R. 116 (1864).

of the Government to a portion of the produce of every *bigha* of the soil as revenue, whereas the claim to possession of the *jalkars* of rivers not forming portions of settled estates is founded upon a supposed right in Government as trustees of the waterways of the country to possess and to assign the exclusive possession of them to any individual it chooses on the payment of revenue for them in the shape of a fishery rent." [*Hurreehur Mookerjea* v. *Chundeechurn Dutt* (28), *Collector of Rungpore* v. *Ramjadub Sein* (29). See, too, *Radha Mohun Mundal* v. *Neel Madhub Mundul* (30) and *Satcowri Ghosh Mondal* v. *Secretary of State for India* (31) where the cases are collected and discussed.]

In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal. In Bracton's time this rule would seem to have been unknown; at any rate he ignores it, and treats the right of fishing in rivers, as did the Roman Law, as a right *publici juris*. Whether in his time this was at common law orthodox or heterodox, or whether he supplemented the defects of our insular system by a reversion to that of Rome, need not now be considered. What is clear is that during the many years between his time and Hale's, the generality of the right of river-fishing, if it ever had been the doctrine of the common law, was such no longer. According to Hale (*De jure maris*, p. 1, Chap. 4; Hargrave's Law Tracts, p. 11), "the right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown as the right of depasturing is originally lodged in the owner of the wastes 'whereof he is lord, or as the right of fishing belongs to him, that is the owner of a private or inland river. . . '. The King is the owner of this great waste,' and as a consequent of his propriety hath the primary right of fishing in the sea or creeks or arms thereof." Be it observed that this doctrine may be called essentially insular, and that the proofs of it which Hale adduces are purely English, namely, Close Rolls, Parliament Rolls, and Rolls of the King's Bench mainly in Plantagenet times, and that he places on Bracton's Roman doctrine an interpretation, confining it to rivers which are arms of the sea, which is itself a dissent from that doctrine. The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil *quasi*-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical

(28) 17 S. D. A. Rep. 641 (sic).
(29) 2 Sev. 378 (1863)
(30) 24 W. R. 200 (1875).
(31) I. L. R. 22 Cal. 252 (1894).

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and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire, and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe (*see* Kent's Commentaries, iii, 525). The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810, in *Carson* v. *Blazer* (32), "the common law principle concerning rivers" (viz., that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), "even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it." (*See* too, *Shrunk* v. *Schuylkill Navigation Co.* 1826, 14, *Sergeant* v. *Rawle*, at p. 78. Thirty years later in *Zimmerman* v. *Union Canal Co.* (33), President Porter observes, the rules of the common law of England in regard to the rivers and the rights of riparian owners do not extend to this commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximate to the size of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela," and sundry other "rivers of Damascus." A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

(32) 2 Binney, at p. 477 (1810).
(33) 1 Watts and Sergeant, 351.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted. In England the rights of the Crown and other rights derived from them have long been established by authority, even though their historical origin is imperfectly known or conjectural. The result may be that the law is quite certain and yet is based on considerations of history and precedent which are quite the reverse. In Bengal a special history, a special theory of rights, tenures and obligations condition the rules applicable to such an incorporeal hereditament as that now in question. In England we go back before Magna Charta for the commencement of several fisheries in tidal navigable waters and know little of their actual origin. In Bengal it is sufficient to say that at the time of the Decennial or the Permanent Settlement, or since, such rights, though possibly descending from remote antiquity, were settled with the Government of India, whose special position, originating on 12th August 1765, when the East India Company became Receiver-General

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in perpetuity of the revenues of Bengal, Orissa and Bihar, is historically well-known. English tenures and Bengal zamindari rights, unduly assimilated at one time, have never fully corresponded to one another. Above all the difference, indeed the contrast of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. If English cases were applied to Bengal, so that the area of enjoyment of a several fishery in tidal navigable waters should be limited to the area within which the Crown, the assumed grantor of the fishery, had owned the subjacent soil at the time of its grant, who could say from time to time what the bounds of that enjoyment are, and where the ownership of the soil is to be delimited? The course of the waters has been in flux for ages: at what date is this ownership to be taken? As Lord Abinger says of the rule of gradual accretion of soil in *In re Hull and Selby Railway* (20) the theoretic basis of which has been variously stated from the time of Blackstone to the present day (*see* the different theories collected by Farwell, L. J, in *Mercer* v. *Denne*(34), "the principle is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property." Take which date you will, the ever-shifting river does not run now where it ran then, and if the ownership of the soil remains as it was, it is sheer guess-work to say in which part of the present waters the grantee of *jalkar* rights shall enjoy his several fishery under his grantor's title, and in which parts he must abstain, since the waters flow over the soil of private owners? Any given section of the river system is in all probability a shifting and irregular patchwork of water flowing over soil which belonged to the Sovereign at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the background of a probability that before the date in question, and yet within historic times, no water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions?

It was urged that the established rule with regard to alluvion should be applied to rights of *jalkar*; that since the right to accretions and the liability to derelictions of soil attached only to gradual accretions or to erosions taking place by imperceptible degrees, so too the right of the owner of the fishery to "follow the river" ought to be limited to cases where the river's encroachments were gradual, and ought not to be extended to an irruption as sudden, and accomplished as rapidly, as was the formation of the channel in question in the Defendant's lands. It is to be observed that here too Indian law, doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to "imperceptible" alterations, Reg. XI of 1825, Arts. 1 and 4, speak of "gradual accession." The analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the Indian

(20) 5 M. and W. 327 (1839).

(34) [1905] 2 Ch. 534 at p. 568.

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rule is established now beyond question, it may perhaps be said without offence, of the Indian as of the English rule, that it represents rather a compromise of convenience than an ideal of justice, for that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole. In any case the analogy is not in *pari materiâ*. Property in the soil is one thing; enjoyment of a profit *à prendre* in flowing water may in some respects be another. True, the profit *à prendre* is to be enjoyed *in alieno solo*; such is its nature. True too that at the time of the grant, the grantor has no power to create this incorporeal hereditament where his ownership of the soil does not extend; but when the power to grant arises from Sovereignty, and has never been decided to be limited to the bounds of the grantor's proprietorship as it may continue to exist from time to time, the mere fact that the *jalkar* right is classified in the language of the English law of real property as a *profit à prendre in alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change. The fish follow the river and the fisherman follows the fish; this may be right or wrong, but the question is not settled by asking under what circumstances of natural physical change the proprietor of an acre of dry land which has vanished from sight can claim to have still vested in him an equal area of river-bed on the same site, or another acre of dry land transferred by the river and attached by accretions to another proprietor's land.

Lastly, it is said to be unjust that a landowner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own; the waters are the tidal navigable waters of the great stream. In physical fact the landowner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The Sovereign power lawfully invests its grantee with *jalkar* rights in part of the river; is it unjust that when that river shifts its course, changing in locality but not in function, the owner of those rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control? There must be some rule and there must be some hardship. To say the least there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established should now be set aside.

Their Lordships are of opinion that no reason sufficiently cogent has been found to warrant them in disregarding the settled Indian authorities, and being further of opinion that the Plaintiffs established their claim at the trial, they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment appealed from should be set aside and the judgment of the Trial Judge restored.

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Solicitors: *Messrs. Watkins and Hunter* for the Appellants.

Solicitors: *Messrs. Theodore Bell & Co.* for the Respondents.

B. D. *Appeal allowed with costs.*

[CRIMINAL REFERENCE.]

No. 95 OF 1914.

SHARFUDDIN, J. TEUNON, J. 1914, 22, May.

KING-EMPEROR *v* JOGENDRA NATH GHOSH, Accused.

Criminal Procedure Code (Act V of 1898), sec. 360, sub-sec. (1), sec. 476—Handing over record of deposition to witness for being read by him if sufficient compliance with law—Such deposition if admissible and assignment of perjury if can be made thereon—Examination of witnesses in enquiry under sec. 476, Cr. P. C.—Duty of Magistrate to make a record of statements.

An order under sec. 476, Cr. P. C., was made against the Petitioner directing his prosecution under sec. 193, I. P. C, with reference to a deposition given by him as a witness at a criminal trial. It appeared that after the deposition had been recorded, the record was handed over to the Petitioner who proceeded to read it over himself. The Magistrate held a preliminary enquiry under sec. 476, Cr. P. C., before making the order for prosecution, and examined witnesses in the course of that enquiry, but made no record of their statements:

Held—*That the provisions of sec. 360, sub-sec. (1), Cr. P. C., were not sufficiently complied with inasmuch as that sub-section requires that the evidence should be read over in the presence, that is, in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it.*

That the deposition was inadmissible and the order for prosecution must be set aside.

That the Code of Criminal Procedure does not contain any provision with regard to the manner in which the evidence in an enquiry under sec. 476, Cr. P. C., should be recorded; but for future reference the Magistrate should have made a summary of the statements of the witnesses examined.

This was a Reference under sec. 438, Cr. P. C., dated the 22nd of April 1914, by R L. Ross, Esq., Sessions Judge of Darbhanga, recommending that the order of the District Magistrate of Darbhanga, dated the 30th of March 1914, directing the prosecution of the accused under sec. 193, I. P. C., may be revised for the reasons set forth in his letter of reference.

The facts will appear from the Letter of Reference which was as follows.

"On the 19th September last, one Monohar Poddar lodged a complaint before the Sub-Divisional Magistrate of Madhubani accusing certain persons of having trespassed in his shop and assaulted him and committed mischief and taken away some papers. The accused were charged under secs. 147 and 379, I. P. C., and were convicted and fined by the Sub-Divisional Magistrate on 23rd December 1913. Their appeal was dismissed by the District Magistrate on 20th February 1914. In that case, Banku Singh, one of the accused, set up the plea of *alibi* and evidence in support of this plea was given by the Petitioner Jogendra, a Sub-Assistant Surgeon in Darbhanga. His evidence was briefly that Banku was under his treatment from 13th to 25th September 1913 for remittent fever, and that during the time of his illness Banku Singh was staying at Kathalbari where he had to attend him every day. He granted a certificate to this effect. The certificate and certain prescriptions for medicines

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given on 13th, 14th, 15th, 16th, 17th, 18th, 22nd and 25th September by the Petitioner were also proved by him. Both the Original and Appellate Courts disbelieved this witness, and the District Magistrate by an order passed under sec. 476, Cr. P. C., dated 30th March 1914, directed his prosecution under sec. 193, I. P. C.

One of the grounds taken in the application for revision is that "there is no reasonable chance of a conviction of the Petitioner for perjury, specially in view of the fact that the provisions of sec. 360, sub-sec. (1), were not complied with." The deposition of the Petitioner before the Sub-Divisional Magistrate does not show on its face that it was read over to the witness in the presence of the accused or his pleader as required by sec. 360 (1). In answer the District Magistrate has forwarded a note submitted by the Sub-Divisional Magistrate in which he says:— 'On perusal of the records it appears that through an oversight of my peshkar the accused did not sign his deposition.' There is no statement that the deposition was read over to the Petitioner and it must therefore be taken as a matter of fact that sec. 360 (1) was not complied with. It follows therefore that the only evidence on which the Petitioner could be convicted under sec. 193, namely, the written record of his evidence, is inadmissible and that the prosecution must necessarily fail: *Mohendra Nath* v. *Emperor* (1).

"Another ground affecting the merits of the case is that the truth of the prosecution case in the aforesaid criminal trial is not inconsistent with the evidence of this Petitioner. There is nothing in the deposition of Jogendra to show at what time of day he attended Banku Singh on 17th August 1913, the day of occurrence. The place of occurrence is village Kachher which appears from the District Map to be at a distance of one mile from Tansari Railway Station. Time-table shows that a train leaves Darbhanga at 11-30 A.M. and arrives at Tansari at 1-29 P.M. The time of occurrence is stated to have been half a *prahar* before sunset. It is therefore possible that the Petitioner's evidence and prosecution evidence may both have been true. Consequently the prosecution evidence alone, as given at the original trial, will not be sufficient for the conviction of the Petitioner and it does not appear that any other evidence is available."

Babus Atulya Charan Bose and *Mon Mohan Bose* for the Accused.

Mr. Sultan Ahmed for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference made by the Sessions Judge of Darbhanga under sec. 438, Cr. P. C. It appears that the prosecution of the Petitioner before him has been directed under sec. 193, I. P. C., with reference to a deposition given by that witness in a case against one Banku Singh. The Sessions Judge has recommended that the order directing the Petitioner's prosecution should be set aside on the ground that in respect of that deposition, the provision of sec. 360, sub-sec. 1, Cr. P. C., has not been complied with. The explanation submitted by the trying Magistrate, this officer and the District Magistrate show that what happened was that after the deposition had been recorded, the record was handed over to the Petitioner. He then proceeded to read it over himself. We are of opinion that that is not sufficient compliance with the provisions of sec. 360, sub-sec (1), Cr. P. C., inasmuch as that

(1) 12 C. W. N. 845 (1908).

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sub-section requires that the evidence should be read over in the presence, that is in the hearing, of the accused in order that the accused should have an opportunity of correcting any mistake in it. On the authority therefore of the case [*Mohendra Nath* v. *Emperor* (1)] cited by the learned Sessions Judge and also on the authority of the case of *Jyotish Chandra Mukerjee* v. *Emperor* (2), we must hold that this deposition is inadmissible in evidence. The order for the prosecution of the Petitioner must be set aside.

We would further point out to the District Magistrate that in this case in his order for prosecution, or in any proceeding referred to therein, he has failed to set out the statements alleged to be false.

We further find from his explanation that though he made a preliminary enquiry under sec. 476, Cr. P. C., and presumably examined witnesses in the course of that enquiry, he has made no record of their statements. We do not find in the Criminal Procedure Code any provision with regard to the manner in which the evidence in such enquiry should be recorded. But we are of opinion that for future reference a summary of the statements should have been made.

The Petitioner is discharged from his bail.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 493 of 1914.

SHARFUDDIN, J.
TEUNON, J.

1914,
14, May.

SHAIKH BAGU, Complainant, Petitioner,
v.
RAIKA SINGH, Accused, Opposite Party.

Criminal Procedure Code, secs. 258, 439—Order of acquittal set aside by High Court in revision on merits, on the application of the Complainant.

Where the trying Magistrate in his judgment by which he acquitted the accused while laying great stress on all consideration that might affect the credibility of the witnesses for the prosecution omitted to consider what might be advanced in their favour and also failed to appreciate the corroborative value of an important witness for the prosecution, the High Court, on the application of the Complainant, set aside the order of acquittal on the merits and directed a re-trial by a new Magistrate.

This was a Rule granted on the 27th of March 1914 against an order of M. S. Harque, Esq., Deputy Magistrate of Singhbhum, dated the 6th of March 1914, acquitting the accused (Opposite Party) under sec. 258, Cr. P. C.

The facts are shortly these :—

The accused was a constable of the local thána. The prosecution story was that the accused along with Tour Jamadar and others went to *Garikhana* to bring some carts for the transit of the Lieutenant-Governor's luggages from Chaibassa when he assaulted one Sheikh Tajoo without any reason with a bamboo rod, causing a fracture in his left knee-joint.

Prosecution examined 8 witnesses and defence 5 witnesses. The Magistrate disbelieved the evidence for the prosecution and was of opinion that the defence version of the case was more probable. In this view he acquitted the accused.

Mr. P. K. Majumdar and *Babu Hari Bhusan Mukerjee* for the Petitioner.

Mr. Sultan Ahmed for the Crown.

The JUDGMENT OF THE COURT was as follows :—

In this case it appears that the Peti-

(1) 12 C. W. N. 845 (1908)
(2) I. L. R. 36 Cal. 955 (1909).

SHAIKH BAGU *v.* RAIKA SINGH.

tioner complained against a police constable, one Raika Singh, his complaint being to the effect that while the constable was employed in impressing carts, for certain purposes, he voluntarily caused grievous hurt to one Sheikh Tajoo. The constable was placed on his trial before a Deputy Magistrate of Chaibassa and after a trial extending over a month and-a-half he was acquitted under sec. 258, Cr. P. C. The Petitioner thereupon obtained this Rule from this Court calling upon the Deputy Commissioner of Chaibassa and upon the accused to show cause why this order of acquittal complained of should not be set aside, practically on the merits.

We have read and considered the judgment of the trying Magistrate and we are forced to the conclusion that he has failed to deal with the case before him with judicial care and impartiality. While laying great stress on all considerations that might affect the credibility of the several prosecution witnesses, it would seem that he has omitted to take into consideration what might be advanced in their favour. In particular we find that he has failed to appreciate or even to correctly cite in his judgment the evidence given by a Deputy Magistrate named Babu Bhaba Deb Sarkar. This witness says that as he was passing by, he saw the accused constable running away followed by a number of men who were shouting, some apparently "*maro shalake*" some apparently "*mar dia.*" Amongst the men pursuing the constable was the Petitioner Sheikh Bagu. The Deputy Magistrate proceeds to say that he stopped the Petitioner and questioned him and that the Petitioner thereupon informed him that the constable had broken the leg or knee of some one of his relatives. The trying Magistrate has wholly omitted from his judgment this portion of the evidence. He has, therefore, failed apparently to consider the corroborative value of that evidence. What value in fact should be given to that evidence is not for us now to say, and we desire to say nothing that may prejudice the accused in the re-trial that we are now about to direct.

For the reasons we have given, we set aside the order of acquittal passed on the 6th March 1914 and direct that the accused Raika Singh be re tried. Having regard to all the facts of this case we are further of opinion that the re-trial should take place at the headquarters of another District. We direct accordingly that the case be now re-tried at the headquarters of the District of Manbhum by some competent Magistrate to be appointed by the District Magistrate of that District.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 83 OF 1914.

HOLMWOOD, J.	REAJADDIN MOLLA & ors.,
SHARFUDDIN, J.	Accused, Petitioners,
1914,	*v.*
13, February.	KING-EMPEROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), secs. 143, 447—Unlawful assembly and criminal trespass—Bonâ fide *belief in the existence of right to land and assertion of such right.*

In consequence of a dispute between two landlords, the disputed property was attached under sec. 146, Cr. P. C., in a proceeding under sec. 145, Cr. P. C., and a Receiver appointed, but the Magistrate appointing the Receiver omitted to give any direction as regards the management of the property. There was a dispute between the tenants on both sides as regards the grazing rights over the property, but it ap-

REAJADDIN MOLLA *v.* KING-EMPEROR.

peared, that the Zamindar of the Petitioners gave them the grazing rights over the land and they objected to a tenant of the rival Zamindar ploughing up a portion of the land over which they alleged they had grazing rights, under colour of a lease from the Receiver. The Petitioners were convicted under secs. 143, 447, I. P. C.

Held—*That the Petitioners could not be convicted of criminal trespass when they were asserting a right which had never been declared against them, which they* bonâ fide *believed they had, and for the same reason they could not be said to have formed an unlawful assembly, because they went and protested against the land being ploughed up.*

This was a Rule granted against the order of Mr. B. P. Chakrabartty, Deputy Magistrate of Comilla, dated the 19th day of November 1913, convicting the Petitioners under secs. 143 and 447, I. P. C., and sentencing each of them to pay a fine of Rs. 10 only, in default each to undergo rigorous imprisonment for ten days, an application for the revision of which order was rejected by F. W. Ward, Esq , Sessions Judge of Tippera, on 10th December 1913.

The material facts will appear from the Judgment.

Mr. Norton and *Babus Manmatha Nath Mukerjee* and *Jatindramohan Ghose* for the Petitioners.

Mr. Orr. for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This Rule arises out of an unfortunate dispute between two landlords in consequence of which, in a proceeding under sec. 145, an order attaching the property has been passed under sec. 146, Cr. P. C., and a Receiver appointed. Unfortunately it appears that the Magistrate who appointed the Receiver has omitted to give any direction as to how the property should be managed and still more unfortunately the tenants on both sides appear to be at loggerheads as regards the grazing rights over the property, but one thing appears to be admitted that the Zamindar of the present accused gave them the grazing rights over this land, and that they objected to one Amjad Ali who was a leading tenant of the rival Zamindar ploughing up a portion of the land over which they allege they have grazing rights, under colour of a lease from the Receiver.

It appears to us that the Receiver should not have granted the lease to Amjad Ali entitling him to cultivate the whole of this land without making proper provision for the grazing rights. The trying Magistrate assumes that he did make such provision, but it is clear from the judgment that he had been given no authority to make such provision and that he had not as a matter of fact determined what the grazing rights were, to what extent they required the land and to what amount of land. Amjad Ali might be entitled for cultivating purposes. The result is, as is too frequently the case in this country, that the peasants left to themselves and finding their grazing rights interfered with fell out, but fortunately owing to the presence of the police on the spot no harm was done. But we think that it is not right that these cultivators should be convicted of criminal trespass when they were asserting a right which had never been declared against them which they *bonâ fide* believed they had, and for the same reason we think that they cannot be said to have formed an unlawful assembly, because they went and protested against the land being ploughed up. The Receiver should now

REAJADDIN MOLLA *v.* KING-EMPEROR.

receive proper instructions from the Magistrate with regard to the management of the property attached, and when such instructions have been given, this Court, as has always been held, would not interfere with such an order of management; and if the orders are duly promulgated and the raiyats know what their rights are under the Receiver and then by show of force do anything contrary to the Reciever's authority, there would be ground for proceeding against them. But at present we think that there is no such ground and that it would be extremely unfortunate to allow this conviction to stand.

The conviction and sentence are therefore set aside and the fine if paid will be refunded. The rule is made absolute.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1950 OF 1913.

HOLMWOOD, J.
SHARFUDDIN, J.

1914,
9, January.

MAHOMED HOSSEIN, Accused, Petitioner,

THANDA MEAH, Complainant, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 342, 263—Warrant case, Magistrate bound to examine accused in—Effect of sec. 262—Case started by prosecution under sec. 457, I. P. C.—Conviction under sec. 456, I. P. C., if proper—Notice to accused of charge—Prejudice.

The Petitioner was summoned under sec. 352, I. P. C., but subsequently the prosecution made a case of house-breaking by night with intent to commit theft (sec. 457, I. P. C.). In the course of the trial before the Magistrate to whom the case was made over for disposal it appeared from the cross-examination of the witnesses for the prosecution that there was familiarity between the Petitioner and a woman in the Complainant's house. The trial was in the summary way and the trying Magistrate without examining the Petitioner under sec. 342, Cr. P. C., convicted him under sec. 456, I. P. C.:

Held—*That sec. 263, Cr. P. C., does not give the Magistrate discretion whether he will examine the accused or not. This is governed by sec. 342, Cr. P. C. It gives the accused the right to refuse to say anything if he chooses. But there must be examination in all warrant cases. Therefore the words "if any" in cl.* (g) *of sec. 263 do not apply to warrant cases.*

That when the Magistrate found that the charge of house-breaking with a view to commit theft broke down and it appeard that there was another object, it was his bounden duty to have given the accused notice of that by drawing up a charge clearly stating what it was that he was accused of doing.

This was a Rule against the order of Mr. N. Ray, Deputy Magistrate of Chittagong, dated the 25th November 1913, convicting the Petitioner under sec. 456, I. P. C, and sentencing him to undergo rigorous imprisonment for two months, an application for the revision of which order was rejected by J. C. Twidell, Esq, Sessions Judge of Chittagong on the 28th November 1913.

The facts will appear from the petition on which the Rule was issued, the material portion of which is set out below:—

"That the case was first placed before Mr. J. J. Barneveille, Joint Magistrate of Chittagong, who after some adjournments issued summons against your Petitioner under sec. 352, I. P. C., and then sent the case before Babu M. B. Dattam, Deputy Magistrate, for disposal; that in the Court of this Magistrate the prosecution having sought to make out a

MAHOMED HOSSEIN *v.* THANDA MEAH.

case under sec. 457, I. P. C., the learned Deputy Magistrate by his order, dated the 27th of October 1913, submi ted the case to the Joint Magistrate for orders.

"That thereafter on the 3rd of November 1913 the learned District Magistrate of Chittagong without withdrawing the case to his own file transferred the same from the Court of the Joint Magistrate to the Court of Babu N. Ray, another Deputy Magistrate.

"That consequently your Petitioner was placed on his trial in the Court of Babu N. Ray, Deputy Magistrate of Chittagong, who proceeded to try your Petitioner in the summary way; that the learned Deputy Magistrate by his judgment, dated the 25th of November 1913, convicted your Petitioner under sec 456, I. P. C., and sentenced your Petitioner to undergo rigorous imprisonment for two months.

"That the learned Deputy Magistrate did not specify the offence for which your Petitioner was tried; that your Petitioner was not examined by the learned Deputy Magistrate and so could not explain the facts appearing against him; that your Petitioner was all along under the impression that he was being tried for an offence under sec. 457, I. P. C."

Mr. Gregory and *Babu Khitish Chandra Sen* for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

We are of opinion that this Rule must be made absolute upon the ground on which it was issued. The learned Magistrate in his explanation has shown either ignorance or neglect of the law as clearly laid down in sec. 342. Sec. 263 does not give him discretion whether he will examine the accused or not. This is governed by sec. 342. It gives the accused the right to refuse to say anything if he chooses. But there must be examination in all warrant cases. Therefore the words "if any" do not apply to warrant cases. Then again the charge was with intent to commit theft as alleged by the prosecution in their evidence, and in their evidence they did not aver that there was any other reason for the house-breaking. It was the defence which tried to elicit from the prosecution witnesses that there was some familiarity between the accused and a woman in the Complainant's house. It is therefore on the defence that the conviction rests and not on the prosecution.

There can be no doubt that when the learned Magistrate found that the charge of theft or the charge of house-breaking with a view to commit theft broke down and it appeared that there was another object, it was his bounden duty to have given the accused notice of that by drawing up a charge clearly stating what it was that he was accused of doing.

The trial appears to us to have been vitiated by these errors and the conviction and sentence are therefore set aside. We do not order a re-trial, because the accused has already been 21 days in jail and we consider that is sufficient to meet the ends of justice in this case. The Petitioner will be discharged from his bail unless he is required to answer to any other charge.

Rule made absolute.

THE

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Contents.

NOTES.

Damaged German War ships in Turkish waters

The fact that the German war-ships *Goeben* and *Breslau* were damaged by belligerent war-ships before they entered Turkish waters did not entitle them to make any prolonged stay in neutral waters. The only variation that the fact of their being damaged may make on the general rules we have already stated is that the damaged ships could ask for sufficient time to make them seaworthy with a view to proceed to their nearest home port. In making repairs they can in no way increase her fighting efficiency. Under the circumstances the more discreet course for them as also for the neutral Power is to disarm them and intern the crew as was done by the United States in 1904 in the case of the Russian cruiser *Lena* which took shelter in San Fransisco in a damaged condition after an engagement with the Japanese fleet.

Can an alien enemy Corporation sue in time of war?

We have stated in our previous issues that an alien enemy subject cannot sue without the license of the Crown. But questions may arise whether an alien enemy Corporation can sue at the time of war. There can be no question that an alien Corporation or Company incorporated in an enemy country cannot. But supposing a Company of alien enemies is registered under the Companies' Act in this country, it may be asked, is it entitled to sue? The answer to the question will depend upon the particular facts of each case. We propose here to deal only with the general principles of law which would govern such cases. The first question that has to be considered in such cases is the trade domicile of such Companies. Here we may state that there is a broad line of distinction between the continental view of International Law as expounded by the more modern French jurists and Courts and the American and English jurists and Law Courts. The modern French school and their followers regard such questions from the point of view of nationality while the American and English school follow the doctrine of trade domicile. The French Courts, however, draw a distinction between resident and non-resident aliens and also between the State and individuals. According to this view resident aliens do not necessarily acquire the enemy character of the belligerent State. Although the American jurists follow the English doctrine that the enemy subjects are "divided by the line of war" and are debarred from having any trading or commercial intercourse, yet American Courts have decided that a resident enemy subject by the facts of his being allowed to reside must be presumed to have the privileges of citizenship and as such may have local trade intercourse and also the right to sue in the local Courts. Having regard to the fact that America has a cosmopolitan population, we can well appreciate why the American Courts have accepted the doctrine of residence and trade domicile as entitling an enemy subject to sue. But in the view of English Law the same cannot be said to be the case.

According to English Law all trade intercourse between enemy subjects "divided by the line of war" is prohibited; it is the Crown alone which can grant a trade license or right of suit. Let us now apply this English doctrine to alien Companies registered in this country. It may be said that when a Company is registered in this country it has a trade domicile in this country. Further, that a company so registered is a "juristic person" in the eye of the law and that in its corporate capacity it is quite distinct from the members composing it who may be all aliens, and by reason of its domicile it is entitled to sue. Theoretically and also as an abstract proposition of law this may appear to be all right. But a Court of law will in every such case have to look beyond this and take into consideration the

concrete facts, as they may be in each case. The mere fact of registration under the Companies' Act in this country cannot give the Court a jurisdiction, if the "principal place of business" and "chief control of the business" is in the enemy country. This has to be ascertained by entering into the facts of each case. According to the English view of public International Law the residence or trade domicile of the Corporation has to be fixed by reference to its "principal place of business" and not by the fact of its doing business in another country even under a registered name.

Next, a Company is no doubt a "juristic person," but one has got to see who are the real persons in authority behind it and for whose benefit the business is being done. If it is a registered Company, it is surely the directors who have the control, management, capacity for contract, etc., behind this "juristic person." The latter is but a name for purposes of suing or being sued as also for designating the Concern in all its transactions for the sake of convenience. The directors have been described by the House of Lords to be the "managing partners" of the Company. They are under the provisions of the Company Law entitled to bind the share-holders by all their acts which are not *ultra vires*. In this respect they may be said to wield larger authority than even managing partners of a firm. So far as the outside world is concerned, the directors are the *de facto* Company. It naturally follows that if the directorate of a Company is composed of enemy subjects, they would no more be entitled to sue or transact business than the managing partners of a partnership business composed of alien enemies and British subjects. In fact on the outbreak of war alien enemy directors of Companies registered in this country according to the doctrines of English Law would become *functus officio*.

A mixed directorate of a Company even with a British or Indian domicile is therefore incapable of making any contract or of instituting any suit or transacting any business of the Company without the license of the Crown. It is not necessary for such directors to retire or resign because on the declaration of war they *ipso facto* become *functus officio* as in the case of partnerships which in the same way become dissolved. The share-holders must then proceed to elect directors in their places, and such of the share-holders as may be alien enemy subjects cannot exercise any right of share-holeders at such election or any other business of the Company. A Court has to scrutinize all these facts before it can allow any suit by a Company of alien enemies, even when registered within jurisdiction, to proceed. The English Law makes no presumption as to right of an alien enemy subject to sue, contract or transact any business from the fact of residence or even trade domicile of a person bearing *primâ facie* an enemy character. The presumption is always the other way and the onus is always on such persons to show that they do not have the enemy character. The Royal Proclamations recently issued and Notifications of Local Governments following thereunder are based on the above principle. They say that trade license can only be granted by the Crown having regard to the merits of each case. Right of suit can similarly be granted by the Crown alone having regard to the special facts, and sec. 83 of the Code of Civil Procedure confers this authority on the Governor-General in Council. A Court of of law may certainly enquire whether a Corporation has an enemy character or not and if by reference to its head office, its place and personnel of chief control, its directorate and its beneficiaries, it is satisfied that the Corporation in spite of its trade domicile possesses an enemy character, it is the Crown alone who can grant a license to sue.

CURRENT INDIAN CASES.

(CIVIL.)

Custom—Pre-emption.

BHATT *v.* PANDYA, I. L. R. 38 Bom. 183.

In litigation between Hindus where one party alleges the adoption of a whole branch of the Mahomedan Law such as that of pre-emption and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and could be proved to have been so adopted by proof of ancient and invariable custom.

A custom must be proved by evidence in the first instance and once it is proved the Courts are entitled to recognise its existence. A custom cannot be proved by the admission of the parties or their counsel before the Court.

Provincial Small Cause Courts Act (IX of 1887).

HARI BALU *v.* GANPATRAO, I. L. R. 38 Bom. 190.

A suit was filed as a Small Cause Court suit before a Judge exercising both Small Cause Court and regular jurisdictions. The Judge finding that the suit involved determination of questions of title to immoveable property, transferred it to the regular file and ultimately passed a decree deciding the question of title.

Held—That it was not a decree falling within the terms of sec. 27 of the Small Cause Courts Act and was therefore not final but was appealable.

Court of Wards Act (Bom. Act I of 1905).

HARI GOVIND *v.* NARSINGRAO, I. L. R 38 Bom. 194.

Sec. 32 of the Bombay Court of Wards Act does not apply to suits pending at the time of the assumption of superintendence of the estate by the Court of Wards.

Stamp Act (II of 1899).

STAMP REFERENCE BY THE BOARD OF REVENUE, I. L. R. 36 All. 137.

The words "final order" in sec. 2, cl. (15) and Art. 45,

cl. (c) of Sch. I of the Stamp Act, refer to the final order of the lowest Court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed.

Mortgage—Prior encumbrancer.

RAGHUNATH KUNWAR, I. L. R. 36 All. 123.

On the basis of a prior mortgage a suit was brought and a decree obtained and the property put up to sale. To this suit the second mortgagee was not made a party. The second mortgagee brought a suit for sale.

Held—That the prior encumbrancer ought not to be called upon for an account of the profits received by him subsequent to the sale.

Specific Relief Act (I of 1877).

RAM MANORATH *v.* DILROJI KUNWARI, I. L. R. 36 All. 126.

On the death of one of the members of a joint Hindu family, his widow's name was by compromise registered in respect of the property standing in his name on an application for partition having been made by co-sharer; the widow also applied for partition of the share which stood in her name. The Plaintiff brought a suit for declaration that the widow was not entitled to partition.

Held—That the suit was not barred by the provisions of sec. 42 of the Specific Relief Act.

Transfer of Property Act, sec. 84—Mortgage—Offer of payment.

CHITAN DAS *v.* GOVIND SARAN, I. L. R. 36 All. 139.

The offer by letter of payment of the mortgage money is not a good tender within the meaning of sec. 84 of the Transfer of Property Act. It is necessary that the money should be actually produced unless it can be shown that the person entitled to receive the money had waived this condition.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD DUNEDIN.	MAHABIR BAKHSH SINGH,
LORD MOULTON.	Petitioner,
SIR JOSHUA WILLIAMS.	*v.*
1914,	THAKUR SHEORAJ SINGH
30th July.	and another.

The Judicial Committee will not interfere in a matter which was entirely within the judicial discretion of the Court below.

This was an Application for special leave to appeal. The Appellant instituted the suit in the Court of the Subordinate Judge of Sultanpur, to recover possession of certain Talukdari property which belonged to Thakurain Dariyao Kunwar. Her name was entered in List 3 prepared under sec. 8 of Act I of 1869. The Appellant claimed that he was the eldest son in the senior branch of the lady's husband, and that as such, he was entitled to inherit her estate. He based his claim on a pedigree which he filed along with the plaint. The Defendants denied the claim, repudiating the correctness of the pedigree filed by the Plaintiff. The Subordinate Judge, as well as the Judicial Commissioners, found that the pedigree was not proved, and accordingly dismissed the suit. The Plaintiff then filed an application in the Court of the Judicial Commissioner of Oudh for review of judgment, on the ground that he had discovered a pedigree of the Plaintiff's family, prepared under certain orders of the Government, which went to support his claim. He urged that he was not aware of the existence of the said pedigree, and could not produce it earlier. The Judicial Commissioners, by an Order dated the 3rd December 1912, rejected the application for review. They held that the Plaintiff had failed to establish by convincing proof that the new pedigree could not have been discovered by him, had he exercised due care and diligence in the preparation of his case. The Plaintiff thereupon applied to the Court below for leave to appeal to His Majesty in Council, against the Order dated the 3rd December 1912 which was refused. Hence the present application for special leave to appeal against the Order dated the 3rd December 1912, as well as against the judgment and decree made in the suit.

Mr. L. DeGruyther, K. C. (with him *Bhugwandin Dubé*) for the Petitioners submitted that the Appellant could not produce the newly-discovered pedigree at the trial, as its existence was not within his knowledge, in spite of his having exercised due care and diligence.

Reference was made to Or. 47 of the Code of Civil Procedure, 1908.

LORD DUNEDIN.—Their Lordships are of opinion that the whole matter was really a matter of judicial discretion as to whether it was shewn to the tribunal interested, whether due diligence had been exercised or not. We cannot grant leave to appeal, because if it were before us, I do not think we could interfere with what the Court below had done.

Their Lordships rejected the petition.

Solicitor: *Mr. Edward Dalgado* for the Petitioner.

B. D. *Leave granted.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before D. CHATTERJEE and WALMSLEY, JJ. RULE NO. 175 OF 1914. AHAMMADULLA CHOUDHURY, Petitioner, *v.* HAKARUSAHU AND ANOTHER, Opposite Party, 22nd July 1914.

Bengal Tenancy Act, sec. 170—Occupancy-hold-

ing, purchaser of, if may set aside sale by deposit—Locus standi.

This was a Rule against the order of the Munsif of Katihar passed in Rent Ex. case No. 1691 of 1913 and dated the 3rd November 1913 allowing the application of the Opposite Party under sec. 170, B. T. Act, to deposit the decretal amount in the said Rent Ex. case and dismissing the said case as fully satisfied. The Opposite Party had purchased the holding in question by a registered *kobala* dated 1st Magh 1315 B. S and since then he had been in possession thereof.

Babu Kalikinkar Chackerburty submitted that the purchaser of an occupancy-holding does not acquire an interest voidable on the sale against and in the absence of any consent of the landlord. Relied on the F. B. case in 18 C. W. N. 990 and 16 C. W. N. 421 and the unreported case (Civil Rule No. 223 of 1914, dated the 19th June 1914) decided by Holmwood and Chapman, JJ.

Babu Jogendra Nath Mukerjee (with *Babu Karunamay Ghose*) relied on the Full Bench case in 18 C. W. N. 990 and the case in 17 C. W. N. 163 and submitted that the purchaser of a non-transferable occupancy-holding gets some interest by his purchase in the holding voidable at the sale.

Their Lordships held, following 16 C. L. J. 548, that the Applicant had *locus standi* and discharged the Rule with costs.

Rule discharged.

CIVIL REVISIONAL JURISDICTION. Before JENKINS, C. J., AND N. R. CHATTERJEA, J. CIVIL RULE No. 500 OF 1914. MATHUR HAZRA, Defendant, Petitioner, *v.* PABAN HAZRA, Plaintiff, Opposite party. 13th June 1914.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 8—"Judge of the Court of Small Causes"—"Expressly invested," meaning of—Government Notification investing all Munsifs of a certain place with powers in general terms, if sufficient—Powers if to be invested in the name of particular Judge.

Plaintiff, Opposite Party, brought this suit for rent against the Defendant Petitioner on the allegation that the Defendant held the lands under the Plaintiff at an annual rental of Rs. 6 and that the Defendant was in possession of the same by building houses and by cultivating the lands. The Defendant admitted being a tenant of the Plaintiff and stated that the Petitioner was a settled raiyat and held about 3½ bighas of agricultural land under the Plaintiff at an annual rental of Rs. 7. The Defendant objected to the case being tried in the Small Cause Court as it was a case under the Bengal Tenancy Act.

The learned Munsif who tried the suit was invested with Small Cause Court powers up to Rs. 100 and he overruled the objection of the Defendant and tried it as a Small Cause Court suit and held that the Defendant held the homestead in suit under the Plaintiff at an annual rent of Rs. 6 and that the suit was not a suit for rent under the Bengal Tenancy Act; and he decreed the suit in part for Rs. 15 as rent.

The Defendant then moved the High Court under sec. 25 of the Provincial Small Cause Courts Act.

Babu Dwijendra Nath Mookerjee for the Petitioner.—The suit, as stated in the plaint, was for rent for homestead lands and tank. Therefore the Munsif had no jurisdiction to try it as a Small Cause Court suit as he was not expressly empowered under cl. (8) of the Second Schedule of the Provincial Small Cause Courts Act: I. L. R. 15 Cal. 174.

Babu Harendra Kumar Sarbadhicary for the Opposite Party:—There is a Notification No. 1778-J. D., dated the 29th June 1904, by which, "all Munsifs of Alipur and Sealdah are empowered to try under Small Cause Court procedure suits for rent for homestead lands up to Rs. 50 in value" 7 C. L. J. 407.

Babu Dwijendra Nath Mookerjee in reply.—"The Judge of the Court of Small Causes" does not include one invested with Small Cause Court powers only. It is doubtful if the language of the Notification would cover the cases of Munsif and Subordinate Judge who may be given Small Cause Court powers after the date of this Notification. Moreover, the Act requires that the powers must be given by the particular name of the person invested with such powers. See s. 15, (1) and cl. (8) of the Second Schedule of the Small Cause Courts Act. This point was not allowed to be argued in the case cited by the other side as was not a point in the reference (see I. L. R. 35 Cal. 677 where this case is also reported). There is an unreported case decided by their Lordship (Mookerjee and Beachcroft, JJ.) on 4-6-14 (Civil Rule No. 251 of 1914), where the identical point was taken by and decided in favour of the Petitioners. That was also a case from Sealdah (24 Parganas).

Held, that although the Notification in question was not happily worded and was rather vague still it had been in vogue for a long time and people had understood it in a particular sense and therefore the order complained of was not interfered with.

H. C. S. *Rule discharged.*

PRIVY COUNCIL.

[Appeal from Bengal.]

Lord Moulton.
Lord Parker of Waddington.
Sir John Edge.
Mr. Ameer Ali.

1914,
Heard, 30, 31, March and 3, 7, 28 & 29, April.
Judgment, 22, July.

Ekradeswar Singh, Appellant,
v.
Musammat Janeshwari Bahuasin, Respondent.

*Hindu Law—Mithila sub-school of Mitakshara Law—Durbhanga Raj—*Babuana *and* sohag *grants to junior members and their wives, incidents of—Succession, rule of—*Kulachar *or family custom—Females and daughter's sons, exclusion of—Grant if partible—Exclusion, custom of, if applies to partitioned share of grant—*"Putra-pautradi," *whether words of limitation or general inheritance—Established custom, isolated departure from, effect of—Widow's right to maintenance—Dispossession by widow—Mesne profits disallowed in absence of proof of offer of maintenance—Maintenance made a charge on property decreed—Costs—Custom, statements of deceased persons as to existence of, if admissible, when made after controversy arisen—Evidence Act (I of 1872), sec. 32.*

By kulachar *or family custom, the right of succession to the* guddi *and to the properties of the Durbhanga Raj Reasat descends according to the rule of primogeniture. The younger sons of the Maharaja who are styled "Babus" are by* kulachar *entitled each by way of a* babuana *grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja gets, by way of* sohag *grant, the usufruct of a portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line. In each case the property granted continues to form part of the Raj Reasat from which it is never separated (being entered in the Government Revenue Register under the name of the Maharaja for the time being as proprietor) and reverts to the Maharaja for the time being on the failure of male descendants in the male line of the grantee.*

Babuana *and* sohag *grants differ essentially in their nature from absolute grants and are subject to the* kulachar *under which they are authorised and in accordance with which they are made.*

The custom governing the succession to and the inheritance of sohag *property is the same as the custom governing the succession to and the inheritance of* babuana *property.*

In each case females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession.

The right under the Mitakshara of coparceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under grant or is subject to a custom which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant or custom.

Babuana *and* sohag *lands descend in the family of Durbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as coparceners.*

Durgadut Singh *v.* Rameshwar Singh (2) *not followed and explained.*

A separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their coparcenary rights in the property is unknown to the law.

The custom excluding the widow, the daughter or the daughter's sons from the

(2) L. R. 36 I. A. 176: s. c. 13 C. W. N. 1013 (1909).

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succession of babuana *or* sohag *grants would apply (as a matter of law) even after the coparceners in joint enjoyment thereof have separated in food, worship and estate.*

Where two brothers holding babuana *and* sohag *property effected a partition thereof, and then one of them died childless leaving a widow :*

Held—*That, although there was little evidence to show that the rule as to exclusion of females, etc., applied even where there has been a partition, the surviving brother was entitled to recover from the widow of the deceased the latter's separated share, as well as immoveable properties acquired from the income and profits of that share which formed accretions to the subject-matter of the grant, subject however to the payment to the widow of a money-maintenance, the amount of which the Judicial Committee fixed and charged upon the share recovered.*

Mesne profits were disallowed in consideration of the fact that no substantial offer of adequate maintenance was made to the widow.

Moveable property and accumulations claimed by the Plaintiff were also disallowed.

A well established custom in the family cannot be defeated by the fact that in one case the custom was not enforced.

In certain sanads *which testified to grants by way of* babuana, *the expression* auras-putra-pautradi *was used to indicate the course of descent :*

Held—*That as such grants could not be made under the ordinary Hindu Law, but were authorised only by the custom which excluded females from succession, the words* auras-putra-pautradi *should be regarded as words of limitation consistent with the custom, and not as words of general inheritance.*

RAM LAL MOOKERJEE *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (1) *distinguished.*

Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible, if it appears that such statements were made after a controversy as to the custom had arisen.

This was an appeal from a judgment, dated the 2nd August 1909, of the Calcutta High Court (Sharfuddin and Richardson, JJ.).

The Appellant's case was that *babuana* and *sohag* properties granted or given by the Maharaja of Durbhanga devolved, according to a family custom which excluded the widow and other female members from succession. The Subordinate Judge of Bhagalpur allowed the claim, but the High Court dismissed it. Sharfuddin, J., concluded his judgment in these words :—

"In the case of *Sivananja* v. *Muttu Ramalinga* (3), it was held 'that what the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of the country; and the course of practice upon which the custom rests, must not be left in doubt, but be proved to certainty.' This decision of the Madras High Court was affirmed on appeal, and the Judicial Committee observed [*Ramalakshmi Ammal* v. *Sivanantha Perumal* (4)] : 'Their Lordships were fully sensible of the importance and justice of giving

(1) L. R. 8 I. A. 46 (1881).
(3) 3 Mad. H. C. 75, 77 (1866)
(4) 14 M. I. A. 570, 585 (1872).

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effect to long established usages existing in particular districts and families in India, but it is of the essence of its special usages modifying the ordinary law of succession, that they should be ancient and invariable ; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence, that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.' In the light of the above authorities it is clear that in order to prove a custom to exclude a widow of a separated brother, the evidence should be clear and unambiguous ; instead of that, what we find is that not a single instance has been successfully established that a widow of a separated brother has been excluded from succeeding her deceased husband's estate.

"The onus being on the Plaintiff we do not think it necessary to discuss the oral evidence on behalf of the Defendant at any length. They prove that there is no *kulachar* with regard to the *babuana* properties which would exclude a widow of a separated brother from inheriting the estate of her husband.

"In the above circumstances we are of opinion that the Plaintiff has totally failed in discharging the onus that was on him, and we therefore think that the judgment of the Subordinate Judge is not correct. We therefore set aside the judgment and decree of the lower Court and dismiss the Plaintiff's suit with costs by decreeing the present appeal."

Hence this appeal.

Sir Erle Richards, K. C., and *Mr. A. M. Dunne* for the Appellants submitted that the *kulachar* or family custom was fully established by the evidence. The Durbhanga Raj was admittedly an ancient and impartible one, and descends according to the rule of lineal primogeniture. The male members received *babuana* grants, and the females were sometimes given what was called *sohag* properties on marriage or other occasions. The *babuana* and *sohag* properties descended according to the same family custom. It was, that on the extinction of male heirs of the grantee, the property, together with all accretions thereto made out of the income thereof, reverted to the Raj. The properties would not pass to the widow or any other female heir of the male grantee according to the Hindu Law, but to the nearest agnate amongst the male descendants only. As to the nature of *babuana* grants, reference was made to *Gunesh Dutt Singh* v. *Moheshur Singh* (5), and *Durgadut Singh* v. *Rameshwar Singh* (2), and *Laliteswar Singh* v. *Bhabeswar Singh* (6). From the very nature of the grants the properties could not descend according to Hindu Law, because thereby it would pass out of the family. During the 300 years of the existence of the Raj there was not a single instance proved where the widow succeeded her husband. The only exception pleaded by the Defendant was that of Ghanlata, but that was not an exception, here right was always disputed by the agnates and she was allowed to remain in possession of the small estate for her maintenance only. By executing an agreement, dated 30th July 1890, she admitted that she had no right to inherit her husband's property by reason of the

(2) L. R. 36 I. A. 176 : S. C. 13 C. W. N. 1013 (1909).

(5) 6 Moo. I. A. 164 (1855).

(6) I. L. R. 35 Cal. 823 (1908).

family custom. The general custom—excluding females of the male members of the Durbhanga Raj—was proved, and there was no exception to it. The *babuana* and *sohag* properties were carved out of the Raj and remained the property of the Raj except under certain conditions relating to their enjoyment. The partition of the *babuana* properties between the Appellant and his late brother did not affect the family custom. There could be no real partition as understood in the Mitakshara: *Durgadut Singh* v. *Rameshwar Singh* (2). The family custom which applied when the male members were joint would continue to apply even after the so-called partition. The properties remained in the hands of the grantees and their male descendants as ancestral properties, and not self-acquired properties, and Netreshwar Singh's will devising the said properties was of no effect.

Mr. L. DeGruyther, *K. C.*, and *Mr. Kenworthy Brown* for the Respondent submitted that the Appellant had failed to prove any family custom in derogation of the ordinary Hindu Law of Inheritance. The nature of the *babuana* grant was that it was made in full satisfaction of all rights of maintenance. It was a heritable and alienable estate governed by Hindu Law. The *babuana* property was partible: *Gunesh Dutt Singh* v. *Moheshur Singh* (5). It was not of the nature of ancestral property. It was of the nature of self acquired property and would pass according to the ordinary law (Mayne's Hindu Law, paras. 270, 275, 540). The *babuana* properties were not impartible. There was no allegation of impartibility. There was no custom regulating the succession, but only a custom of reverter to the Raj in the event of failure of the male line. Here there has been a partition under the Hindu Law. Reference was made to the following cases:—*Durgadut Singh* v. *Rameshwar Singh* (2), *Dharma Das Kundu* v. *Amulyadhan Kundu* (7), *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank Limited* (8). It is settled that the property can be sold. There is no *sanad* or grant in respect of the property in dispute, and therefore the words of limitation cannot be exactly ascertained. The words *putra-pautradi* do not necessarily exclude females: *Ram Lal Mookerjee* v. *Secretary of State for India in Council* (1). The case of Ghanlata succeeding as heir was fully established. The statement of the Maharaja of Durbhanga was not admissible. The statements were made after the controversy had started: Sec. 32, Evidence Act, 1872; *A. B. Miller*, *Official Assignee of the estate of Ram Kishen Das* v. *Babu Madho Das* (9). The onus of proving the family custom by clear and unambiguous evidence lay on the Plaintiff, and he had failed to discharge it. In any view of the evidence the Appellant was not entitled to Mauza Umzar or any lands outside pargana Nisankhpur Kusha, or the lands purchased, or the moveable property claimed by him.

Sir Erle Richards replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—The suit in which

(1) L. R. 8 I. A. 46 (1881).
(2) L. R. 36 I. A. 176: S. C. 13 C. W. N. 1013 (1909).
(5) 6 Moo. I. A. 164 (1855).
(7) I. L. R. 33 Cal. 1126 (1906).
(8) L. R. 30 I. A. 209 (1903).
(9) I. L. R. 19 All. 76, 92 (1896).

this Appeal to His Majesty in Council has arisen was brought on the 20th December 1906, in the Court of the Subordinate Judge of Bhagalpur, by Babu Ekradeshwar Singh, who is the Appellant here, against Musammat Janeshwari Bahuasin, who is the widow of the Plaintiff's younger brother Babu Janeshwar Sing. The Plaintiff and his brother were sons of Netreshwar Singh, who was a younger son of Maharaja Rudar Singh of Durbhanga.

The Plaintiff claimed a declaration that he was entitled to the properties in suit which were owned by and in the possession of his deceased brother, a decree for possession of those properties, for mesne profits, and other reliefs. The property claimed consisted of the share which the Plaintiff's brother had obtained on a partition between them of immoveable property which had been granted by a *babuana* grant to their father, of immoveable property which had been granted by a *sohag* grant to their mother, of immoveable property alleged to be accretions to the *babuana* property, and of accumulations. The Plaintiff's claim was based on an alleged custom in the family of the Durbhanga Raj by which widows and other females were excluded from all rights to the possession of lands held under *babuana* grants or *sohag* grants. It was alleged by the Plaintiff that the properties which had been purchased by his father and by his brother had been purchased with profits which had been derived from the *babuana* property and were to be treated as accretions to that property. The Defendant, who was in possession, denied the existence of any such custom and by her written statement put the Plaintiff to proof of his title to possession.

The Durbhanga Raj is an ancient and impartible Raj, and by the *kulachar*, or family custom, the right of succession to the *guddi* and to the properties of the Raj Reasat descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of Durbhanga are styled "Babus," and by the *kulachar* each younger son is entitled by way of a *babuana* grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Durbhanga gets, by way of a *sohag* grant, the usufruct of a portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line. In each case the property, village or villages granted, continues to form part of the Raj Reasat, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Durbhanga as the proprietor, and the property so granted reverts to the Maharaja for the time being of Durbhanga on the failure of male descendants in the male line of the grantee. *Babuana* grants and *sohag* grants differ essentially in their nature from absolute grants, and are subject to the *kulachar* under which they are authorised and in accordance with which they are made. The family of the Durbhanga Raj are Hindus, and except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu Law, which, so far as it applies to this case, may be taken as following the Mitakshara of the Benares School.

Maharaja Rudar Singh of Durbhanga, by a *babuana* grant granted to his son Babu Netreshwar Singh, by way of main-

tenance as *babuana*, the dehat milkiat appertaining to pargana Nisankhpur Kusha, together with *dasturat malikana*. That grant has not been put in evidence in this suit, but the fact that the grant was made is proved by a *sanad*, dated 7th Phagun Badi 1257, which was granted by Maharaja Rudar Singh to his eldest son Maheshwar Singh. That *sanad* was registered in the Registry of Muzaffarpur on the 13th February 1850. The *sanad* shows that *babuana* grants had also been made by Maharaja Rudar Singh to two others of his younger sons, and contains the following directions :—

"The said Maharaj-kumar Babus shall continue in possession of the said parganas, and the Government revenue, which shall be due on account thereof, will be paid by them to you, and you will pay the same to the Government along with the Government revenue of the Raj. The said Babus shall live in a style befitting the position of Babus, and you shall treat them according to your sense of propriety as a Raja, and in a manner befitting their position as Babus."

On the death of Maharaja Rudar Singh, his eldest son Maheshwar Singh succeeded to the *guddi* and the Raj Reasat, and became Maharaja of Durbhanga. Maharaja Maheshwar Singh by a *sanad*, dated 6th Aghan Sudi 1259 Fasli (A. D. 1852), granted to Bahuasin Sohagin Mauza Madhapur as a *sohag* gift. As translated in this record, the *sanad* contains the following clause :—"You and your sons and grandsons, etc., shall cultivate or get cultivated the mauza aforesaid, and enjoy the usufruct thereof yourself." Bahuasin Sohagin was the wife of Babu Netreshwar Singh and the mother of the Plaintiff, and of his late brother. She is referred to in the record as Musammat Netrobati Bahuasin.

The Plaintiff's mother died in 1879. His father died in 1883, when the Plaintiff and his brother were minors. Until the separation of the brothers and a partition between them, the effect of which will later be considered, the Plaintiff and his brother were coparceners in the *babuana* property, which, according to Hindu Law, was, in their joint possession, ancestral property, subject, however, to such family custom as applied to it. Similarly, the *sohag* property was ancestral property in which, at the time of the separation and partition, the Plaintiff and his brother were coparceners. The Plaintiff came of age in 1888, and was put in possession of the *babuana* property and the *sohag* property as manager for the family consisting of himself and his brother. The younger brother came of age in 1896. Soon after the younger brother came of age, disputes arose between the brothers, they separated and each brought a suit against the other to obtain partition of the property in which they were coparceners. Decrees for partition were made, and in 1900 the property was partitioned between the brothers.

The younger brother died without issue on the 18th April 1906, leaving surviving him his wife, who is the Defendant to this suit. On her husband's death she took possession of the property which he held at the time of his death. Her right to the possession of that property is disputed in this suit on the ground that by a family custom she as a widow, although entitled to money-maintenance, was excluded from any right to the possession of that property.

The *kulachar* or family custom under which the Plaintiff claimed is thus described by him in his plaint :—

"1 That the family, to which the Plaintiff and the Defendant's husband belong, has held from time immemorial the properties known as Raj

Reasat of Durbhanga, and constituting an impartible Raj, and is governed by the *kulachar* or family custom in the matter of succession and inheritance as hereinafter mentioned.

"2. That by such *kulachar* and family custom, females, either widows or daughters and heirs in the female line, are altogether excluded from succession.

"3. That so far as the said Raj Reasat is concerned, the same descends according to the rule of lineal primogeniture on the eldest son of the last holder, the other sons obtaining portions of the Raj for maintenance and support by way of *babuana* grants.

"4. That in the event of the last holder of the said Raj dying without male issue, natural or adopted, his younger brother, or, in the absence of brother, his nearest agnate, according to the rule of lineal primogeniture, succeeds to the said Raj to the exclusion of widows and other females.

"5. That the incidents of the said *babuana* properties are, that the name of the Maharaja Bahadur of Durbhanga for the time being stands recorded in the Government Register as the proprietor of the mauzas comprised in the said properties, and it remains a part and parcel of the said Raj, and the Babus holding the said properties pay the Government revenue and other public demands payable in respect of the said mauzas to the said Maharaja who pays the same to Government; and that the said Babus and their male heirs in the male line remain in possession and enjoyment of the said mauzas; and that on the extinction of the heirs, male, of the grantees in the male line, the said mauzas together with all acquisitions, moveable and immoveable, made from the income thereof, revert to the said Raj.

"6. That by virtue of the *kulachar* aforesaid and the incidents of the said *babuana* grants, on the death of any male descendant in the male line of any Babu or younger scion of the said Raj family to whom a *babuana* grant as aforesaid has been made, without male issue, natural or adopted, his nearest agnate among the other male descendants in the male line of the said grantee succeeds to his share in the said *babuana* grant together with all accretions thereto as aforesaid.

"7. That in accordance with the customs of the family of Raj Durbhanga usufructs of some village or villages out of the Raj properties are granted to females of the family on the occasion of their marriages or other ceremonies. The rule of succession and other incidents connected therewith are the same as that of *babuana*; the villages granted to them descend to males of their body in unbroken male line; and on the extinction of male issue the said village or villages revert to the Raj."

The Plaintiff put forward the following as an explanation of the separation and partition between him and his brother :—

"16. That after the husband of the Defendant attained majority, and in consequence of disagreement between him and the Plaintiff, they separated and divided amongst themselves the major portion of the aforesaid properties and *sohag* property merely for the sake of convenience and undisturbed enjoyment of usufruct without prejudice to their coparcenary rights as junior members of the Raj Durbhanga family; but they being of junior branch of the Durbhanga Raj family, their status as coparceners in the Durbhanga Raj family did not come to an end, nor did such partition in any way affect or alter the nature and incident of their tenure of the said grant.

"17. That the husband of the Defendant died on the 18th April 1906 without any issue, and leaving Plaintiff his full brother, and the Defendant his widow.

"18. That according to the *kulachar* or family custom referred to above obtaining in the Durbhanga Raj family, including the junior branches thereof, the Defendant has no right or title to the estate left by her husband; and the Plaintiff, as the surviving male heir in the family of the grantee Maharaj-kumar Babu Netreshwar Singh and also as a coparcener in the Durbhanga Raj family, is entitled to succeed to and to the possession of the estate left by the husband of the Defendant, representing his share of the said grant and accretions thereto; and that the Defendant is only entitled to suitable maintenance out of the same; and that she is not entitled to succeed to and possess the said estates, properties and effects as is falsely pretended by her."

It may be observed that a separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their coparcenary rights in the property is unknown to the law. As

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the Plaintiff was a party to the suits in which the decrees under which the partition was effected were made he is not in a position to deny as against his brother's widow that partition did in fact take place. He may, however, have intended by his plaint to represent that the partition between him and his brother had not the ordinary legal effect of a partition between coparceners, and that the custom of the Durbhanga Raj family which would exclude widows from the succession when the members of a branch remained joint would equally apply to exclude the widow of a separated member of a branch.

The Subordinate Judge found, as the fact was, that there had been complete separation between the brothers in food, worship and estate, and consequently that at the time of the death of the younger brother in 1906 the Plaintiff had no coparcenary interest in any of the property in suit. The correctness of that finding has not been questioned in this appeal. The Subordinate Judge also found that there is a valid custom in the junior branches of the family of the Durbhanga Raj, including the family to which the parties to the suit belong, that widows do not inherit *babuana* properties, and that the succession and inheritance in the case of *sohag* grants are governed by the custom which governs the succession and inheritance in the case of *babuana* grants, and he held that notwithstanding that there had been complete separation between the brothers, the custom applied. He gave the Plaintiff a decree for possession of some of the immoveable properties which the Plaintiff claimed, for certain moveable property and for mesne profits. From that decree the Defendant, the Respondent here, appealed to the High Court of Judicature at Fort William in Bengal. The learned Judges before whom the appeal came found that although the subjects of *babuana* and *sohag* grants would on the failure of male heirs in the male line of the grantee revert to the Maharaja of Durbhanga for the time being, the Plaintiff had failed to prove any custom by which the widow of a childless and separated Babu was not entitled during the continuance of *babuana* or *sohag* grant to hold for a Hindu widow's interest the property which her separated husband had held under a *babuana* or *sohag* grant, and, consequently, applying the rules of the ordinary Hindu Law, those learned Judges decided that the Plaintiff had failed to prove as against the Defendant that he was entitled to the possession of any of the property in suit, and by their decree set aside the decree of the Subordinate Judge and dismissed the suit. From that decree this appeal to His Majesty in Council has been brought.

Some statements deposed to by witnesses who were called, and some of the documents which were put in were not admissible as evidence in this suit. It seems to have been overlooked at one period of the suit that evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. There is, however, abundant evidence to prove what was the custom in this family of the Durbhanga Raj which applied to *babuana* grants and *sohag* grants and to accretions to *babuana* immoveable property.

Their Lordships are of opinion that the Subordinate Judge arrived at a correct conclusion on the evidence that the custom governing the succession to and the inheritance of *sohag* property is the sam

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as the custom governing the succession to and the inheritance of *babuana* property. In the High Court Mr. Justice Richardson held that *sohag* property is similar in its nature and incidents to *babuana* property, and is governed by similar considerations, and Mr. Justice Sharfuddin did not dissent from that view. Their Lordships find that, except that a *babuana* grant is made to a male while a *sohag* grant is made to a female, there is no difference so far as the right to succession to the property is concerned between a *babuana* grant and its incidents and a *sohag* grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Durbhanga for the time being. The general evidence as to custom, upon which their Lordships have found that widows are excluded from the succession to *babuana* and *sohag* properties, includes and is strongly supported by instances in this family of Durbhanga of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed, possession on the death of their husbands.

In some of the *babuana sanads* which are in evidence in this suit the words which have been regarded in the Court below as words of limitation are in the vernacular *auras-putra-pautradik*. As to those *sanads* Mr. Justice Sharfuddin in his judgment in this case said :—

"From the copies of *sanads* (Exs. 20 A, 20 B 20 C, 20 D and 20 E) it is clear that female children and daughters' sons were excluded from the inheritance of the *babuana* properties. The expressions used in the *sanads* are *auras-putra-pautradik*, which means sons born of the loins. I take it to mean that so long as there is one descendant of this description, the properties granted are not to revert to the Raj."

That construction is consistent with the evidence as to those *babuana* grants to which their Lordships attach importance, and their Lordships are unable to regard them as words of general inheritance which would include female as well as male heirs. In this connection the attention of their Lordships has been drawn to the judgment of this Board in *Ram Lal Mookerjee* v. *The Secretary of State for India in Council* (1) in which it was held that in Bengal in a gift to a man the vernacular words *putra-pautradi-krame* would be read as words of general inheritance, and would include female as well as male heirs, where by law the estate would descend to such heirs. *Babuana* grants could not be made under the ordinary Hindu Law, but they are authorised by the custom which excludes females from the succession. Their Lordships must regard the words *auras-putra-pautradik* as used in these *sanads* as words of limitation consistent with the custom, and not as words of general inheritance.

Their Lordships having found that under the custom which applies to the branches of this family widows are excluded from all right to succeed to *babuana* property or to *sohag* property, it is necessary to consider whether that custom, which has been proved to apply where the members of the branch remain joint, can, without evidence that it has been applied where the members of a branch

(1) L. R. 8 I. A. 46 (1881).

have separated in food, worship and estate, be held to exclude the widow of a childless and separated member from a Hindu widow's interest in the *babuana* and *sohag* properties which had been held by her husband as his separate property. In this case it is clear that until the brothers separated, the *babuana* and *sohag* properties were held by them, subject to the terms of the grants and the custom, as joint ancestral property in which their rights were those of coparceners.

The right under the Mitakshara of coparceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant or the custom. It has been contended that there can be no partition of *babuana* or of *sohag* property in this family of Durbhanga, and that to allow that *babuana* and *sohag* property could be partitioned would be to frustrate the very object with which *babuana* grants and *sohag* grants have been made and the very object with which the custom in the family of the Durbhanga Raj authorised the making of such grants by the Maharaja for the time being of Durbhanga, that object being to provide by a grant of lands suitable maintenance, having regard to the position of the family, for the grantee, and his or her male descendants in the male line, and to relieve the Maharaja of Durbhanga from the possibility of having from time to time to provide for such descendants maintenance by gifts of money.

In support of the contention that there can be no partition of *babuana* property, reference has been made to the judgment of this Board in *Durgadut Singh* v. *Rameshwar Singh* (2). That case related to a *babuana* grant in this family of Durbhanga. Their Lordships in that case stated that those who for the time being are entitled to be maintained out of *babuana* property "cannot have it divided amongst them by proceedings in the nature of partition." The statement referred to, although doubtless correct, cannot be regarded as an authority binding in this appeal, as it was made upon a concession as to facts which were not proved, and which certainly would not be proved by the evidence in this suit. The concession which was made by counsel in that case was that lands which had been granted to Kirkat Singh by a *babuana* grant descended to the eldest male heir of the grantee to be held, or managed, by the person to whom they descended for the maintenance of the family. The evidence in this suit proves that *babuana* and *sohag* lands descend in the family of Durbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as coparceners.

Apart from the general evidence that females are excluded from the succession to *babuana* and *sohag* properties, there is little evidence, and that apparently merely evidence of opinion, that the rule as to the exclusion of females from a succession applies where there has been a partition. It is probable that there have been few instances in this family of Durbhanga of a separation in food, worship and estate in which this question as to the right of a female to succeed to *babuana* or *sohag* property could have

(2) L. R. 36 I. A 176: s. c. 13 C. W. N. 1013 (1909).

arisen. It is doubtful that with the exception of the present case and the case of Musammat Ghanlata, who was the widow of Babu Ghansham Singh, there has been any case in which a separated and sonless member of a branch of the Durbhanga family had a wife who survived him.

Musammat Ghanlata's case occurred in a branch which descended from Maharaja Madho Singh, from whom the present Maharaja of Durbhanga descended through Maharaja Rudar Singh who made the *babuana* grant in this case. Ramput Singh, who was a younger son of Maharaja Madho Singh had a *babuana* grant; he had six sons, one of whom was Dharamput. Dharamput had by his wife Dharamlata a son Ghansham Singh, who had by his wife Musammat Ghanlata two daughters but no son. Ghansham's daughters married and had male issue. Ghansham Singh separated from his uncles and cousins and obtained possession of his father's sixth share of the *babuana* property of that branch. On Ghansham Singh's death his widow Musammat Ghanlata entered into possession of his one-sixth share of the *babuana* property as hers by right of inheritance and in the presence and with the knowledge of the agnates of her deceased husband she was registered as the proprietor of that one-sixth share, and held possession of it for 16 years until she died. A few days before she died, Musammat Ghanlata executed an *ekrarnama* in which she stated that by custom she had no title to the share, and alleged that she had been permitted to hold possession of it merely by way of maintenance. It is obvious that she executed the *ekrarnama* as a compromise to secure, if possible, 400 bighas of the lands for her grandsons, who were sons of her daughters. No explanation satisfactory to their Lordships of the reason why Musammat Ghanlata was allowed to take and to hold possession of her late husband's one-sixth share, and why the custom was not enforced in her case, has been forthcoming. It is possible that, owing to the novelty of the position, the parties who were concerned were in some doubt as to their rights under the custom. However that may have been, their Lordships are of opinion that a well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced. The subsequent history of Ghansham's one-sixth share, so far as it is known to their Lordships, is inexplicable.

Their Lordships hold that the custom in this family of the Durbhanga Raj by which females are excluded from the succession to *babuana* property and to *sohag* property applies in this case notwithstanding the separation and the partition which was effected by the Plaintiff and his late brother, and consequently that on the death of his brother the Plaintiff became entitled to the possession and enjoyment of the *babuana* property and of the *sohag* property which his brother held at the time of his death. Their Lordships agree with the Subordinate Judge, for the reasons stated by him, that the immoveable properties which were acquired from the income and profits of the *babuana* properties are to be considered as accretions to the *babuana* properties, and they hold that the Plaintiff became, on his brother's death, entitled to the possession and enjoyment of those immoveable properties. Their Lordships are not satisfied that the Plaintiff proved a title to the possession of any of the moveable property or accumulations which he claimed. The Defendant was and is en-

EKRADESWAR SINGH *v.* MUSAMMAT JANESHWARI BAHUASIN.

titled to money-maintenance, and as no substantial offer of adequate maintenance was made, their Lordships consider that the claim for mesne profits should be disallowed.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside ; that the Appellant should have a decree for the possession of the immoveable properties in suit excepting Nos. 15, 19 and 21 of Schedule 3, and No. 10 of Schedule 4 (A), and that in other respects the decree of the Subordinate Judge should be varied by dismissing the suit ; that it be declared that the Respondent is entitled to be paid monthly during her life, unless the property reverts in the meanwhile to the Maharaja of Durbhanga for the time being, future maintenance at the rate of Rs. 15,000 per annum, such maintenance to be a charge upon the immoveable properties which the Appellant will recover by the order in this appeal ; and that no costs be allowed to either side in the High Court or in the Court of the Subordinate Judge.

Their Lordships consider that if the Appellant and his brother had not effected a partition, this litigation might have been avoided. No costs of this appeal will be allowed to either side.

Solicitors : *Messrs. W. W. Box & Co.* for the Appellant.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondent.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

APPEAL NO. 11 OF 1914.

JENKINS, C. J.
WOODROFFE, J.
1914,
1, May.

LACHMI CHAND JHAWAR, Plaintiff, Appellant,
v.
HEMENDRA PROSAD GHOSH, Defendant, Respondent.

Negotiable instrument—Promissory note, silent about interest, oral agreement as to, if provable—Negotiable Instruments Act (XXVI of 1881), sec. 80—Evidence Act (I of 1872), sec. 92 (2).

Where there was no mention of interest in a promissory note and it was sought by the Plaintiff to prove that by a contemporaneous oral agreement it was settled between the Plaintiff and the Defendant that interest would run at the rate of 5 per cent. per mensem :

Held—*That under sec. 92 (2) of the Indian Evidence Act, the Plaintiff was not entitled to prove any such oral agreement as to the rate of interest.*

Where the Defendant admitted in his written statement that he hod verbally agreed to pay interest on the promissory note at the rate of 12 per cent. per annum, sec. 80 of the Negotiable Instruments Act (XXVI of 1881) was no bar to the interest being decreed at that rate.

The facts of the case will appear sufficiently from the judgment of Chitty, J.

The material contention between the parties will appear from their pleadings given below. The Plaintiff stated in his plaint :—

"1. That by a Hundi bearing date the 14th day of April 1912 and executed at Calcutta, the Defendant for valuable consideration promised to pay to the Plain-

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tiff the sum of Rs. 1,100 sixty days after the date thereof.

"2. That the rate of discount agreed to between the parties at the time the said Hundi was drawn was 5 per cent. per month and it was agreed between the Defendant and the Plaintiff that if the Defendant should fail to pay the amount due on the said Hundi as the same became due, he should pay interest on the amouut remaining unpaid at the aforesaid rate of 5 per cent. per month."

The Defendant in his written statement stated in reply:—

"The Defendant admits the statement contained in para. 1 of the plaint.

"With reference to para. 2 of the plaint the Defendant denies that he agreed to any discount or to pay interest on the amount of the Hundi at the rate of 5 per cent. per month as untruly alleged by the Plaintiff and he states that he agreed to pay interest on the amount remaining unpaid at the rate of 12 per cent. per annum from the due date of the said Hundi."

The judgment of Chitty, J., was as follows:—

CHITTY, J.—This is a suit upon a negotiable instrument. Though written on a Hundi Stamp and purporting to be accepted, the document is in form a promissory note for Rs. 1,100 payable sixty days after date. The promissory note is admitted by the Defendant. The only question is as to interest. The promissory note is silent as to interest, but the Plaintiff pleads that the rate of discount agreed between the parties at the time the said Hundi was drawn was 5 per cent. per mensem, and it was agreed between the Plaintiff and the Defendant that if the Defendant should fail to pay the amount due on the said Hundi as the same became due, he should pay interest on the amount so remaining due at the aforesaid rate of 5 per cent. per mensem. The Defendant denies that he agreed to pay at the rate of 6 per cent. (it should be 5 per cent.) per mensem, but admits an agreement to pay at the rate of 12 per cent. per annum. The only point for my determination is whether the Plaintiff can be allowed to give evidence of the agreement which he alleges. I am of opinion that he cannot. It is true that in the case of *Sowdamonee Debya* v. *A. Spalding* (1), evidence of a subsequent agreement appears to have been allowed. That was a reference from the Small Cause and the point does not appear to been argued. The case of *Ghanshiam Lalji* v. *Ram Narain* (2) has no application as the collateral agreement there was in writing, and the question was whether such an agreement was enforceable, by reason of the provisions of sec. 80 of the Negotiable Instruments Act, 1881. In my opinion, evidence of the agreement now sought to be proved is excluded by the provisions of sec. 92 of the Evidence Act. It is, as pleaded, a contemporaneous oral agreement which would have the effect of materially adding to the terms of the written contract. It cannot, I think, be allowed under proviso 2 to the section. It is true that the promissory note is silent as to interest, but that would be the case in most documents into which an additional stipulation is to be introduced. This too is a formal document, and it cannot be presumed that the parties intended to agree upon anything that was not inserted in it. It would, in my opinion, be very dangerous to allow evidence of such agreements, as the creditor

(1) 12 C. L. R. 163 (1882).
(2) I. L. R. 29 All. 33 (1906).

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would be thus enabled to adapt the rate of interest to the requirements of the case, and, when the debtor had once failed to pay, to enhance his claim accordingly.

The Defendant admits the claim for interest at 12 per cent. per annum and this I think he must pay. There will be a decree for the Plaintiff for Rs. 1,100 and interest on that amount at 12 per cent. per annum from the due date of the promissory note till to-day, and costs on scale No. 2 and interest on judgment at 6 per cent. per annum.

Against this decree the Plaintiff preferred this appeal.

Mr. D. N. Basu for the Plaintiff-Appellant.—The question is whether or not oral evidence is admissible under secs. 99 and 92 of the Evidence Act, to prove the rate of interest. They do not apply. They apply to a document which embodies the terms of a contract. Here admittedly all the terms of the contract were not reduced into writing. Oral evidence is admissible, because it deals with a collateral (separate) oral agreement (provisoes 2 and 5 of sec. 92). It is not necessary that the whole agreement should be in writing, etc. [*Jumnadas* v. *Srinath Roy* (3), *Harris* v. *Rickett* (4), *Cutts* v. *Brown* (5)], and Woodroffe, p. 472. The intention of the parties who did not intend that the writing should contain the whole agreement between them may appear from direct evidence or by the informality of the document: *Behary Lal* v. *Kamini Soondaree* (6), *Ruthua Mudaliyar* v. *Arumuga Mudaliyar* (7), at pp. 198 and 199. Here there is direct evidence. A Hundi is not such a formal document as to exclude oral evidence of interest and it is not usual to include interest in Hundi. It is a separate agreement and is admissible under sec. 92, prov. 2: *Sowdamonee Debya* v. *A. Spalding* (1), *Umesh Chunder* v. *Mohini Mohun* (8). If the parties agreed to a high rate of interest, it is to be allowed: *Satish Chunder* v. *Hem Chunder* (9), *Ghanshiam Lalji* v. *Ram Narain* (2). Sec. 80 of the Negotiable Instruments Act does not apply. It does not affect the contractual relation of the parties. If there is an express contract to pay interest, it would not override that contract: *Ghanshiam Lalji* v. *Ram Narain* (2).

Mr. R. N. Mitter for the Defendant-Respondent.—Sec. 92 of the Evidence Act precludes all oral evidence to contradict, vary, add to, or subtract from the written instrument except in cases provided for in the proviso to sec. 92. Besides, parole evidence is generally inadmissible whether it consists of (1) direct oral testimony, etc., (2) their admissions, declarations of intent, etc., (3) their statements against interest, etc. See Phipson on Evidence. Here of course there is an admission in the written statement to the effect that it was agreed that interest would be paid at the rate of 12 per cent. per annum. Even then, on the principle itself, oral evidence should not be allowed, because even our admission would not bring it out of the operation of sec. 92 of the Evidence Act, which precludes such evidence. Proviso 2 to sec. 92 has no application. When the document is silent, under sec. 80, Negotiable Instru-

(3) I. L. R. 17 Cal. 176n (1886).
(4) 28 L. J. Ex. 197 (1859).
(5) I. L. R. 6 Cal. 328 (337) (1880).
(6) 14 W. R. 319, 320 (1870).
(7) 7 M. H. C. R. 189 at pp. 198-199 (1872).

(1) 12 C. L. R. 163 (1882).
(2) I. L. R. 29 All. 33 at p. 36 (1906).
(8) 9 C. L. R. 301 (1881).
(9) I. L. R. 29 Cal. 823, at pp. 825, 826 (1902).

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ments Act, interest at the rate of 6 per cent. only is chargeable whereas it is alleged that he was to pay interest at the rate of 5 per cent. per month, *i.e.*, 60 per cent. per annum.

It was not a separate contract, but part of one and the same contract. If parties had really intended that interest at 60 per cent. would be paid, the natural thing is, that creditor would have insisted on the agreement being in writing. Silence, as in this case, amounts to an obligation to pay statutory rate of interest and here we are agreeable to pay the ordinary bazar rate of interest. A collateral oral agreement to annex a term different from customary term (*e.g.*, in this case ordinary rate of interest, *i.e.*, at 12 per cent. per annum) has been held inadmissible. See *Fawkes* v. *Lamb* (10), per Blakburn, J. Here the document was a formal document and no parole evidence is admissible. *Ghanshiam Lalji* v. *Ram Narain* (2) is clearly distinguishable, as there was a collateral written agreement and custom was pleaded: *Sowdamonee Debya* v. *A. Spalding* (1). It was an *ex parte* matter and the point was not seriously argued at all; also there it was a subsequent oral agreement, here on the pleadings the agreement was contemporaneous. See *Basanti Bibi* v. *Sheo Mangal Parshad* (11), where it was held that no agreement of parties not embodied in a negotiable instrument can override provisions of sec. 80 of Negotiable Instruments Act.

Here of course, Court had jurisdiction to make a decree with interest at 12 per cent on the admission in the written statement, and so it did. Cases where oral evidence has been held to be inadmissible: *Campbell* v. *Hodgson* (12), *Foster* v. *Jolly* (13), *Abrey* v. *Crux* (14), *New London Credit Syndicate* v. *Neale* (15). See also *Fatima Bibi* v. *Hanmantha Row* (16).

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—In my opinion the judgment of Mr. Justice Chitty should be affirmed. The only difficulty in this case is occasioned by the second paragraph in the Defendant's written statement, for that gives some colour to the suggestion that sec. 92 of the Evidence Act is not applicable. But for that paragraph I think the Plaintiff's claim would be barred by sec. 92 of the Evidence Act; and, even conceding that the second paragraph of the written statement entitles the Plaintiff to say that the whole agreement is not contained in the document, still the Judge has given effect to that admission and allowed the Plaintiff interest during the period for which he claims, at the rate of 12 per cent. per annum. That appears to me to meet the justice of the case, and I would therefore dismiss the appeal with costs.

WOODROFFE, J.—I agree. I think that the evidence offered by the Plaintiff was excluded by the provisions of sec. 92 of the Evidence Act. The Plaintiff, however, can take advantage of the admission made by the Defendant in the written statement and he has been given the benefit of that by the decree under appeal. I agree, therefore, in the order passed.

Messrs. B. N. Basu & Co., Solicitors, for the Appellant.

(1) 12 C. L. R. 163 (1882).
(2) I. L. R. 29 All. 33 (P. C.) (1906).
(10) 31 L. J. Q. B. 98 (1862).
(11) 6 A. L. J. 283 (1909).
(12) [1819] 1 Gow. 74.
(13) [1835] 1 C. M. & R. 703.
(14) [1869] L. R. 5 C. P. 37.
(15) [1898] 2 Q. B. 487.
(16) 17 M. L. J. 296 (1907).

LACHMI CHAND JHAWAR *v.* HEMENDRA PROSAD GHOSH.

Babu J. K. Sarkar, Solicitor, for the Respondent.

A. K. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 202 OF 1913.

COXE, J.
RAY, J.
1913,
22, July.

ABDUL KARIM ABU AHMED KHAN, Defendant, Appellant,
v.
ABDUS SOBHAN CHOUDRY and ors., Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), sec. 92—Suit to remove matwali *of mosque—Compromise by which Plaintiff agrees to withdraw suit for consideration, whether lawful—Compromise if may be recorded before question whether endowment public or private decided.*

In a suit instituted under sec. 92, C. P. C., on the allegation that the Defendant (the matwali *of two mosques) had misappropriated certain property dedicated for their up-keep and praying* inter alia *that the Defendant might be removed from the* matwaliship *and a new* matwali *appointed and a scheme for the proper discharge of the trust framed, the parties entered into a compromise, whereby the Plaintiffs agreed to withdraw from the suit in consideration of certain advantages to be received by them, but the Court refused to record the compromise and pass a decree on its basis. On appeal,*

Held—*That the question whether the agreement of compromise was a lawful one depended on the further question whether the endowment in suit was a public endowment or not, and until that question was decided, it could not be said to be proved to the satisfaction of the Court that the suit had been adjusted by lawful agreement.*

GYANANANDA *v.* KRISTO CHANDRA (1) *referred to.*

This was an Appeal preferred on the 28th of April 1913 against an order of M. Smither, Esq., District Judge of Zilla Dacca, dated the 15th February 1913.

The order under appeal was passed in a suit brought by four Plaintiffs with the consent of the Advocate-General for the removal of the principal Defendant (No. 1) from a *matwaliship* and for other reliefs. The suit was instituted on 25th January 1910. The Defendant on the basis of certain transactions, dated 17th March 1912, stated that the dispute had been adjusted by an agreement embodied in a document marked A which was produced, and prayed that the suit should be disposed of under Or. 23, r. 3, by being dismissed in accordance with the agreement.

The Plaintiffs denied that there was any compromise. Two of the Plaintiffs, they alleged, were no parties to the transaction alleged and that there was a proposal of compromise which had fallen through and they expressed their determination to proceed with the suit.

By the order appealed against the Court below dismissed the Defendant's application and ordered the suit to proceed.

The Defendant No. 1 appealed.

Dr. Rash Behary Ghose, Babus Jogesh Chandra Ray and *Akhil Bandhu Guha* for the Appellant.

Mr. B. Chakravarti, Babus Jnanendra Nath Sarkar and *Nares Chandra Sen-Gupta* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal arises out of a suit brought under sec. 92, C. P. C. The Plaintiffs

(1) 8 C. W. N. 404 (1901).

ABDUL KARIM ABU AHMED KHAN *v.* ABDUS SOBHAN CHOUDRY.

alleged that the Defendant had misappropriated certain property dedicated for the upkeep of two mosques and made several allegations of misconduct against him. They prayed that the Defendant might be removed from the *matwaliship* and a new *matwali* might be appointed, that a scheme might be framed for the proper discharge of the trust and for various other reliefs. The suit has been pending for a considerable time and several different proceedings have been prosecuted in it.

The present appeal is against the decision of the District Judge refusing to order a certain agreement to be recorded under Or. 23, r. 3, and to pass a decree in accordance therewith. The ground on which the learned District Judge has refused to record this compromise is that this suit under sec. 92 cannot be lawfully compromised in this way, and the compromise arrived at is not a lawful agreement within the terms of Or. 23, r. 3.

The Defendant appeals, and it is argued on his behalf that it is not shown that this is a public endowment at all, and that if it is not a public endowment, the suit can certainly be compromised; secondly, it is argued that even if it is a public endowment, the Plaintiff can withdraw from the prosecution of the suit and the compromise does not amount to more than such a withdrawal.

It appears to me quite clear that if this be a public endowment, the suit cannot be compromised by this petition. The case of *Gyanananda* v. *Kristo Chandra* (1) is in my opinion an authority for this view, and it appears to me to be in accordance with common sense. There is no reason whatever why the worshippers at this mosque, if it be a public mosque, and those who are interested in its management should be prejudiced, as undoubtedly they would be prejudiced by the stifling of this suit. And it is not in my opinion correct to say that the compromise itself is merely the withdrawal of the suit. The first Plaintiff agreed, according to the memorandum of agreement that has been placed before us, that the suit should be withdrawn for ample consideration. Paragraph 5 of the memorandum relates to the withdrawal of the suit and the first two of the paragraphs show that the first Plaintiff was to receive a considerable advantage for this withdrawal. It was not therefore a mere withdrawal from the prosecution of the suit with which the Court of course could not interfere. It was an application formally to record a bargain under Or. 23, r. 3, the terms of which bargain could subsequently be used in evidence by the parties. I think, therefore, that if this be a public endowment, the order of the Judge below is perfectly right.

On the other point it has been argued that this question whether or not this is a public endowment was finally decided between the parties by decision of the District Judge so long ago as April 1910. That decision was passed in dealing with an application for the appointment of a Receiver and the Judge held that the deed operated to create a public endowment and that the suit was *primâ facie* maintainable. He however rejected the application to appoint the Receiver, so that it would hardly seem that this decision was necessary for the disposal of that application. It has however been argued that ever since then the parties have acted on the view that this matter has been settled. I think for the purpose of the pending proceedings that this view is

(1) 8 C. W. N. 404 (1901).

correct. The parties have ever since that decision apparently gone on the assumption that for the purpose of proceeding with this suit, the endowment must be regarded as a public endowment until the ultimate decision when the issue on this question will be finally determined. This is strongly indicated by the fact that in judgment under appeal there is no reference at all to any controversy on this point, and this Court on the 8th February 1912 in dealing with another interlocutory proceeding also seemed to have proceeded on the assumption that while this suit is pending, it must be regarded as one dealing with a public endowment. The Defendant cannot be prejudiced by this view being taken, for if hereafter it should be found, when the suit is formally tried, that this is not a public endowment, the suit will necessarily fail and he will in no way be injured but rather benefited by the fact that this compromise has not been allowed. On the other hand if this compromise is allowed, the persons interested in the mosque will be very considerably prejudiced, if the suit is disposed of on this compromise and the question whether or not it is a public mosque is not finally determined. The terms of Or. 23, r. 3 are that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement, the Court shall order the agreement to be recorded and pass a decree. The question whether this is or is not a lawful agreement depends on the further question whether this is or is not a public endowment, and so long as it remains subject to controversy whether this is a public endowment or not, it cannot in my opinion be said to be proved to the satisfaction of the Court, that the suit has been adjusted by a lawful agreement.

I think, therefore, that in the circumstances the decision of the Judge below is right and the appeal must be dismissed with costs. The hearing fee is assessed at five gold mohurs.

The record will be sent down at once.

RAY, J.—I agree.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1085 OF 1913.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 11 and 12, December. 1914, Judgment, 1, June.	ARJUN DASS, Petitioner, *v.* GUNENDRA NATH BASU-MALLICK, Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 47—Limitation Act (IX of 1908), sec. 18, Art. 166—Execution started against deceased judgment-debtor—Sale if may be set aside—Purchaser of occupancy-holding if may apply—Limitation—Fraud—Abuse of processes of Court—Onus—Bengal Tenancy Act (VIII of 1885), sec. 153, if bars second appeal in application to set aside sale—Practice—Revision-application treated as appeal.

Where proceedings to execute a decree for rent obtained against an occupancy-raiyat having been started more than a year after the judgment-debtor's death, writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served and thereafter at the sale at which no bidders attended, the property was purchased by the decree-holder who on 8th April 1912 got delivery of possession through Court, and within one month thereof the Petitioner who had previously purchased the holding from the tenant applied to have the sale set aside :

ARJUN DASS *v.* GUNENDRA NATH BASU-MALLICK.

Held—*That the execution-proceedings were liable to be set aside on the ground of grave irregularity.*

Quære.—*Whether the irregularity was such as rendered the sale absolutely void or voidable only.*

Held—*That the application came within sec. 47 of the Civil Procedure Code and was not time-barred, sec. 18 of the Limitation Act being applicable in the circumstances of the case.*

LIVINIA ASHTON *v.* MADHABMONI DASI (1) *referred to.*

MALKARJUN *v.* NARAHARI (2), STOWELL *v.* AJUDHIA NATH (6), SHEO PRASAD *v.* HIRA LAL (7) *distinguished.*

That it was for the decree-holder to show that the Petitioner had on any date earlier than 8th April 1912 knowedge of the sale.

That the Petitioner from whom rent was received though he might not have been formally registered as a tenant had locus standi *to apply under sec. 47 to set aside the sale, although he had failed to prove that the holding was transferable by custom.*

PROSUNNO KUMAR *v.* BAMA CHURN (20) *distinguished.*

That a second appeal lay in the case although the claim in the suit for rent was under Rs. 100.

The explanation added to sec. 153 of the Bengal Tenancy Act by the Amending Act of 1907 has not completely nullified the Full Bench decision in KALI MANDAL *v.* RAM SARBESWAR (22).

(1) 11 C. L. J. 489 : s. c. 14 C. W. N. 560 (1910).
(2) L. R. 27 I. A. 216 : s. c. I. L. R. 25 Bom. 337 (1900).
(6) I. L. R. 6 All. 255 (1884).
(7) I. L. R. 12 All. 440 (1889).
(20) 13 C. W. N. 652 (1909).
(22) I. L. R. 32 Cal. 957 : s. c. 9 C. W. N. 721 (1905).

In this case no question of limitation or Court-fees arising, the Petitioner's application for revision was treated as a memorandum of appeal.

This was a Rule against an order of A. J. Chotzner, Esq., District Judge, 24-Parganas, dated the 22nd of April 1913 confirming that of Babu Khagendra Nath Dutta, Munsif, Barasat, dated the 23rd of December 1912.

The facts of the case will sufficiently appear from the judgment.

Babu Probodh Chandra Chatterjee for the Petitioner.

Dr. Dwarkanath Mitter and *Babu Tarakeswar Pal Choudhury* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

We are invited in this Rule to set aside an order of the District Judge, who, in concurrence with the Court of first instance, has refused an application for reversal of an execution-sale. The facts, as they appear on the face of the record, may be briefly recited. One Gunendra Nath Basu-Mallik brought a suit for recovery of arrears of rent against Sitanath Banerjee, the recorded tenant of an occupancy-holding which comprised 17 bighas of land and is said to have been worth at least Rs. 300. The decree was made *ex parte* on the 4th July 1909 for a sum of about Rs. 63 together with costs about Rs. 9. On the 27th May 1911 the Petitioner Arjun Dass, who had previously purchased the holding from Sitanath Banerjee, made a deposit of Rs. 67 in satisfaction of the judgment-debt. By some oversight, the amount deposited did not cover the whole of the costs decreed. On the 25th October 1911, the decree-holder

applied for execution of his decree against Sitanath Banerjee for recovery of the balance still due, which amounted to a sum of about Rs. 5. Sitanath Banerjee had, however, died on the 17th May 1910. Execution was yet taken out against the dead man. On the 2nd November 1911, the Court ordered execution to proceed against the judgment-debtor on record and notice under r. 22 of Or. 21 of the Code was directed to issue upon him, as more than one year had elapsed from the date of the decree. A return was filed that the notice had been duly served on Sitanath Banerjee on the 28th November 1911. Subsequently writ of attachment and sale proclamation were issued with the name of Sitanath Banerjee thereon. Returns were filed in usual course that the processes had been served in accordance with law. On the 12th January 1912 the holding was put up to auction; there was no bidder present, and the decree-holder purchased the property for Rs. 50. On the 8th April 1912, the Court delivered possession to the decree-holder in his capacity as auction-purchaser. On the 7th May 1912, the Petitioner applied to the Execution Court for reversal of the sale. He alleged that he had purchased the holding several years before the sale, that he was in possession by payment of rent to the landlord, and that the decree-holder had managed to buy the property for a very small price at a sale held in the course of proceedings taken against a dead man. The Court of first instance refused to set aside the sale, and that order has been on appeal confirmed by the District Judge. In our opinion, the proceedings initiated and carried on against the dead judgment-debtor were infructuous, and the Courts below have failed to exercise a jurisdiction vested in them, namely, to annul a sale held in the course of such a proceeding.

Or. XX, r. 22, provides that where an application for execution is made more than one year after the date of the decree or against the legal representatives of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for, requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. In the case before us, more than one year had elapsed from the date of the decree and the judgment-debtor had died in the interval. There was consequently a two fold reason for the issue of the notices contemplated by r. 22, but such notice could be issued only upon the legal representatives of the judgment-debtor against whom alone execution could proceed under sub sec. 1 of sec. 50. The decree holder, however, initiated the proceeding and carried it on throughout against the dead man as if he were still alive. The Court was not only not apprised that the proceedings were taken against a dead man, but untrue returns were repeatedly filed to show that the processes had been duly served. It is difficult to conceive a graver abuse of the process of the Court, and the question inevitably arises, is a sale deliberately brought about under such circumstances to be treated as valid and operative? In the case of *Livinia Ashton* v. *Madhabmoni Dasi* (1) this Court was called upon to consider the effect of a sale held without notice to the judgment-debtor, under sec. 248 of the Code of 1882. In that case, the judgment-debtor was alive, but although more than a year had elapsed since the date of the decree, no notice

(1) 11 C. L. J. 489 : s. c. 14 C. W. N. 560 (1910).

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under sec. 248 was served upon her. This Court held on the authority of the decision of the Judicial Committee in *Malkarjun* v. *Narahari* (2) that although the sale could not be treated as a nullity and ignored by the party whose property had been sold as if it had never taken place, yet it was voidable, as the omission to issue the prescribed notice was a serious irregularity. It was pointed out that the omission to serve the notice was not a material irregularity in publishing or conducting the sale within the meaning of sec. 311 of the Code of 1882, but was a good ground for reversal of the sale upon an application under sec. 254, which could be made under Art. 178 of the second schedule to the Limitation Act of 1877, within three years from the date of sale. It was also explained that the object of a notice under sec. 248 is not merely to give the judgment-debtor opportunity to show cause why the decree should not be executed, because, for instance, it is time-barred or has been adjusted, but also to give him an opportunity to satisfy it before execution is issued. The principles thus enunciated in *Livinia Ashton* v. *Madhabmoni Dasi* (1) have been adopted and applied in the cases of *Lakshmicharan* v. *Srischandra* (3), *Kumed Bewa* v. *Prosunna Kumar Roy* (4) and *Shamsundar* v. *Jhumat Shah* (5). Tested in the light of these principles, the sale in the case before us cannot possibly be sustained. There was no notice under Or. XXI, r. 22, upon the legal representatives of the judgment-debtor; the Court could not issue

(1) 11 C. L. J 489 : s. c. 14 C. W. N. 560 (1910).

(2) L. R. 27 I. A. 216 : s. c. I. L. R. 25 Bom. 337 (1900).

(3) 13 C. L. J. 162 (1910).

(4) I. L. R. 40 Cal. 45 (1912).

(5) 11 Ind. Cases 893 (1911).

such notice, though it was incumbent upon the Court to do so, because the decree-holder never intimated to the Court that the judgment-debtor was dead. A sale held under these circumstances must be set aside on the ground of grave irregularity in the proceedings. But the present case is really much stronger than the one before this Court in *Livinia Ashton* v. *Madhabmoni* (1). Here the execution-proceeding was initiated and carried on throughout against a dead man. The cases of *Stowell* v. *Ajudhia Nath* (6) and *Sheo Prasad* v. *Hira Lal* (7) are of no assistance to the decree-holder-auction-purchaser. In those cases, the execution-proceeding had been commenced against the judgment-debtor and his property had been attached during his life-time; the sale took place after his death without notice to his legal representatives. It was ruled that the property, when sold, was as the result of the attachment, validly in the custody of the Court, and that consequently the sale was not a nullity, but could be set aside on the ground of material irregularity in the publication of the sale proclamation. The case before us is of an essentially different description; it is not the case of a man who after due notice of the execution-proceeding defaults to pay the judgment-debt and as a result has his property brought to sale, it is the case of a man who is dead, and whose property is sold because he fails to respond to the notice issued by the Court on him at the instance of the judgment-creditor [see *Debi Baksh* v. *Habib Shah* (8).]

(1) 11 C. L. J. 489 : s. c. 14 C. W. N. 560 (1910).

(6) I. L. R. 6 All. 255 (1884).

(7) I. L. R. 12 All. 440 (1889).

(8) I. L. R. 35 All. 331 (1913).

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The question of the legality of an execution-sale held in course of proceedings initiated and carried on against a dead judgment-debtor has been repeatedly considered in cases of the highest authority. In *Chick* v. *Smith* (9) it was ruled that in the case of death of the judgment-debtor, even a few hours before execution issued, the execution was invalid [see also the notes to *Jefferson* v. *Morton* (10); substantially to the same effect are the decisions in *Rameswari* v. *Durgadass* (11), *Imamunnessa* v. *Liakat* (12), *Gopal* v. *Gunamani* (13)]. No doubt, there has been some divergence of Judicial opinion upon the point, whether the sale should be treated as void or voidable, but the Courts are unanimous that if the sale is directly impeached, it cannot be sustained. The question has been repeatedly examined in the Courts of the United States and the authorities almost unanimously hold that if execution issues after the death of the judgment-debtor, the sale is void, only a small minority hold that it is voidable (Freeman on Executions, sec. 35; Freeman on Void Judicial Sales, sec. 24; Klebar on Void Judicial and Execution Sales, sec. 280; Rover on Judicial Sales, sec. 827) The point has been elaborately investigated by the Supreme Court of the United States on more than one occasion [*Erwin* v. *Dundas* (14); *Taylor* v. *Doe* (15); *Ransom* v. *Williams* (16); *Mitchell* v. *Moxent* (17)], and it has been uniformly ruled that an execution commenced after the death of the judgment-debtor named therein is void and that the purchaser at a judicial sale held in such a void proceeding is not protected; but it is otherwise, where an execution is regularly issued and is levied on the land of the judgment-debtor during his life-time; in the latter case the sale is regarded as a completion of the previous execution by which the property had been expropriated in accordance with law. The matter may be put briefly in the words of the judgment in *Brown* v. *Parker* (18): "Judicial proceedings cannot be carried on in the name of a dead man; there is as much necessity for a Plaintiff as for a Defendant; the proceedings in either case are as much arrested by the death of one as of the other." We hold accordingly that the sale held on the 12th January 1912 must be set aside on the basis of the application, dated the 7th May 1912, treated as one made under sec. 47 of the Code. No question of limitation arises, notwithstanding the comprehensive language of Art. 166 of the First Schedule of the Limitation Act of 1908 which is wider in its terms than the Article it replaces, namely, Art. 166 of the Limitation Act of 1877. The case is plainly one for the application of sec. 18; no notices had ever been issued upon any person interested in the property sought to be sold; false returns were, on the other hand, filed to the effect that the processes had been duly served on the judgment-debtor who had, as a matter of fact, died more than a year before the proceedings were commenced against him; besides this, the decree-holder-auction-purchaser did not take delivery till after more than a month had expired from the date of the sale and the Petitioner came into Court within one month from the date of such

(9) 8 Dowling 337 (1840).
(10) 2 Saunders Rep. 6 at p. 12.
(11) I. L. R. 6 Cal. 103 (1880)
(12) I. L. R. 3 All. 424 (1881).
(13) I. L. R. 20 Cal. 370 (1892).
(14) [1846] 4 Howard 58.
(15) [1851] 13 Howard 287
(16) [1864] 2 Wallace 317.
(17) [1866] 4 Wallace 237.
(18) 15 Ill. 307.

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delivery. There is nothing to show that the Petitioner had any previous knowledge of the sale, and as their Lordships of the Judicial Committee observed in *Rahimbhoy* v. *Turner* (19), the burden would lie upon the decree-holder to show that the Petitioner had, on any date earlier than the 8th April 1912, knowledge of the sale held in the course of proceedings of which no notice had been given to any living man. We also observe that the objection was taken in the Court below that the Petitioner had no *locus standi*, as he had failed to prove that the holding was transferable by custom. It was proved, however, that rent was received from the Petitioner after his purchase, though his name was apparently not formally registered as tenant. We are of opinion that the Petitioner was competent to make the application and that the decision in *Prosunno Kumar* v. *Bama Churn* (20) does not govern this case.

We may finally add that although the application must be deemed to have been made under sec. 47 of the Code of 1908, a second appeal may at first sight seem barred under sec. 153 of the Bengal Tenancy Act, as the claim in the suit for rent was under Rs. 100 [*Shyama Charan* v. *Debendra Nath* (21)]; but a second appeal does apparently lie in this case on the authority of the decision of the Full Bench in *Kali Mandal* v. *Ram Sarbeswar* (22), the effect of which, as explained in *Benimadhab* v. *Bisseswar* (23), has not been completely nullified by the explanation added to sec. 153. The view that a second appeal lies to this Court in the present case, does not, however, create any difficulty in the way of the Petitioner, because the petition on which this Rule was granted may be treated as a memorandum of appeal, as no question of limitation or court-fees arises.

(19) L. R. 20 I. A. 1: s. c. I. L. R. 17 Bom. 341 (1892).
(20) 13 C. W. N. 652 (1909).
(21) I. L. R. 27 Cal. 484 (1900).
(22) I. L. R. 32 Cal. 957: s. c. 9 C. W. N. 721 (1905).
(23) 16 C. L. J. 542: s. c 17 C. W. N. 84 (1911).

The result is that the orders of the Courts below are discharged, the application to set aside the sale is granted, and the sale is cancelled. The Petitioner will be restored to possession in execution of the order of this Court. The Petitioner will also receive his costs in all the Courts. We assess the hearing fee in this Court at five gold mohurs.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 404 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
8, May.

ANUKUL CHANDRA ROY, Petitioner,
v.
KAMARALI SARDAR, Opposite Party.

Workman's Breach of Contract Act (XIII of 1859), sec. 2, order under—Right of appeal from the order—Proper orders to be made under sec. 2.

No appeal lies to the Sessions Court from the order of the Magistrate under sec. 2 of Act XIII of 1859.

The Magistrate, while making an order under sec. 2 of Act XIII of 1859, cannot make an order of imprisonment in default, but such an order could be made after there has been non-compliance with the order of re-payment or carrying out the contract.

The facts of the case are briefly these :—

The Opposite Party took an advance of Rs. 8,000 and odd for the purpose of

getting performed by coolies a certain earth-work for the master of the Complainant. He procured some coolies and part-performed the work, after which he left the work unfinished, whereupon the Petitioner made an application to the Sub-Divisional Officer of Kushtea under the Workman's Breach of Contract Act (XIII of 1859).

The Sub-Divisional Officer made over the case to an Honorary Magistrate of 1st class power for trial and the latter found the Opposite Party guilty and ordered him to refund portion of the advance-money or to finish the work and in default ordered that he should be imprisoned for three months. The Opposite Party appealed to the Sessions Judge of Nadia, who held that the Honorary Magistrate not being a Magistrate of "full powers" had no jurisdiction and that Act XIII of 1859 did not apply, as the Opposite Party was not a workman or labourer, but a Contractor, and accordingly set aside the order of the Honorary Magistrate. The Petitioner then moved the High Court, and obtained the rule on the ground that no appeal lay to the Sessions Judge; but their Lordships (Coxe and N. R. Chatterjea, JJ.), while issuing the rule on behalf of the Petitioner, coupled it with another rule, *viz.*, to show cause why the order of the Honorary Magistrate should not be set aside on the ground that the Act XIII of 1859 did not apply to the accused.

Babu Brojendra Nath Chatterjee for the Petitioner.—No appeal lay to the Sessions Judge, the right of appeal does not exist as a matter of course, it is a creature of Statute. Neither the Criminal Procedure Code nor any other Statute provides for appeal in such a case. As no appeal lay to the Sessions Judge, his judgment could not be looked at. His judgment being out of the way, the judgment of the Magistrate must stand good, and it as also the evidence on the record show that the Opposite Party was a workman. But the trying Magistrate made one mistake, namely, he awarded imprisonment in default at this stage, whereas this should have been done after the Opposite Party had failed to comply with the order of the Magistrate as to the refund of the money or completing the work.

The JUDGMENT OF THE COURT was as follows:—

This was a Rule calling upon the District Magistrate of Nadia as well as the Opposite Party to show cause why the decision of the learned Sessions Judge should not be set aside on the ground that it was passed without jurisdiction and why the order of the Honorary Magistrate should not be set aside on the ground that Act XIII of 1859 does not apply to the accused.

The accussd in this case has been ordered under sec. 2 of Act XIII of 1859 to perform a certain contract that he entered into as a workman. All that we have got to see in connection with this case is whether the accused is a workman or not. The evidence is clear that he is a workman. In fact the contract was given to him on the basis of his being a workman and he engaged to do the work himself and to get it done by others, and in consideration of his agreeing to do this he received from the Petitioner's master large sums of money aggregating to over Rs. 8,000. A certain portion of the work has been done and Rs. 2,078 is yet due for which work has to be rendered. The accused has refused to do any more work

and hence the order passed by the Honorary Magistrate in this case. Against that order the accused appealed to the Judge who has set aside the order of the Honorary Magistrate on the ground that the Act does not apply to the accused along with some other grounds. We see that in this case no appeal lay to the Judge. The order passed by the Magistrate does not come under the provisions of sec. 408 to make it appealable to the Judge. We therefore set aside the order of the learned Judge purporting to have been passed in appeal. That order being vacated, the order of the Honorary Magistrate will remain.

But we notice that the learned Magistrate has erred in directing the accused to suffer imprisonment for three months. That order could be passed under sec. 2 after there is a non-compliance with the order of re-payment or carrying out the contract.

We therefore make the rule absolute in respect of the first part of the Rule and discharge the Rule in respect of the second portion.

Rule made absolute in part.

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 727 of 1914.

Sharfuddin, J.
Teunon, J.
1914,
4, June.

Gaya Ray,
Petitioner,
v.
The Emperor,
Opposite Party.

Act IV (B. C.) of 1866, sec. 13B, cl. (c)—Police officer being in possession of money when on duty—Contravention of order of Commissioner of Police—Order contravened, necessity of proof of—Plea of guilty, qualified.

The Petitioner was placed on his trial under sec. 13B, cl. (c) *of Act IV of 1866 (B. C.) for being while on duty in possession of annas four, contrary to an order of the Commissioner of Police. After the examination of one witness, the Petitioner pleaded guilty to having the money in his possession. He, however, stated before the Magistrate that at the time in question he was not on duty, but engaged in the private business of a Police officer and also that he had been on duty the previous night. The Magistrate convicted the accused on this plea of guilty. The order the contravention of which was the subject-matter of the prosecution was not proved:*

Held—*That a copy of the Government order or an extract therefrom or a reference thereto should have been placed on the record.*

That the Petitioner's plea of guilty was to be looked upon merely as an admission of the fact that he had at the time in question the sum found upon his person.

The High Court set aside the conviction and sentence and directed a re-trial by a new Magistrate.

This was a Rule granted on the 4th May 1914 against an order of Mr. Keays, Second Presidency Magistrate of Calcutta, dated the 1st May 1914, convicting the Petitioner under sec. 13B (*c*), Act IV, 1866 (B. C.), and sentencing him to undergo rigorous imprisonment for 14 days.

The material facts will appear from the judgment.

Babu Tarakeshwar Pal Chowdhury for the Petitioner.

The Judgment of the Court was as follows:—

In this case, the Petitioner, a Police constable, was convicted under sec. 13 B, cl. (*c*), of Act IV of 1866, and sentenced to 14 days' rigorous imprisonment. The charge against him was that while on

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duty in Kyd Street he was in possession of a sum of annas four contrary to an order passed by the Commissioner of Police which was his duty as such Police officer to obey. He was placed on his trial and one witness was examined. Thereupon, it appears, the accused pleaded guilty to having as a matter of fact the money in his possession. He was thereupon convicted and thereafter obtained the present Rule from this Court calling upon the Chief Presidency Magistrate to show cause why the conviction of and the sentence imposed upon him should not be set aside on the ground, first, that the order said to have been contravened was not proved, and secondly, that it was not proved that the constable at the time in question was on duty. In his explanation the Presidency Magistrate says, "the rule, the contravention of which was the subject-matter of the complaint, is contained in Government Order No. 746-P., dated 12th February 1910, and as such requires no formal proof." That may be so. But it was advisable that a copy of the Government Order or an extract therefrom or a reference thereto should have been placed on the record. It is then stated that the witness examined, viz., the Sub-Inspector, deposed that the accused was on duty at the time in question. The duty has not been specified. The accused now states that at the time in question he was in fact not engaged on Police duty but was engaged in the private business of a certain Police officer. It would seem from the affidavit filed in support of the application for the present rule which has not been contradicted that before the trying Magistrate he made this statement and also the statement that he had been on duty the previous night. It would thus appear that his plea of guilty is to be looked upon merely as an admission of the fact that he had at the time in question the sum of annas four upon his person.

In these circumstances, we make the Rule absolute, set aside the conviction and sentence and direct that the Petitioner be re-tried and that in the re-trial his defence be considered and adjudicated upon. We further direct that the re-trial do take place at the Central Police Court before the Chief Presidency Magistrate, or a Magistrate to be nominated by him.

Rule made absolute.

CRIMINAL REVISIONAL JURISDICTION.

REV. No. 681 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
Heard, 4, June.
Judgment, 5, June.

HAR NARAN SARDAR and ors., Petitioners,
v.
THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898)—Conviction of rioting with common object of assault—Acquittal by Appellate Court on charge of rioting and conviction of assault if proper—Necessity of finding against individual accused on charge of assault.

The Petitioners were charged under sec. 147, I. P. C., the common object of the alleged unlawful assembly as stated in the charge being to assault the Police. No charge under sec. 353 or sec. 323 was framed. The Magistrate convicted the Petitioners under sec. 147, I. P. C. The Sessions Judge in appeal acquitted the Petitioners of the offence of rioting and convicted them under sec. 353, I. P. C., in respect of the assault committed upon the several Police officers. The Sessions Judge did not find which Police officer was assaulted by which Petitioner :

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Held—*That the Sessions Judge was wrong in convicting the Petitioners of an offence under sec. 353, I. P. C., the Petitioners not having been called upon to answer any such charge.*

That in the view taken by the Sessions Judge of the case, a finding as to which Police officer was assaulted by which Petitioner was essential.

This was a Rule granted on the 27th April 1914 against the order of the Joint Magistrate of Alipur, dated the 11th March 1914, convicting all the Petitioners under sec. 147, I. P. C, and sentencing them to various terms of imprisonment (some two months' and others six weeks'), which order was on appeal modified by the Additional Sessions Judge of 24-Parganas on 14th April 1914 by altering the conviction to one under sec. 353, I. P. C., and reducing sentences from 2 months to one month in the case of some and from 6 weeks to 3 weeks in the case of the remainder.

The material facts are set out in the judgment.

Mr. Norton, Babus Jogendra Nath Mukerjee and Dharma Das Banerjee for the Petitioner.

Babu Probodh Chandra Chatterjee for the Crown.

The JUDGMENT OF THE COURT was as follows :—

In this case it appears that on the 9th of December last, the day of the Mahurrum there was a collision between two Mahurrum processions or between those processions or one or other of them and the Police officers on duty at the time and place in question. Of the Mahurrum parties one was composed of the employees of the Budge-Budge Jute Mill and one, spoken of as the Katki Dal, of the employees of an oil depôt. In the occurrence it would seem that four of the Police officers and three members of the Katki Dal were injured.

The nine Petitioners before us and some others were therefore placed on their trial before the Joint Magistrate of Alipur. Having heard the witnesses for the prosecution, the Joint Magistrate framed against the accused a charge of rioting, and in the charge so framed, it was stated that the common object of the unlawful assembly, which has culminated in the riot, was to assault the Police. No charges were framed under sec. 353 or sec. 323 of the Code. Why this was not done does not appear from the record. It may be that the Joint Magistrate thought it unnecessary to ascertain which of the accused before him, if any, were responsible for specific injuries. In the result the Joint Magistrate convicted the nine Petitioners (and one other accused with whom we are not now concerned) and sentenced them under sec. 147 of the Code to various terms of imprisonment.

On appeal, the Additional Sessions Judge of Alipur came to the conclusion that the attack made by the mill employees was made not upon the Police, but upon the members of the Katki Dal, and that the injuries suffered by some of the officers were sustained in their endeavour to separate the two Mahurrum parties.

Finding, therefore, that the Petitioners were not actuated by any common design to assault "the Police," that the injuries caused represented the independent acts of individuals and that in respect of any such injury only the person inflicting it could be made responsible, the Sessions Judge held that the charges framed by the Joint Magistrate, failed and therefore

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acquitted the Petitioners of the offence of rioting.

When from the evidence on the record the Sessions Judge deduced, as he appears to have deduced, that the common object of the Petitioners and their companions was to assault the members of the Katki Dal, and when he also found that in the attack thus made upon that party some of its members were injured, whether upon these findings if the Sessions Judge had been able further to hold that by the error or omission in the statement of the common object as set out in the charge, the Petitioners had been in no way prejudiced or misled, the Sessions Judge should or should not have affirmed the convictions is a matter we need not now discuss.

Having acquitted the Petitioners of the offence of rioting the Sessions Judge next proceeded to convict the Petitioners each of an offence under sec. 353 of the Code in respect of the assault committed upon the several Police officers. Here the Sessions Judge has fallen into manifest error. The Petitioners had not been called upon to answer to any such charge and it cannot be said that they have not been prejudiced, for the judgment of the Joint Magistrate appears to show that in his opinion in the case of some, if not all of the Petitioners, the evidence going to show that they had individually inflicted specific injuries, though sufficient to establish general activity in the riot, was not sufficient to prove the commission of the definite act alleged.

Moreover, in convicting the Petitioners of an assault or assaults upon the Police, the Sessions Judge has not found which Police officer was assaulted by which Petitioner though in the view taken by him of the case such a finding was essential.

We therefore set aside the conviction of and the sentences imposed upon the Petitioners under sec. 353 of the Code. But having regard to the finding arrived at by both Courts, and having heard learned Counsel for the Petitioners on this point as on other points, we think that in this case our proper course is to set aside also the acquittal of the Petitioners under sec. 147, and to direct that they be re-tried on charges properly framed under secs. 147, 353, 323 and any other appropriate section of the Penal Code. We order accordingly.

Conviction set aside :
Re-trial ordered.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 433 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914.
8, May.

GENU MANJHI and others, Petitioners,
v.
THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 236, 237—Indian Penal Code (Act XLV of 1860), secs. 147, 323—Sec. 237, Cr. P. C., when applies—Conviction of rioting without any charge under sec. 323, I. P. C.—Conviction under sec. 323, I. P. C., by Appellate Court after setting aside conviction of rioting, legality of.

The Petitioners were convicted by the Magistrate, under sec. 147, I. P. C. On appeal the Sessions Judge set aside the conviction and sentence under sec. 147, I. P. C., and convicted the Petitioners under sec. 323, I. P. C. No charge had been framed against the Petitioners under sec. 323, I. P. C.:

Held—*That sec. 237 has to be read with sec. 236. If the facts of the case do not fall under sec. 236, sec. 237 has got no application. There was no charge framed against the Petitioners for an offence of*

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causing hurt and they had therefore no opportunity to defend themselves on this charge and the conviction and sentence must be set aside.

This was a Rule granted on the 17th March 1914, against an order dated the 15th January 1914 of Mr. E. G. Drake-Brockman, Sessions Judge of Bhagalpur, convicting each of the accused under sec. 323, I. P. C., and sentencing each to pay a fine of Rs. 50, on appeal from an order of Babu Sarada Prosad Sarkar, Deputy Magistrate of Banka, dated the 2nd January 1914, convicting the Petitioners under sec. 147, I. P. C., and sentencing them to rigorous imprisonment for four months and directing under sec. 106, Cr. P. C., each of them to furnish his own recognisance in the sum of Rs. 100 together with two sureties for Rs. 200 each for keeping peace for one year.

Babus Dasarathi Sanyal and *Atul Chandra Dutt* for *Babu Sailendra Nath Palit* for the Petitioners.

The JUDGMENT OF THE COURT was as follows :—

This is a Rule calling upon the District Magistrate of Bhagalpur to show cause why the conviction of and the sentence passed on the Petitioners under sec. 323, I. P. C., should not be set aside on the ground that there was no charge framed against them of any offence under that section or why such other order should not be made as to this Court may seem fit and proper.

It appears that the Petitioners were originally charged under sec. 147, I. P. C., and convicted and sentenced under that section to undergo rigorous imprisonment for four months. On appeal, the Appellate Court held that there was no case under sec. 147, I. P. C., and that there was a case against the accused under sec. 323, I. P. C., for having caused hurt. The learned Sessions Judge, therefore, set aside the conviction and sentence under sec. 147, I. P. C., convicted the Petitioners of the offence of committing hurt and inflicted a fine of Rs. 50 on each. They moved this Court and obtained the present rule. The Magistrate in his explanation says that most likely the Petitioners relied on sec. 238 of the Criminal Procedure Code, but their case really falls under sec. 237 of the Code. Sec. 237 has to be read with sec. 236. If the facts of the case do not fall under sec. 236, sec. 237 has got no application. There is no doubt that the offence committed, as found by the lower Appellate Court, was an offence of causing hurt. But the accused were not prepared to give any defence against the charge of hurt. There was no charge framed against them for an offence of causing hurt. They had therefore no opportunity to defend themselves on this charge.

In making this Rule absolute, we may refer to the case of *Yakub Ali* v. *Lethu Thakur* (1), which is on all fours with the present case. The Rule is therefore made absolute. The fine, if paid, must be refunded.

Rule made absolute.

[CRIMINAL REFERENCE.]

REF. No. 133 OF 1914.

SHARFUDDIN, J.
TEUNON, J.

1914,
16, July.

SUBANS SINGH, Complainant,
v.
MOHABIR PROSHAD SINGH and others, Accused.

Criminal Procedure Code (Act V of 1898), sec. 250—Compensation, order for payment of, by Complainant—Opportunity to show cause.

(1) I. L. R. 29 Cal. 288 (1902).

SUBANS SINGH *v.* MOHABIR PROSHAD SINGH.

The Magistrate after acquitting the accused made the following order—" Accused acquitted, Complainant to pay compensation to each of the accused under sec. 250, Cr. P. C., and show cause why he should not pay. Complainant is absent. His brother verbally shows cause which is insufficient; order made absolute."

Held—*That the Complainant was in fact given no opportunity of showing cause and the order should be set aside.*

This was a Reference under sec. 438, Cr. P. C., dated the 6th June 1914, from F. Roe, Esq., Sessions Judge of Patna, recommending that the order of A. R. Toplis, Esq., Sub-Divisional Magistrate of Barh, dated the 25th April 1914, directing the Petitioner to pay Rs. 50 to each of the Opposite Party under sec. 250, Cr. P. C., be set aside and the case remanded to the Sub-Divisional Officer of Barh for an opportunity to be given to the Petitioner to show cause against the order made for the reasons set forth in the Letter of Reference.

The facts will appear from the Letter of Reference, the material portion of which is set out below :—

"The Petitioner instituted a criminal proceeding under sec. 379 or 147 against a number of raiyats, 24 in all, upon an allegation that they had looted crops from a *khalihan* in the possession of Petitioner. After a full trial the Sub-Divisional Officer of Barh acquitted and discharged all accused and came to a definite finding of fact that the case was intentionally and deliberately false. He therefore ordered the Petitioner to show cause why he should not pay Rs. 50 as compensation to each of the accused.

"The judgment was written out of Court and was delivered in open Court on the day succeeding the arguments in the case. The order-sheet of the date on which the judgment was delivered runs as follows :—

* * * *

(Quoted in High Court's judgment.)

"It is clear that no real opportunity has been given to the Petitioner to show cause against this order. It is therefore bad and should be set aside.

"I venture to recommend that the case be remanded to the Sub-Divisional Magistrate for an opportunity to be given to Petitioner to show cause against the order. I venture to think that at the present stage it is premature to consider whether the case having been found deliberately false can be said to be frivolous or vexatious or whether upon the merits the case should have been declared false and order for compensation made or whether the lower Court exercised a wise discretion in giving so large a sum as compensation."

Mr. Bogram and *Babu Baidyanath Narain Sinha* for the Complainant.

Babus Monmatha Nath Mukherjee and *Siva Nandan Ray* for the Accused.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference made by the Sessions Judge of Patna recommending that an order under sec. 250, Cr. P. C., passed by the Sub-Divisional Magistrate of Barh should be set aside on the ground that the Complainant was not given an opportunity of showing cause against the said order.

It appears that the Complainant instituted a case against 24 accused. The case was tried before the Sub-Divisional Magistrate of Barh and resulted in the acquittal of the accused. Thereupon the Magistrate made the following order as appears from the order-sheet: "Judgment delivered. Accused acquitted.

SUBANS SINGH v. MOHABIR PROSHAD SINGH.

Enter false, secs. 147 and 379, I. P. C. Complainant to pay Rs. 50 compensation to each of the accused under sec. 250, Cr. P. C., and show cause why he should not pay. Subans Singh is absent. His brother verbally shows cause which is insufficient. Order made absolute." On this we think that the Complainant was in fact given no opportunity of showing cause, and we therefore set aside the order as recommended by the Sessions Judge of Patna.

We do not consider it necessary, as prayed for by the other side, to send the case back in order that the Complainant may be now given an opportunity to show cause.

Order set aside.

[CRIMINAL REFERENCE.]

REF. NO. 19 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
21, July.

THE EMPEROR
v.
DALU SARDAR, Accused.

Indian Penal Code (Act XLV of 1860), secs. 300, 325—Murder—Grievous hurt—Hanging a human body believing the person to be dead and thereby causing death, if murder—Intention to kill.

The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the navel. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body and hung it by a rope. The post-mortem *examination showed that death was due to hanging.*

Held—*That the accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder. The offence that the accused committed was an offence under sec. 325, I. P. C., for having given her kicks blows and slaps before she fell down.*

This was a Reference by J. Cornes, Esq., Sessions Judge of Rajshahi, dated the 17th of June 1914, disagreeing with the verdict of the majority of the jury who found the accused not guilty of the charge framed against him under sec. 302, I. P. C.

The accused was on trial on a charge of murder. The verdict of the majority of the jury (4) was in favour of his acquittal: one thought that he should be convicted.

The accused was charged with having committed murder of his wife Sandeshi.

The prosecution case was as follows:—

The accused Dalu was assaulting his wife Sandeshi outside his house and pushed her inside and Sandeshi cried from there that she was being killed. This was seen by Tota Bibi, a prosecution witness, who cried aloud, and Neki and Musa, two other prosecution witnesses, came. Musa forced his way in, but was driven out by Dalu. Neki called Naibulla, another prosecution witness, who came and drove Dalu out. Two other persons, Mirjan and Rishi, came and found Sandeshi insensible and tried to revive her without effect. Dalu drove them out and closed the door.

Information was given to Headman Sarafat, who sent for the Panchayat. Sarafat found Dalu going from his house and Dalu admitted killing his wife to him. Dalu ran to his house and bolted himself in. Sarafat followed and through the door saw Sandeshi hanging from a beam. Accused was got out and arrested.

The Sub-Inspector came and cut the body down and sent it for *post-mortem*

THE EMPEROR *v.* DALU SARDAR.

examination. Accused was sent up and made a qualified confession.

Two witnesses spoke to actually seeing Dalu throttling Sandeshi. The evidence of Sarafat and the Sub-Inspector also pointed to death either by strangulation or hanging. The Assistant Surgeon after *post-mortem* gave as his deliberate opinion that death was due to hanging and gave his reasons therefor, though he admitted also that it might be due to strangulation if the streaks on the body were of blood and not of saliva.

Babu Bibhusan Dutt for the Accused.

Mr. D. N. Sarkar for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a reference made by the Sessions Judge of Rajshahi under sec. 307, Cr. P. C. The accused was tried by jury on a charge under sec. 302, I. P. C., of the murder of his own wife on the 29th of April 1914. Out of the 5 jurors, four were of opinion that the accused was not guilty and one of them was of opinion that the accused was guilty. The learned Sessions Judge, not finding himself in a position to accept the verdict of the majority of the jury and thinking that for the ends of justice the matter should be referred to this Court, has done so under sec. 307, Cr. P. C.

The facts of the case are these : On the date of the occurrence the accused was seen assaulting his wife outside his house and pushing her inside the house. The neighbour witnesses say that they actually heard the woman crying from inside the house that she was being killed. When the people arrived, they wanted to rescue the woman and at last the husband was separated from the wife. They found the wife in an unconscious state. They tried to give her water, but the woman could not drink. The people thought that she was dead. Then it appears that the accused again went inside the house, turned out one or two persons who were inside the house and shut the door. Before this the woman was lying on the ground, but after the accused re-entered the house, people discovered that this woman was hanging by the neck by a piece of string tied to the roof of the house. On this the accused was sent up for trial.

It appears that soon after the occurrence the accused admitted to one Sharafat, a witness for the prosecution, that he had killed his wife, because she was carrying on an intrigue with one Madari. It also appears that the accused made a statement before a Judicial officer some days later. Therein also he made a similar statement.

The question now is what offence he has committed.

But before we come to answer that question, it is necessary to ascertain from the medical evidence the probable cause of the death of this woman. The medical evidence shows that she most probably died of hanging. There can be no doubt that her body was suspended by a rope by the husband, the present accused. The question is whether he at the time intended to kill her. The people thought her dead when she was slapped and kicked in the region of abdomen and, no doubt, the accused also thought that she was dead. When for the second time he entered into the house, most likely in order to create an appearance that the woman had committed suicide he took up the unconscious body of his wife, thinking it to be a dead body, and hung it up by a rope. Therefore he could not have intended to kill her, if he thought

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REPORTS (See Index).

High Court Notices.

ORIGINAL SIDE.

The High Court, Original Side, will be closed for the Annual Vacation (including Mahalaya, Durga, Lakshmi and Kali Pujas, Bhratriditia, Ed-duz-zoha and Jagadhatri Puja) on and from Friday, the 4th September, to Saturday, the 14th November, 1914, both days inclusive, and also on Monday, the 16th November, 1914, on account of Kartik Puja, and will resume its sittings on Tuesday, the 17th November, 1914.

The offices of the Court, Original Side, will be closed for general business for the Annual Vacation on and from Saturday, the 19th September, to Wednesday, the 11th November, 1914, both days inclusive.

One Judge will remain in town for urgent business and arrangements will be made for the attendance of such superior and subordinate officers as may be required for the disposal of urgent business.

By order,

HIGH COURT, O. S.; *The 26th August 1914.* MAURICE REMFRY, Offg. *Registrar.*

The under-mentioned principal officers will be on duty :—

The Master will hear urgent Chamber applications on the following specified days in September, *viz.* —Friday the 4th, Monday the 7th, Wednesday the 9th, Friday the 11th, Monday the 14th, and Wednesday the 16th, after which application for special appointments for the hearing of urgent Chamber applications should be made as will be notified hereafter.

The Hon'ble Mr. Justice Fletcher will hear applications of a specially urgent nature, other than Chamber applications, on Tuesday the 8th September and Monday the 15th September, and thereafter will sit only by appointment, applications for which should be made in writing to the officers on duty :—

From 4th to 8th September—
Mr. S. C. MITTER (Bar-at-Law),
8, Harish Chunder Mookerjee Road, Bhowanipur.

From 9th to 13th September—
Mr S. N. ROY (Bar-at-Law),
44, Hari Ghose Street, Calcutta.

From 14th to 18th September—
Mr. C. C. DASS,
13, Duff Street, Calcutta.

From 19th September to the end of vacation —
Mr. G. RYPER,
105, Park Street, Calcutta.

By order,

HIGH COURT, O. S; *The 31st August 1914.* MAURICE REMFRY, Offg. *Registrar.*

APPELLATE SIDE.

It is hereby notified that the High Court, Appellate Side, will be closed for the Annual Vacation from Friday, the 4th September, to Saturday, the 14th November, 1914, both days inclusive.

Notice as to the days on which the Vacation Judges will sit for the hearing of motions and cases in which vakils are engaged and as to the distribution of business, will be given from time to time.

The Vacation Judges will not sit during the following Court and Gazetted (Executive) holidays, *viz* :—

Gazetted holiday on account of Mahalaya.	Saturday, the 19th September, 1914.
Gazetted holiday on account of Durga and Lakshmi Pujas.	Wednesday, the 23rd September to Sunday, the 4th October, 1914.
Gazetted holiday on account of Kali Puja.	Sunday and Monday, the 18th and 19th October, 1914.
Court holiday on account of Bhratriditia.	Wednesday, the 21st October, 1914.
Gazetted holiday on account of Jagadhatri Puja.	Tuesday and Wednesday, the 27th & 28th October, 1914.
Court holiday on account of Ed-uz-zoha.	Friday & Saturday, the 30th and 31st October, 1914.

The office of the Appellate Side will be closed for the Vacation from Saturday, the 19th September to Wednesday, the 21st October 1914, both days inclusive.

Such Translators, Examiners, Copyists and Assistants of the Record Department as may be required, will attend throughout the Vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

HIGH COURT, APPELLATE SIDE: *The 31st August, 1914.* H. M. VEITCH, Offg. *Registrar.*

Collection of debts by alien enemy at the time of war.

Strictly speaking according to English practice an alien enemy subject or persons bearing alien enemy character are entitled to make contracts or collect money only for the purposes of subsistence and the necessaries for life. If more money

is put into their hands, it would be putting a burden on the Government to watch its destination or appropriation. Therefore we think that the order that has been recently made by the Bombay High Court at the instance of the Advocate-General of Bombay is the proper order to make. All collections made by alien enemies during the war should be deposited with the Government-recognised Banks and when they wish to draw out any money they should apply to and satisfy the High Court as to the absolute necessity and lawful purposes for its withdrawal and appropriation.

The protection of merchant shipping under neutral flag.

The United States has declared from the very outset that she will allow the ships of the belligerent Powers not only to fly American flag for carrying merchandise but also to enter such ships in American registry. It should be stated here that transfer of a ship by one belligerent to any neutral Power by such means in view or after the declaration of war would not ordinarily be recognised by other belligerents. But in this case since similar privileges have been conceded to all the belligerents it is expected that none would contest the concession so granted by the United States. By observing impartiality in this respect the United States has in no way departed from the obligations of a neutral Power. But this concession does not preclude any of the belligerent Powers from searching such vessels and confiscating enemy cargo. As Great Britain is not only the largest ship-owning country but has also the largest navy in the world, the concession granted by the United States will surely accrue more to the benefit of Great Britain than of Germany.

Declaration of London, acceptance by Great Britain.

The acceptance of the Declaration of London by Great Britain and France will also ensure much greater degree of safety to the merchant shipping in the present war. Vessels flying neutral flags will be protected from capture and general merchandise other than contrabands of war may be transported in such vessels with greater safety. Of course any belligerent will be entitled to question the *bonâ fides* of such flags. Enemy goods in such vessels will also retain their enemy character and may be captured and confiscated by any of the belligerents. But in the high seas such scrutiny in respect of the cargoes sailing under neutral flag must presuppose the existence of a belligerent navy all over the world. It has been announced that the German navy has singularly failed to interfere with the other belligerents' shipping. The present dearth of shipping in India must not be attributed to any apprehended interference by the German navy with British shipping in the East but is chiefly due to the fact that even commerce at the time of war must give way to military necessity. Directly the requirements of military transport are adequately met, we are sure that merchant shipping will be gradually restored. The acceptance of the Declaration of London by Great Britain and France who are the paramount naval powers in the world ensures freedom of commercial intercourse with Italy, America, Spain, Portugal, Holland, Norway, Sweden and other neutral countries both in the Old and the New World.

International Law and International Code of Honour.

German jurists have contrary to the view of the jurists of the civilized world maintained that all rules of International Law must yield to military necessity. We no doubt admit that the rules of public International Law have not the same binding force as those of Municipal Law. We are further prepared to concede that it has no more binding force amongst nations than perhaps a Code of Honour has amongst gentlemen. We may state here that the Code of Honour that was evolved in ancient India and which used to be observed almost to the letter even in the deadliest and bitterest of wars, as we find from our ancient literature and history, will require the modern world to be reborn and its civilization retraced to appreciate and act up to its standard. What however has staggered the people of this country at the present moment is how Germany which in the region of philosopy and science has far surpassed the other nations of the world could set at naught the ordinary dictates of humanity and fair-play not to speak of culture and civilization. Maltreatment of non-combatants, wreckless damage of property, incendiarism are repugnant to both modern and ancient ideas of civilized warfare.

Devastation by an invading army.

According to the accepted doctrines of public International Law universities and buildings devoted to religion, art, science and charity, historic monuments as also hospitals are inviolable so long as they are not used for military purposes. But during the sack of Pekin, the famous library and other historic relics of our time-honoured neighbours were looted by the Germans and much valuable literary treasure was destroyed. In the eye of the so-called Western civilization any excesses are permissible in the East. But at Louvain, the university town in Belgium, the Prussian army is said to have burnt the library and the university town to wreak their vengeance on Belgians for defending their hearth

and home. Women and children are also said to have been packed into railway trains and sent to an unknown destination. This seems to show that intellectual advancement in national life does not necessarily imply a corresponding moral advancement. The moral sense of the German people, or at any rate of the Prussian executive, seems to have gone down considerably since the Franco-Prussian war of 1870.

Breach of Belgian neutrality, past and present conduct of Prussians.

The accepted moral Code of Honour amongst the first class Powers in Europe has hitherto-fore regarded the neutrality and independence of the smaller States, like Belgium, as inviolable. After the phenomenal success of Prussian arms at Sedan on the 1st of September 1810 the question of the violation of the neutrality of Belgium arose between France and Germany in a very different way. The Prussians had to pay a heavy toll in killed and wounded at the battle of Sedan, and they proposed to the French that for the sake of humanity they may be allowed to remove the sick and wounded through Belgium. But France objected on the ground that it would amount to a violation of the neutrality of Belgium. For, the sick and wounded soldiers are always a burden on the army and to allow the Prussian army to send them back through a neutral country would much more lighten their military burden than if they had to do the same across the French frontier.

Sedan had practically decided the issue of the last Franco-Prussian war and if the Prussian army chose to violate the neutrality of Belgium through considerations of humanity no power on earth could have prevented it from doing so and very likely the act would not have been regarded by jurists and historians as quite reprehensible. But in the days of the present Kaiser's grandfather Germany's Code of Honour was much higher than in the present times. Then even the victorious Prussian army shrank from a technical violation of the neutrality of Belgium. But the Kaiser has not only provoked a war with Europe but from the very start has cast to the winds the Code of Honour that has so long governed civilized warfare. It is not surprising therefore that his army should maltreat non-combatants, wrecklessly damage private property, make bonfire of libraries, art treasures and universities and cause distress and misery amongst helpless women and children. The use of Dumdum bullets, and the dropping of prohibited explosives from air-crafts are also in a line with the other atrocities of the present war.

Review.

THE INDIAN ARMS ACT. *By Iqbal Sing, Pleader, Chief Court, Punjab. Printed at the Mercantile Press, Lahore.*

This is an annotated edition of the Indian Arms Act with a collection of Government Rules and Orders made under the Act. The text of the Act with notes thereon is followed by six bulky Appendices containing Rules framed by Government (1909), miscellaneous Orders of the Government of India, Rules relating to British soldiers' shooting passes, Rules for the export, import and transport of arms, Tariff duties, etc. Chapter II of Appendix 5 which deals with the relation of the Indian Arms Act with other connected Acts is important, but the general arrangement of matter in the book is such as to bring into prominence the importance due to it. The Notes are not merely collections of head-notes, but in some places are in the form of a commentary, and as a whole the book bears evidence of an earnest effort on the part of the author to collect all relevant and useful information on the subjects dealt with. But some defects are noticeable. Although the sections and the notes thereon are printed in different types the printing is not sufficiently distinctive to catch the eye. The setting out of full texts of long Government Notifications in the body of the commentary on a particular section is not commendable; for such an arrangement cannot but have a misleading effect. The index to the book should have been fuller. The table of contents given in the beginning of the book is defective and there is no table of cases cited in the notes. Although a large amount of matter has been collected in the book, we do not find a full and up-to-date list of persons exempted from the operation of the Arms Act. The book requires much improvement in many respects and we hope that the author will see to it when he brings out the next edition.

Notes of Cases.

CALCUTTA HIGH COURT

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE, J. APPEAL FROM APPELLATE DECREE No. 933 OF 1912, SARDHAKAR PODH AND OTHERS, Defendants, Appellants, *v.* BISESWAR GAONTIA, Plaintiff, Respondent. Heard, 22nd and 23rd, July. Judgment, 5th August 1914.

Central Provinces Tenancy Act, secs. 31, 32, 33—Improvement by tenant—Compensation—Determination without aid of Assessor—Jurisdiction—Irregularity—Waiver.

One Traga who was either a Gaontia or thiccadar of some kind in a village in the Central Provinces gave to the Defendant a lease for all time in respect of some lands which were found to be Bhogra lands of the village, on receipt of a *selami* of Rs. 300 in 1893. Traga afterwards surrendered the Mauza to the zemindar who while in *khas* possession made an endorsement on the lease granted by Traga saying that he sanctioned the holding of the Defendant as a raiyat. The zemindar then settled the Mauza with the Plaintiff, the Gaontia. The lease by Traga was not by a registered document and no effect had been given to it in the Courts below. The Defendant, however, claimed compensation for improvements effected by him. There was no dispute in the First Court as to the fact of an improvement having been made. The dispute was as to the cost of the improvement, the Plaintiff putting it at Rs. 120, the Defendant at Rs. 400. The First Court awarded Rs. 300 as compensation. There was an appeal by the Defendant and a cross-appeal by the Plaintiff as to the amount of the compensation. The lower Appellate Court confirmed the decision of the first Court and there was a second appeal by the Defendant and a cross-appeal by the Plaintiff. The second appeal was dismissed.

In the cross-appeal it was contended, *firstly*, that the Defendant was not a tenant who could under the Central Provinces Tenancy Act effect an improvement and even if it be taken that he made the improvement he could not claim compensation and, *secondly*, that the Courts below had no jurisdiction to determine the amount of the compensation without the aid of assessors as required by sec. 33 of the Central Provinces Tenancy Act and the rules made thereunder.

Held, that the tenant under the circumstances, was entitled to compensation.

Beni Ram v. *Kundan Lal* (I. L. R. 21 All. 496) referred to.

Sec. 32 of the Central Provinces Tenancy Act required the Court to determine the amount and the Rules directed the Court to associate assessors with it. Hence there was no want of initial jurisdiction in the Court and it was the manner in which that jurisdiction was to be exercised which had been defective in the case; this was a mere irregularity which had been waived.

Babu Satis Chunder Ghose for the Appellants.

Babu Ram Chandra Mozumdar for the Respondent.

A. T. M. *Appeal and cross-appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE NO. 1539 OF 1913. SM. AMINESSA, Plaintiff, Appellant, *v.* JINNATHALI & ORS., Defendants, Respondents. 29th July 1914.

Under-raiyati holding—Transferability—Custom.

In this case the Plaintiff-Appellant was the raiyat of a plot a land. She gave an under-raiyati lease to Defendant No. 2. Defendant No. 2 sold the lease to Defendant No. 1 Jinnat Ali.

The Plaintiff brought this suit for *khas* possession. The Defendant No. 2 alleged that the land was still in his possession, that he had not sold the land to Defendant No. 1 but had only made a *benami* in his favour to avoid creditors and he produced the *kobala*. Defendant No. 1 supported him and said there was no passing of the consideration money and Defendent No. 2 was in possession and paid rents to the raiyat-landlord.

The Munsif gave the Plaintiff a decree, holding that the sale of the holding was real and so there was an abandonment and the raiyat-landlord was entitled to *khas* possession and that Defendants Nos. 1 and 2 were colluding. The District Judge of Noakhali, however, reversed the decision of the Munsif and dismissed the suit, holding that in any view of the case the lease was transferable as there was nothing in the Bengal Tenancy Act which invalidated the sale; it was transferable by the general law (Transfer of Property Act).

Babu Hit Lal Guha on behalf of Plaintiff-Appellant said that these leases were excepted from the operation of the general law by sec. 117 of the Transfer of Property Act. As there was no provision for such transfer in the Bengal Tenancy Act, they cannot be transferred without a custom to that effect. The onus of proving custom was on the Defendants and that they had failed to do. Referred to I. L. R. 4 Cal. 135 which was on all fours, though the ruling was based on the Rent Law of Bengal (Act X of 1869). The Bengal Tenancy Act could have changed the law but has not. Further the *obiter dictum* of Maclean, C. J., in 7. C. L. J. 553, supports the view taken in the above ruling. Further, the recent Full Bench ruling (reported in 18 C. W. N. 971) supported the view.

Babu Hem Chandra Sen for the Defendent No 2, Respondent, submitted that there was no real transfer, the whole transaction was a *benami* one. The Defendant claimed an occupancy right which was transferable and further as he had made ample provision for the due payment of rent there could be no abandonment. Further there was nothing in the Bengal Tenancy Act to make the transfer of an under-raiyati holding void or voidable.

Cites in support 1 C. W. N. 162.

Held, that an under-raiyati lease is not transferable without the consent of the landlord.

I. L. R. 4 Cal. 135, 7 C. L. J. 553 followed. 1 C. W. N. 162 distinguished.

H. L. G. *Appeal decreed with costs.*

THE EMPEROR *v.* DALU SARDAR.

that the woman was already dead. We have therefore to fall back on what happened at the earlier stage of the occurrence when the accused gave the deceased kicks, blows and slaps. No doubt the kicks were given below the navel, a place where it is most especially dangerous to kick a woman. She fell down and became unconscious. The offence, therefore, that the accused committed was an offence under sec. 325, I. P. C. Under the circumstances of the case we are of opinion that he cannot be convicted of murder, but of an offence under sec. 325, I. P. C., only. We, therefore, convict him under that section, and sentence him to undergo rigorous imprisonment for four years.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN. LORD ATKINSON. LORD SUMNER. SIR JOHN EDGE. MR. AMEER ALI. 1914, Heard, 18, 19 and 23, June. Judgment, 20, July.	MAHARAJA SURJA KANTA ACHARJYA BAHADUR, since deceased (now represented by Maharajkumar Sashi Kanta Acharjya), Appellant, *v.* SARAT CHANDRA ROY CHOWDHURI, Respondent.

*Revenue Sale Law (Act XI of 1859)—Sale of entire estate—Persons holding portions of estate for over 12 years adversely to the then owners, if may maintain possession against purchaser—Limitation—*Thak *survey—Dispute of owners of neighbouring mahals as to boundary—Determination by Survey authorities—Decisions, value of, as evidence, though not as estoppel—Acquiescence—Privy Council—Practice—Concurrent findings on issue of fact—Reg. II of 1819, resumption of alleged* lakheraj *and settlement with person other than zemindar—Dispute between grantee and zemindar as to whether specified plots zemindari or* lakheraj *– Onus.*

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined and the purchaser at a Revenue sale purchases not the interest of the defaulting owner but that of the Crown, subject to the payment of the Government assessment, and as against a person who claims title to any portion of the estate by adverse possession, the time limited by the Limitation Act commences to run from the date of the sale.

When there are concurrent findings of the Courts below on an issue of fact, the Judicial Committee accepts these findings unless it is established that the judgments of the Courts below are clearly wrong.

ALLEN *v.* QUEBEC WAREHOUSE COMPANY (1).

Where the question whether certain lands were included within a mahal was in 1849, in the course of a Thak *survey, determined by the Survey authorities in a proceeding in which opportunity had been given to all parties interested of making their claims, raising their objections and producing their evidence :*

Held—*That though the parties were not estopped by the decisions arrived at, these were obviously of high authority and when acquiesced in by all the parties interested for a length of time and made the basis of important transactions should not be disturbed unless upon the clearest proof that they were erroneous.*

Where certain lands within a permanently settled mahal were resumed under Reg. II of 1819 and settled along with other Government Khas Mahal lands with

(1) 12 A. C. 101 (1886).

a person other than the zemindar, the onus of proving that lands within the ambit of the zemindari were part of such resumed land as against the zemindar did not lie on the person who claimed it as such in the sense that on his failure to discharge it, the lands must be taken to remain and be vested in the zemindar.

This was an Appeal from a Judgment of the Calcutta High Court (Stephen & Holmwood, JJ.), dated the 22nd May 1908. The action was brought by the Respondent as auction-purchaser at a revenue sale to recover possession of lands from the Appellant. The facts of the case sufficiently appear from their Lordships' Judgment. The Subordinate Judge of Rajshahi had allowed the Plaintiff's claim, and his decree was affirmed on appeal.

The learned Judges of the High Court concluded their Judgment in the following words :—

"We have already noticed the objections that were raised to the 1858 settlement on these very same grounds of wrongful inclusion of lands of the surrounding villages of the Sershabad estate, and it only remains to note that the final order of settlement to be found on page 486A lays down the boundaries as those villages up to the Panchatara tree of Shahbazpur (showing that that tree was a good deal north of the present Dhobra tree) together with the river Ganges. This order was passed on the spot in presence of the representatives of all parties, and is stated to be according to the *Thak* and Survey maps with which Enayetulla's map was compared. We have thus a clear history of the area in dispute down to the time of the permanent settlement, and there can be no doubt that the survey line is the boundary upon which the settlement of 1859 was made and that no one on behalf of the Defendants had any possession within that line until after the mahal had been made over to the minor in permanent settlement, and that there is no reason to suppose that the survey boundaries included any land not affected by the resumption proceedings in 1834.

"The whole of the arguments, therefore, based on subsequent possession, assumed land-marks, and hypothetical relaying of the *tanabandis*, falls to the ground, and we are left with the survey line as the sole basis of settlem nts.

"The fifth point is that a right to avoid incumbrances applies only to land settled in the permanent settlement of 1793 and not to land settled as part of a Government mahal. There seems to be a conclusive answer to this contention in the contents of the Settlement Rubokari of 1859, which show that that settlement was the first permanent settlement of the estate under the Regulation of 1793 and not a settlement of a Khas Mahal. The land escaped settlement originally, because an unjustifiable claim to have it treated as *debottar* was set up. This was adjudicated on, as we have already said, in the resumption proceedings in 1834, and the settlement of 1838 was a temporary one with an *ijaradar*, because the proprietor refused to take a permanent settlement.

"The sixth point is that the dispossession of the Plaintiff by the Defendant does not create an incumbrance which the Plaintiff as the purchaser at a land revenue sale is entitled to set aside under sec. 37 of Act XI of 1859; and, that, consequently, he is not entitled to the period of 12 years from the date when the sale became final, provided by Art. 121 of the Limitation Act, for the purpose of bringing his suit. In answer to this, we need only say

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that we are bound by a long series of decisions in this Court, where the law is laid down to the opposite effect. Of these we need only mention *Karmi Khan* v. *Brojo Nath Das* (2), and *Nuffar Chandra Pal Chowdhuri* v. *Rajendra Lal Goswami* (3).

"The seventh point is that accepting the law laid down by this Court, there is, in fact, still no incumbrance, and that the Plaintiff is, therefore, unable to claim the protection of Art. 121. For, the Plaintiff and his predecessors as owners of a permanently settled estate never had possession of the land, which was reduced into the possession of the Defendant as soon as it became capable of being possessed; they were never, therefore, dispossessed, and without dispossession there is no incumbrance.

"But since, as we have already found, the Defendants never commenced to take any possession till after 1859, when, as we have shown, they could acquire no right by accretion, and as the reformations that took place were on the Plaintiff's estate, the Defendants were mere trespassers admitted by the laches of the Plaintiff's predecessors, and their possession is an incumbrance liable to be set aside by the Plaintiff under sec. 30 of Act XI of 1859.

"Finding, therefore, as we do, that the Appellant fails in all his contentions, this Appeal is dismissed with costs."

Hence this Appeal.

Mr. L. DeGruyther, *K. C.*, and *Mr. Bhugwandin Dube*, for the Appellant, submitted that the lands in dispute did not form any portion of the mahal purchased by the Respondent. Permanent settlement of the Pargana Serahabad was made with the Appellant's predecessor-in-title. Lands situate in 8 villages in that pargana were resumed under the provisions of Reg. 2 of 1819, by a decree of Court in 1834 and 1836. Neither the Government nor the Respondent was entitled to hold an area of land larger than what was resumed in execution of that resumption decree. The terms of the decree fixed the area as 7,889 odd bighas and the execution proceedings specified the boundaries. The area of land so resumed was the village of Taraf Shyampur Paharpur. The burden of proving that the lands in dispute formed a portion of the area resumed, rested upon the Respondent and he had failed to discharge it. The rights of the parties ought to be determined according to the terms of the resumption decree. The Survey map subsequent thereto, especially in 1848, could not possibly affect those rights. The Survey officer is not a Judicial officer and a Survey map is no evidence of title, it is only evidence of possession: *Nobo Coomar Dass* v. *Gobind Chunder Roy* (4). By means of the survey neither the Government nor the lessees from the Government could extend their title to more land than what was resumed under the decree. The permanent settlement of 1859, assuming that it was made on the basis of the Survey map of 1848, could not lawfully confer upon the lessee a better title than the Government had therein. There was no proof that any portion of the lands settled in 1859 was the bed of a navigable river and there was nothing to show that the Government settled the river-bed. What they really settled was the area of the land resumed. It was impossible that the area of the land resumed in 1836, which was 7,889, could amount to 20,254 bighas now claim-

(2) I. L. R. 22 Cal. 244 (1894).
(3) I. L. R. 25 Cal. 167 (1897).

(4) 9 C. L. R. 305, 307 (1881).

ed by the Respondent. There was no question of concurrent finding of fact. The real point to determine on the appeal was the extent and the boundaries of the area resumed in 1836. The decisions in the boundary disputes that took place between the parties were not *res judicata* and did not estop the Appellant from raising the question of the rights of the parties.

Sir Erle Richards, K. C., and *Mr. A. M. Dunne* for the Respondent submitted that the case was concluded by concurrent findings of the Courts below. The findings were that the boundaries of the resumed land were definitely ascertained and fixed in 1848 when the Survey map was prepared, and that the permanent settlement of 1859 was made on the basis of that Survey map of 1848. The resumption decree specified the quantity of the area resumed only approximately. The correct extent and boundaries were fixed in 1848 in Survey proceedings, to which the Appellants were parties, and all parties had ever since acted upon the Survey map of 1848. The Appellant was estopped from denying the accuracy of the Survey map.

The Courts below have held that there was nothing to show that the lands in dispute were not included in the area resumed in 1836. Further, even if the lands in dispute were not included in the area resumed, the bed of a public navigable river vested in the Crown. The Ganges was a public navigable river and it ought not to be presumed that the river-bed was included in the lands permanently settled with the Appellant's predecessor in 1793. The presumption was that the Crown was the owner of the bed in 1859, and the burden of proving the contrary lay upon the Appellant: *Jagadindra Nath Roy* v. *The Secretary of State for India in Council* (5). There was evidence to show that in 1859 the river-bed was also settled as such and that would explain the increase in the area of the land.

Mr. L. DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an Appeal from the Judgment and Decree, dated the 22nd May 1908, of the High Court of Judicature at Fort William in Bengal affirming a judgment and decree of the 27th March 1905 of the Court of the Subordinate Judge of Rajshahi.

The action out of which the appeal arises was brought by the Respondent as purchaser at a sale held under Act XI of 1859 in consequence of the non-payment by the owner of the Government assessment of the Khas Mahal Shyampur Paharpur situate within the Pargana Sershabad and No. 218 on the Tauzi of the Maldah Collectorate, to recover possession of about 2,720 bighas of the Mauza Nij Shampur alleged to form portion of the said Khas Mahal, the possession of which was withheld by the Appellant, and for damages, for mesne profits and further relief.

This sale was held on the 14th of January 1891 and duly confirmed on the 15th of March following.

The Appellant relied upon two defences :—First, that the land, the possession of which was sought to be recovered, styled for convenience the land in dispute, did not form any portion of the mahal so purchased by the Respondent, and, secondly, that even if it did, the

(5) L. R. 30 I. A. 44 at p. 52 : s. c. 7 C. W. N. 193 (1902).

Appellant and those through whom he claimed had held possession of this land adversely to all persons having claims upon it continuously since, if not before, the year 1859 up to the present time, and that the Respondent's claim was therefore barred by the Limitation Act. In anticipation of this second defence the Respondent, in his plaint, alleged that this adverse possession, even if proved, was, under the provisions of Act XI of 1859, only an incumbrance on the mahal purchased, that on sale this latter was vested in him free from all incumbrances, including the incumbrance thus created, and that consequently his right to recover possession was not barred by the Limitation Act.

It was admitted by Mr. DeGruyther, on behalf of the Appellants, that on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited, or rather, determined, and that under such a sale as that which took place in this case, what was sold was not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment, and that therefore the time limited by the Limitation Act only commenced to run from the date of the sale in this case, the 14th of January 1891. If this be so, then, as the action was instituted on the 23rd of December 1902, the statutory period of 12 years had not elapsed before the latter date, and the claim of the Respondent to recover was unaffected. This defence may be accordingly put aside. There remains the part-and-parcel question.

In order to appreciate the respective contentions of the parties litigant, and the rulings of the Courts below upon this question, it is necessary to refer shortly to the history of those properties of which the land in dispute is alleged to have formed part.

It was not, their Lordships think, disputed that at the time of the decennial settlement of Bengal one Chandra Narayan Roy was the zemindar of the Pargana Sershabad, and that the permanent settlement of 1793 was made with him in respect of that pargana. Neither was it disputed that at the time of this settlement Chandra Narayan Roy improperly returned as *debottar* lands, *i.e.*, lands devoted to religious purposes, and therefore unassessable to Government revenue, portions of eight mauzas or villages forming portion of the pargana Sershabad. The Crown being misled by this untrue statement subsequently instituted proceedings, under Reg. 2 of 1819 dealing with such matters, to depirve, by way of resumption, Chandra Narayan Roy and his successor of the land so untruly described. The Crown represented by the Indian Government obtained a decree for resumption of this latter land on the 24th of December 1834, which was on appeal confirmed by the Special Commissioner on the 18th of June 1836. Possession of the misdescribed land having been thus obtained by the Government, they unified it and constituted it a Khas Mahal.

The main contention of the Appellant has been that as Chandra Narayan Roy was the owner under the permanent settlement of the entire pargana of which the land so resumed formed part, the burden of proving that the land in dispute formed portion of the land so resumed rested upon the Respondent, and that in so far as he failed to discharge that burden, the lands in dispute must

be taken to remain and be vested in the Appellant, the successor-in-title to Chandra Narayan Roy, as his property. This contention, though in the main in their Lordships' view, sustainable enough, is in one respect mistaken, namely, this that it was competent for the Crown in the year 1859, when making the settlement, under which the Respondent in effect claims to have added to the resumed land other land then belonging to it and made a grant of both combined. Such difficulty as the case presents arises altogether from one's inability to identify by metes and bounds the land actually resumed, and it is to this point the Appellant's Counsel have directed their lengthy and ingenious arguments.

Three attempts have been made to fix the boundaries of this land and to definitely ascertain its position and extent, in 1838, in 1840 and in 1848, respectively. Both the Courts below have found that the last of the three, namely, that made in 1848, was so successful that the accuracy of the result then arrived at was not before them successfully impeached. It is embodied in the map of the Survey of the village of Shyampur Paharpur surveyed in April 1848, a copy of which numbered Map 2 was given in evidence. The conclusions of the Courts below on this point being concurrent findings on an issue of fact, the well established rule of this Board in such cases, as stated by Lord Herschell in *Allen* v. *Quebec Warehouse Company* (1), is this :—"Their Lordships do not consider that the question they have to determine is what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong." It is vital to the Appellant's case that this should be shown on his behalf for this reason, that after the decree for resumption of the misdescribed *debottar* lands had been enforced, and the Government assessment upon them fixed, Chandra Narayan Roy declined to take grant of them offered to him by way of settlement, and thereupon a lease or *ijara* settlement, of them was made to one Shib Chandra Chatterji for a term of 20 years from the 1st of May 1838. On the expiration of this term, after some delay, a grant by way of final settlement of this Khas Mahal was, on the 27th of September 1859, made to Jogendra Narayan Roy, a younger son of Chandra Narayan Roy. By successive transfers made from time to time this mahal ultimately became vested in Udoy Chanda Bothra, the defaulting owner, upon whose failure to pay the Government revenue, it was, as already mentioned, sold to the Respondent on the 14th of January 1891.

Now the Subordinate Judge has found (p. 383) that the permanent settlement of this mahal (Tauzi No. 218) in September 1859 "was undoubtedly made upon the *Thak* and Revenue Survey of 1847, 1848." And the High Court have found as a fact (p. 410), that "the settlement of 1859 was made on the basis of the Survey map whether that map was right or wrong, and whether it differed from the *tanabandi* of 1840 and the settlement of 1838 or not. That it was wrong, there is not a particle of evidence to show. It was always acted upon, and must be taken to be the best evidence of what was settled in 1859.

It was contended before their Lordships, as before the Courts below, that on a comparison of this Survey map of

(1) 12 A. C., 101 (1886).

1848, with the proceedings in the Court of the Collector of Maldah on the 18th of June 1838, before Mr. Edward Latour, "in the matter of the settlement of Khas Mahal Taraf Shyampur Paharpur decreed under Reg. 2, 1819," and the Rubokari dated the 11th March 1840 of Mr. William Bell [Deputy Collector of the district of Maldah (p. 274, R.)] and with the map prepared by him entitled *simanabandi* map prepared by him, it would be found that the area of the land alleged to have been resumed according to the Revenue Survey was largely in excess of the 20,254 bighas which in the proceedings before Mr. Latour they are found to measure, that the survey was consequently plainly inaccurate, and the findings of both the Courts below as to its being unimpeachable were, therefore, clearly wrong. This contention is dealt with in the Courts below, and especially by the High Court in their judgment at pp. 410 and 411. The so called map prepared by Mr. Bell is in truth no map at all. It is a picture containing lineal measurements, made in different directions, estimated in *rasis*, from a peg identified as one of those placed by Mr. Latour. No superficial areas were measured or the contents ascertained. In the order made by Mr. Bell on the 11th of March 1840 it is recited, amongst other things, that the boundaries of the Khas Mahal were taken by Mr. Latour by fixing pegs in certain places, and measuring from these pegs in certain directions, but that several of these pegs had been swept away, that at the time of Mr. Latour's settlement the River Bhagirathi flowed below and to the west of a certain palm tree treated by Latour as a landmark for the purpose of his measurements, namely the Panchatara palm tree at Dhoka, that there was Majh Dearah to the west of this river, and to the west again of that Majh Dearah the River Ganges flowed, that all the lands of this Majh Dearah were diluviated, that the two rivers became united, and the former bed of the latter river became Dearah. The physical features of the Khas Mahal thus became altogether changed. In addition, the question of this alleged excess in the survey was elaborately dealt with in the proceedings instituted in the Court of the *Thakbast* Deputy Collector of the districts of Bhagalpur and Maldah in reference to disputes arising between the owners of the neighbouring Mauza of Sherpur Bhandar, and Ram Chandra Roy and others, as owners of this Mauza Shyampur Paharpur touching the boundaries between these mauzas. In the order made by the Deputy Collector on the 11th May 1848, the proceedings before Messrs. Latour and Bell, respectively, are cited at length, the alleged excess is dealt with, and it is ordered that the *hadbast* of the whole of this property in dispute should be made within the circuit of Shyampur Paharpur, that a *parwana* should be written to Syed Ata Hossein Peshkar, directing him to make the *hadbast* thereof, and that a copy of the proceedings shall be forwarded to the Superintendent of *Thakbast* for final orders with respect to the excess lands. In pursuance of this order the case came before the Superintendent of Surveys for re-trial, and by his order, dated the 6th of March 1849, reciting again at length the proceedings before Messrs. Latour and Bell, and stating the cause to which this excess was due, it was ordered that the Appellant's objections should be disallowed, and that the lands which the Deputy Collector considered to be excess lands should be held

to be intrinsically the land of Shyampur Paharpur Government Khas Mahal belonging to Chandra Chatterji, the Respondent in that case, and that the *Thak* prepared by the said officer should be maintained and confirmed. These last proceedings, like those preceding them, are in truth determinations by public officials of the matters in dispute, all the parties interested being given the opportunity of making their claims, raising their objections, and producing their evidence. The parties to them are, no doubt, not estopped by the decisions arrived at, as they would be in regular proceedings in Courts of law, but these determinations are obviously of high authority, and when acquiesced in by all the parties interested for a length of time, and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they are erroneous. Their Lordships have not found that the comparison of Bell's map with the Survey map is sufficient to lead them to the conclusion that the latter is, save possibly in one respect, erroneous, nor have they discovered anything in any of the proceedings subsequent to the year 1848 to lead them to think so. The bed of the Ganges is apparently included in the mahal according to the Survey map, but this does not form part of the lands in dispute, and if it belonged to the Crown, as it is contended it did, it would be vested in the purchaser by the settlement of the 27th of September 1859. The finding of both Courts that the survey formed the basis of the settlement has not been impeached and their Lordships, on full consideration of all the evidence, find themselves unable to come to the conclusion that the other concurrent finding of fact, namely, that the Survey map is accurate, was clearly wrong. They are, therefore, of opinion that the judgment and decree appealed from should stand, and that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. W. W. Box & Co.* for Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 125 OF 1913.

FLETCHER, J.
RICHARDSON, J.
1914,
14, April.

JUGOL KISHORE, Decree-holder, Appellant,
v.
CHINTAMONEY, Judgment-debtor, Respondent.

Limitation Act (IX of 1908), Art. 182, cls. (5) and (6)—Step in aid of execution—Accompanying serving peon and identifying the judgment-debtor, if a step in aid of execution—Court deciding ex parte *and without notice to judgment-debtor—Application within time—Decision if binds judgment-debtor—*Ex parte *decree.*

One of the decree-holders accompanying the serving peon and identifying the judgment-debtor upon whom notice of the application for execution had been taken out for service does not by itself constitute a step taken by the decree-holders in aid of execution within cls. (5) and (6) of Art. 182 of the Limitation Act.

Where an application for execution which was reported by the office of the Executing Court to be time-barred was, without notice to the judgment-debtor, held by the Court to be within time, and registered and later on dismissed for default,

Held—*That the decision that the application was not time-barred was not binding on the judgment-debtor.*

Jugol Kishore v. Chintamoney.

An ex parte *decree is a good decree, but if it is made in the absence of and without notice to the other party, it does not bind him, and does not prevent him from showing what the true facts of the case were.*

This was an Appeal against an order of Babu Tarak Nath Dutt, Sub-Judge of Zilla Hooghly, dated the 8th January 1913, reversing an order of Babu Sarada Prosunno Banerjee, Munsif of Amta, dated the 21st June 1912.

The facts of the case will apoear from the judgment.

Babu Atul Krishna Roy for the Appellant.

Babu Jadu Nath Kanjilal for the Respondent.

The Judgment of the Court was as follows:—

Fletcher, J.—This is an Appeal against an order of the learned Subordinate Judge of Hooghly dated the 8th January 1913. The sole question raised by the Appellant in this case is whether the application for execution of a certain decree is barred by limitation. The learned Judge of the lower Appellate Court has held that it is barred and the present appeal has been preferred by the decree-holders against that order.

The decree-holders obtained the decree as long ago as the 14th April 1903 in the Court of the Munsif of Gobindpur in the district of Manbhum for Rs. 500. The first application for execution was made as long ago as the 23rd July 1903. That application was dismissed for default on the 5th September 1903.

The next application for execution was dated the 9th July 1906. Notice of that application was ordered to be issued on the 21st July 1906; and according to the Appellant, the notice was actually served on the 27th July 1906, one of the decree-holders identifying the judgment-debtors to the serving peon. It is essential for the Appellants in the present case to show that what took place on the 27th July 1906 comes under either cl. 5 or cl. 6 of Art. 182 of the Indian Limitation Act. How the Appellants can say that the mere fact that one of them went along with the serving peon to identify the judgment-debtors was itself a step in aid of execution, I do not understand. If a person goes along with the serving peon to identify a party, that would not be a step in aid of execution, but is one of the necessary preliminaries to enable the Court to deal with the matter when the party, if served, comes before it. In the present case, the learned Subordinate Judge came to the conclusion that the 21st July 1906 when notice was directed to be issued was the proper date from which he should calculate the time from which the period of limitation commenced to run. I think, the learned Judge rightly rejected the 27th July 1906 as being that date on the ground that one of the decree-holders went along with the serving peon to identify the judgment-debtors. That application was also dismissed for default on the 4th August 1906.

Then the third application was made on the 27th July 1909. The office reported on the next day that the application was barred by limitation. The learned Judge, on the 9th August 1909, without any notice to the judgment-debtors, held that the application for execution of the decree was not barred and directed notice to issue. On the same day the application was registered and nothing else having been done, on

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the 4th September 1909 the application was dismissed for default.

Then the present application was made on the 24th April 1911 and the decree was transferred to the Court of the Munsif at Amta, in the district of Hooghly, for execution and the learned Judge of the lower Appellate Court held that the decree became incapable of execution, because no steps in aid of execution had been taken between the 21st July 1906 and the 27th July 1909. It is said that the order of the Court dated the 9th August 1909 holding that the decree was not barred is binding on the judgment debtors until it is set aside. But this is not so. It is quite true that an *ex-parte* decree passed by a Court is a good decree; but, if the decree is made in the absence of and without notice to the other party, of course that decree does not bind the other party or does not stand in his way of showing what were the true facts of the case and it seems to me that the judgment-debtors not having had any notice of the order of the 9th August 1909 are entitled to show that the decree has become barred by limitation by reason of no steps having been taken between the 21st July 1906 and the 27th July 1909. I think, the learned Judge of the lower Appellate Court came to a correct conclusion when he held that this decree was not capable of being executed. That being so, the present Appeal fails and must be dismissed. Having regard to the fact that the judgment-debtors have got rid of the liability under the decree, I think, there ought not to be any order as to the costs of this Appeal.

RICHARDSON, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2740 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1914, Heard, 29 and 30, January. Judgment, 30, January.

AMULYA RATAN SIRCAR, Plaintiff, Appellant, *v.* TARINI NATH DEY and ors., Defendants, Respondents.

Occupancy holding, non-transferable, if may be disposed of by Will—Title by estoppel—Testator or heir-at-law, if estopped—Statute, construction of—Right if may be taken to have been conferred by implication—Bengal Tenancy Act (VIII of 1885), secs. 26, 178 (3) (d).

Except under a local usage a raiyat is not competent to make a testamentary disposition of a non-transferable occupancy holding.

The heir-at-law of the raiyat is not estopped from questioning the validity of the devise.

HARIDAS *v.* UDOY CHARAN (2) *dissented from.*

Rights cannot be conferred by mere implication from the language used in a statute. There must be clear and unequivocal enactment.

ARNOLD *v.* MAYOR OF GRAVESEND (1) *followed.*

The doctrine of estoppel cannot be applied as between donor and donee in every case.

There is no estoppel in favour of the executor or legatee as against the testator.

There is no estoppel in favour of the executor or the legatee as against the heir-at-law of an occupancy raiyat so as to deprive him of what he is entitled to take by statute.

(1) 2 K. & J. 574, 591: s. c. 110 R. R. 327 (1856).

(2) 12 C. W. N. 1086 : s. c. 8 C. L. J. 261 (1908).

AMULYA RATAN SIRCAR *v.* TARINI NATH DEY.

This was an Appeal from a decision of J. C. K. Peterson, Esq., District Judge, 24-Parganas, dated the 26th July 1911, reversing that of Babu Khagendra Nath Bose, Munsif, Alipore, dated the 30th September 1910.

The facts of the case will appear from the judgment.

Babu Girija Prosunna Roy Choudhuri for the Appellant.

Babu Jyotish Chandra Hazra for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The subject-matter of the litigation which has culminated in this Appeal is one-half share of an occupancy holding which admittedly belonged at one time to Tarapada Chatterjee. The right to this one-half share is claimed, on the one hand, by the transferee from the heir-at-law, who is the Plaintiff Appellant, and, on the other hand by the transferees from the executor, who are the Defendants-Respondents. The occupancy holding, it is not disputed, is not transferable by custom or local usage. In so far as the Plaintiff is concerned, his transfer from the heir-at-law has been recognised by the landlord, and no question can arise as to its validity on that ground. The substantial question in controversy is, whether the testamentary disposition was valid and operative so as to exclude the heir-at law, because if there was a valid testamentary devise, the property passed to the executor, and the heir-at-law consequently took nothing. On behalf of the Defendants-Respondents, it has been contended that the occupancy holding, though not transferable by custom or local usage, may be the subject of a valid testamentary disposition. The Bengal Tenancy Act admittedly does not contain any provision expressly applicable to this subject. But our attention has been drawn to section 26 which regulates the devolution of occupancy right when a raiyat dies intestate, and it has been argued that the legislature has herein, by implication, indicated that a raiyat is competent to make a testamentary disposition of his occupancy right. There is clearly no force in this contention. In the first place, if we were to accept the mode of interpretation of sec. 26 suggested by the Respondents, we would have to contravene the elementary rule of construction that right cannot be conferred by mere implication from the language used in a Statute; there must be a clear and unequivocal enactment [*Arnold* v. *Mayor of Gravesend* (1)]. In the second place, full effect would be given to the implication contained in sec. 26, if it were shown that a raiyat is competent to make a testamentary disposition of his right of occupancy in certain events. Now, sec. 178, sub-sec. (3), cl. (d), indicates that in this respect the right of an occupancy raiyat stands on the same footing as his right to transfer his holding. Cl. (d) provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage. In the case before us, no local usage has been proved and the Respondents are not in a position to support the validity of the bequest as made in accordance with a local usage. The Respondents have consequently been driven to take up a different position. Their contention is that the heir-at-law is estop-

(1) 2 K. & J. 574, 591 : S. C. 110 R. R. 327 (1856).

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ped from questioning the validity of the devise made by the testator, and in support of this view reliance has been placed upon the judgment of Mr. Justice Doss in the case of *Haridas* v. *Udoy Charan* (2). It may be conceded that the view taken by that learned Judge does support the argument for the Respondents. But it is worthy of note that when an appeal was preferred under the Letters Patent against the decision of Mr. Justice Doss, the decree was affirmed on a different ground: *Udoy Charan Das* v. *Haridas Bairagee* (3). It is consequently impossible for us to treat the matter as concluded by authority, although the opinion expressed by Mr. Justice Doss must be deemed entitled to the highest consideration. On behalf of the Appellant, the correctness of the view taken by Mr. Justice Doss has, however, been controverted; and we have been invited to examine the grounds upon which that opinion is based.

Mr. Justice Doss points out, in the first place, that a transfer of an occupancy holding is not a void transaction that it is binding between the parties, namely, the transferor and the transferee and all persons claiming through them, and that it is voidable only at the option of the landlord or his representative-in-interest. This view is founded on the doctrine of estoppel, which was clearly recognised by Phear, J., when he observed in *Bibee Suhodra* v. *Maxwell Smith* (4) that the raiyat "certainly could not himself recover it (the holding) from the stranger to whom he had transferred it for valuable consideration," and by Couch, C. J., when he remarked in *Nurendra* v *Ishan* (5), that "the raiyat could not recover possession from the transferee as he would be bound by his act of transfer." To the same effect is the express decision in *Bhagirath Changa* v. *Hafizuddin* (6), where Stevens, J., pointed out that when the occupancy raiyat has transferred his holding on the representation that he had a transferable interest therein, he cannot, on principles of equity and good conscience, be permitted to prove against the transferee, who had paid consideration for the transfer, that he had no transferable interest to convey. This is an intelligible principle, recognised so long, and so firmly established that its soundness cannot now be successfully challenged. Mr. Justice Doss then concludes that if this is the character of the transaction, namely, the character of a voidable transfer, "it seems to follow that the heir of an occupancy raiyat ought to be held bound by a transfer of the holding made by a will." The learned Judge then proceeds to state the reasons for this inference, namely, that if the heir is bound by a transfer for valuable consideration or by a gift, there does not seem to be any reason why he ought not to be held bound by a transfer made by a Will. Before we test this reasoning, it is necessary to observe that the broad proposition that the heir of an occupancy raiyat is bound by a gift made by the raiyat himself may, when occasion arises, require examination. Cases are, no doubt, conceivable where the donee may, by the acceptance of the gift, have altered his position and may in such circumstances be entitled to rely upon the doctrine of estoppel

(2) 12 C. W. N. 1086: s. c. 8 C. L. J. 261 (1908).

(3) 10 C. L. J. 603 (1909).

(4) 20 W. R. 139 (1873).

(5) 13 B. L. R. 274 (2:5): 22 W. R. 22 (26) (1874).

(6) 4 C. W. N. 679 (1900).

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in support of his title. To take a concrete illustration: A is offered two gifts by two of his relations, on the condition that if he accepts one, he must renounce the other; he makes his election in favour of one of the gifts. His position would be altered if that donor were permitted thereafter to prove against him that the donor had no transferable title to convey. But, on the arguments addressed to us, we are not prepared at present to accept it as an invariable principle of law that, in every case of gift, the doctrine of estoppel may be applied as between donor and donee. Let it be assumed, however, for the purposes of the present argument—and for that purpose alone—that in all cases of transfer for valuable consideration as also in all cases of gift, the heir is bound by the same estoppel as the transferor or the donor himself; does it follow that this principle is applicable to cases of testamentary devise? In the case of transfer *inter vivos*, with or without consideration, there is, on the assumption made, an estoppel in favour of the transferee as against the transferor, and that estoppel is binding upon the heir of the transferor. In the case of a testamentary devise is there any estoppel as between the testator and the intended legatee or the executor? It cannot be disputed that it is open to the testator, up to the very last moment of his life, to change his mind, and to revoke the disposition made by him. His testament does not come into operation till the moment after his death. Consequently, as between the testator on the one hand and the legatee or executor on the other, there is no room for any possible application of the doctrine of estoppel. The position becomes plain when we recall to mind the nature of the estoppel applicable to cases of transfer for consideration. The principle is stated lucidly by Lord Denman in *Pickard* v. *Sears* (7), in the following terms:—"Where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The principle was amplified and re-stated by Lord Selborne in *Bank of Lousiana* v. *The First National Bank of New Orleans* (8) in these terms:—"The foundation of that doctrine, which is a very important one and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated affect the contract, and without reliance upon which or without the statement of which the party would not enter into the contract and which being otherwise than as they were stated would leave the situation after the contract different from what it would have been if the representations had not been made, then the person making those representations shall, so far as the powers of a Court of equity extend, be treated as if the representations were true and shall be compelled to make them good." Lord Selborne then procceeded to add a very important qualification, "but those must be representations concerning existing facts," and thereby emphasised the statement of Lord Cranworth in the case of *Jordan* v. *Money* (9), to the effect that in order to found an estoppel the representation must be of existing facts and not of mere

(7) 6 A. & E. 49; 45 R. R. 538 (1837).
(8) L. R. 6 H. L. 352 at 360 (1873).
(9) 5 H. L. C. 185 (1854).

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intentions. It is clear, therefore, that as between the testator on the one hand and the executor or legatee on the other, there is no estoppel. Consequently, so far as the heir-at-law is concerned, he cannot be deemed bound by any derivative estoppel traceable to an estoppel which bound his ancestor. If he is to be bound by any estoppel, it must be an independent estoppel against him; but on behalf of the Respondents no intelligible principle of justice, equity or good conscience has been suggested upon which any such independent estoppel can be reasonably founded. The truth is that the testament, if it takes effect, comes into operation immediately after the death of the testator; at the same moment, precisely, the statutory right of inheritance comes into operation, and there is no reason why an estoppel should be applied against the heir-at-law so as to deprive him of what he is entitled to take under the statute. We are thus constrained to hold that the view taken by Mr. Justice Doss cannot be supported on principle; and that in the case of a testamentary devise of non-transferable occupancy holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity. In the case before us, the result follows that there was no valid disposition in favour of the executors. The Plaintiff, as the transferee from the heir-at-law by successive devolution, is consequently entitled to the property claimed, in respect whereof the Defendants are trespassers in the eye of the law.

The result is that this Appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 130 OF 1912.

FLETCHER, J. RICHARDSON, J. 1914, Heard, 14, July. Judgment, 21, July.	KUNJA LAL ROY and ors., Plaintiffs, Appellants, *v.* UMESH CHANDRA ROY and others, Defendants, Respondents.

Occupancy holding, if may be bequeathed by Will—Bengal Tenancy Act (VIII of 1885), sec. 26.

Except under local usage, an occupancy holding is not capable of being bequeathed by Will.

AMULYA RATAN SARCAR *v.* TARINI NATH DEY (2) *followed.*

DAYAMAYI *v.* ANANDA MOHAN ROY (3) *referred to.*

This was an Appeal preferred on the 6th of May 1912, against the decree of Babu Debendra Bejoy Basu, Subordinate Judge of Zilla Murshidabad, dated the 27th of January 1912.

The facts of the case will sufficiently appear from the judgment.

Babus Ram Chandra Majumdar, Chandra Sekhar Banerjee and *Atul Chandra Bose* for the Appellant.

Babus Mohini Mohan Chatterjee, Peary Mohan Chatterjee and *Probodh Chandra Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an Appeal by the Plaintiffs from the judgment of the learned Subordinate Judge of Murshidabad, dated the 27th of January 1912.

The Plaintiffs as the executors of the Will of one Anandamoyee brought the

(2) 18 C. W. N 1231 (1914).
(3) 18 C. W. N. 971 (1914).

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suit against the Defendants to recover certain moveable and immoveable property. The property in question formerly belonged to one Digambar Roy who by his Will, dated the 14th Bhadra 1304, bequeathed all his properties absolutely to his wife Anandamoyee. By her Will, dated the 29th of Bhadra 1314, Anandamoyee appointed the Plaintiff and one Atul Behary Roy (since deceased) to be her executors and gave the whole of her property for the maintenance of the worship of an idol to be established after her death. Anandamoyee died on the 2nd Aswin 1314, corresponding with the 19th of September 1907, and after her death her Will was duly proved.

The Defendants having dispossessed the Plaintiffs of the property, they brought the present suit to recover the same. The Defendants claimed as heirs of Digambar after the death of Anandamoyee. The learned Subordinate Judge decreed the suit in part, but dismissed it with respect to certain *jotes* held with a right of occupancy by Digambar holding that such *jotes* were not capable of being bequeathed by Will. Against this decision the Plaintiffs have appealed to this Court.

Sec. 26 of the Bengal Tenancy Act, 1885, enacts, "If a raiyat dies intestate, in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immoveable property."

This section standing alone no doubt suggests that a right of occupancy is immoveable property and, if it be so, I should have thought that the holder would have the right to bequeath it by his Will.

For, by sec. 46 of the Indian Succession Act, 1865 (which is incorporated in the Hindu Wills Act), it is provided that "every person of sound mind and not a minor may dispose of his property by Will."

It has not been argued before us, nor could it be, that in no circumstances can a raiyat make a Will in respect of a right of occupancy. Sec. 26 of the Bengal Tenancy Act speaks of a raiyat dying "intestate" in respect of a right of occupancy and must therefore contemplate that in such cases a raiyat should die "testate" in respect of a right of occupancy. It has been argued however that an occupancy raiyat can only dispose of his right by Will when there is a special custom enabling him to do so. In support of this argument reference was made to secs. 11 and 18 of the Act authorising a tenure-holder and a raiyat holding at fixed rates to dispose of their holdings by Will.

It is said therefore that as the Act is silent as to the power of an occupancy raiyat to dispose of his holding by Will, the only power that an occupancy raiyat has of disposing by Will of his holding under sec. 183 is in the even of there being a special custom in that respect. This principle of construction was applied by the Full Bench of this Court in the case of *Lakhan Narain* v. *Jainath* (1) with respect to the heritability of non-occupancy rights. In a recent case [*Amulya Ratan Sarcar* v. *Tarini Nath Day* (2)] it was held that an occupancy raiyat had no power to bequeath by Will his holding unless a special custom to do so was proved. This decision is binding on us unless it has been affected by the recent decision of the Full Bench reported in *Dayamayi* v. *Ananda Mohan Ray* (3). That decision however

(1) I. L. R. 34 Cal. 516 (1907).
(2) 18 C. W. N. 1290 (1914).
(3) 18 C. W. N. 971 (1914).

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did not deal with the power of an occupancy raiyat to bequeath his holding.

The case appears to me to be concluded by the authorities I have cited above. The present Appeal therefore fails and must be dismissed with costs.

RICHARDSON, J.—The law is admittedly in an unsatisfactory condition, the question of transferability of occupancy rights having been dealt with in the Bengal Tenancy Act rather by way of suggestion than by way of positive legislation.

I agree that on the authorities as they stand, occupancy rights are not capable of being made the subject of testamentary disposition.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3840 OF 1912.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 15, May. 1914, Judgment, 26, May.

JIBANANDA CHAKRABARTY and others, Defendants, Appellants, *v.* KALIDAS MALLIK and another, Plaintiffs, Respondents.

Easement—Right to take water from tank along defined route—Servient owner if may alter route—Dominant owner, if may insist on use of old route—Motive of servient owner, if material.

When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access and the servient owner cannot at his discretion substitute for his use some other means of access, any more than the dominant owner himself can, at his discretion, take recourse to a different path. The dominant owner may insist on his right to use the old path, his motive in so doing being immaterial.

This was an Appeal from a decision of Babu Asutosh Banerjee, Subordinate Judge, Burdwan, dated the 2nd September 1912, affirming that of Babu Narayan Chandra Ghosh, Munsif, Burdwan, dated the 8th April 1911.

The facts of the case will appear from the judgment.

Babus Bipin Behari Ghosh and *Ramani Mohan Chatterjee* for the Appellants.

Babu Gour Chandra Pal for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the Defendants in a suit for declaration of the prescriptive right of the Plaintiffs to take water from a tank, for removal of the obstruction erected by the Defendants to the exercise of such right, and for an injunction to restrain interference in future. The facts are not in controversy at this stage and may be briefly narrated. The Defendants are the owners of a tank which stands on their land. The Plaintiffs are neighbours and have their residence at some distance towards the east of the tank. They and the members of their family have, for more than 20 years, peaceably and openly, as of right and without interruption, used the water of the tank, claiming title thereto as an easement. They used to obtain access to the water by a path across the east bank and down a flight of steps on the eastern slope of the bank. In 1908, the Defendants re-excavated the tank, repaired the slope on all sides and built a flight of masonry steps on the northern slope. Since then, the Defendants have

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prevented the Plaintiffs from access to the water in the accustomed manner by what has been described as the eastern ghât. The Defendants, however, do not deny that the Plaintiffs have acquired a right of easement in the water of the tank, and they are agreeable to the use of the water by them by means of the new flight of steps built on the northern slope. But the Plaintiffs are not satisfied with this and insist on their right to reach the water by what formed the eastern ghât and has now been obliterated by the Defendants. The question consequently arises, whether when the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access, or, may the servient owner, at his own discretion, substitute for his use some other means of access. No authority directly in point has been placed before us by either the Appellants or the Respondents in support of their respective contentions. But we are of opinion that on principle the question must be answered in favour of the dominant owner.

It is plain, as was pointed out by Lord Campbell, C. J., in *Race* v. *Ward* (1), that water as it issues on excavation of a well or a tank, is not to be considered as produce of the soil and that a right to enter on land and to take such water may be acquired as an easement: *Manning* v. *Wasdale* (2), *Constable* v. *Nicholson* (3), *Macnaghten* v. *Baird* (4), *Gardner* v. *Hodgson* (5).

This right, it is obvious, may be analysed into two constituent elements, namely, a right to go on the land of the servient owner and a right to take the water which stands on his land and so long as it stands there is his property. The two constituent rights are acquired simultaneously, but each must nevertheless be acquired in conformity with the statute. Now, in so far as a right of way is concerned, it is clear that to establish a private right of way by prescription it is necessary that in going across the lands to any particular point or for any particular purpose, a particular route must be used. As Morton, J., puts it on behalf of the Full Bench in *Hyot* v. *Kennedy* (6), "to establish a way by prescription the use must be not only open, adverse, uninterrupted, peaceable, continuous and under a claim of right, but must be confined substantially to the same route and to substantially the same purpose for which the way was designed originally, unless the way is one for all purposes." This is plain, for a way imports of necessity a right of passing along a particular route between certain termini: *Jones* v. *Percival* (7), *Holmes* v. *Seely* (8), *Rojers* v. *Duncan* (9). On this principle it has been ruled that the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been

(1) [1855] 4 E. and B. 702; 99 R. R. 702.
(2) 5 A. and E. 758; 44 R. R. 576 (1836).
(3) 14 C. B. N. S. 230 (1863).

(4) [1903] 2 I. R. 731.
(5) [1901] 2 Ch. 198.
(6) [1898] 170 Mass 54.
(7) 5 Pick 485.
(8) 19 Wendell 507.
(9) 18 Can. Sup Ct. 710.

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accustomed to pass from the field to the way and to make a new entrance at a fresh place: *Woodeyer* v. *Haddon* (10), *Berridge* v. *Ward* (11), *Marshall* v. *Alluswater* (12). The rule is based on obvious good sense, for though the servient owner may not object to a person entering his land at a particular spot, for that may not cause him any inconvenience, it may be very much against his inclination, and it may be detrimental to his property that the dominant owner should enter it at any other place. But the position is clearly mutual, and if the right of way has been acquired from one point to another in a particular direction, the servient owner cannot, at his choice, substitute another way between the same points, but by a different route, which might be less convenient to the dominant owner. It is for the protection as well of the dominant as of the servient owner that the right acquired should be limited to the part of the area of the servient tenement over which it has been actually exercised: *Clifford* v. *Hoare* (13), *Wood* v. *Stourbridge Ry. Coy.* (14), *Strick & Coy.* v. *City Officers Coy.* (15). To put the matter briefly, the extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period; or, as Lord Watson stated it in *Mac Intyre Brothers* v. *Mac Gavin* (16), a prescriptive right to take water in a particular way and at a particular place infers "no right to take the supply of water in any other way and at any other place: *Blackburne* v. *Sommers* (17), *Hussain Rowther* v. *Abubakar* (18). We are not here concerned with the question of the alteration of the mode of enjoyment of a right of easement by mutual consent of parties, nor are we called upon to examine the question of the right of the dominant owner to deviate from the way acquired by prescription, when such way has been obstructed by the servient owner himself: *Selby* v. *Nettlefield* (19), *Hawkins* v. *Carbines* (20). The general rule is that when a right of way by a particular track has been acquired by a dominant owner, the servient owner cannot force upon him, in lieu thereof, a different track, any more than the dominant owner himself can, at his discretion, take recourse to a different path. Tested in the light of this principle, the claim of the Plaintiffs is unanswerable. They have proved to the satisfaction of the Courts below that, for much longer than the statutory period they have had free access to the water of the tank of the Defendants by a track across the eastern bank and by a flight of steps down the eastern slope. The prescriptive right they have acquired has become indefeasible and the Defendants were not entitled to improve the tank so as to interrupt and make impossible the exercise of the right of the Defendants in the particular mode they had adopted for many years. The position might have been different if the Plaintiffs had merely proved that they had appropriated the water of the tank for the statutory period and had failed to show that they had used a definite means of access to reach

(10) 5 Taunton 126, 132 (1813).
(11) 2 F. and F. 208 [1860] affirmed 10 C. B. N. S. 400 (1861).
(12) L. R. 7 Q. B. 166 (1871).
(13) [1874] L. R. 9 C. P. 362.
(14) 16 C. B. N. S. 222 (1864).
(15) [1906] 22 T. L. R. 667.
(16) [1893] App. Cas. 268, 277.
(17) [1879] L. R. 5 Ir. 1.
(18) [1909] 20 Mad. L. J. 699.
(19) [1873] L. R. 9 Ch. App. 111, 114.
(20) [1857] 27 L. J. Ex. 44.

the water; in such a contingency, while the Plaintiffs would have acquired a prescriptive right to use the water, they could not have claimed access to the tank by a particular path; they would have had no ground for complaint so long as the Defendants allowed them reasonable facilities of approach to the tank. In the case before us, however, the Plaintiffs, as we have seen, stand in a position of much greater advantage; they have acquired a right to reach the water by a definite path and also a right to use the water. We may add that the conduct of the Plaintiffs is really not quite so unreasonable as has been characterised by the Defendants. The access to the water of the tank by way of the flight of new masonry steps on the northern slope involves the use of a longer and more circuitous way and, what is more important, a loss of privacy, to which so much importance is attached by females in this country. But it is immaterial what motive animates the Plaintiffs, for, as Lord Halsbury, L. C., said in *Mayor of Bradford* v. *Pickles* (21), no use of property, which would be legal if due to a proper motive, can become illegal, because it is prompted by a motive which is improper or even malicious. We are of opinion that as the Plaintiffs have acquired a right, not merely to the use of the water of the tank of the Defendants but also to have access to the water in a particular mode, the Court of first instance rightly decreed the suit; and as that decree has been confirmed by the Subodinate Judge, this appeal must be dismissed with costs.

Appeal dismissed.

(21) [1895] A. C. 587.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE ORDERS

NOS. 149 AND 174 OF 1912.

IMAM, J.
CHAPMAN, J.
1914,
Heard,
30, January and
2, February.
Judgment,
4, February.

S. M. AMIRANNESSA CHOWDHURANI, Decree-holder, Appellant,

v.

S. M. KURIMANNESSA CHOWDHURANI and ors., Judgment-debtors, Respondents.

Civil Procedure Code (Act V of 1908), secs. 144, 151—Execution sale set aside on ground of decree-holder and auction-purchaser's fraud—Auction-purchaser if may be directed to make over profits realised without suit—Restitution.

Where a sale in execution of a decree is set aside at the instance of the judgment-debtor on the ground of fraud on the part of the decree-holder as well as of the auction-purchaser,

Held—*That the Court in setting aside the sale can in the exercise of its powers under sec. 151 of the Civil Procedure Code direct the auction-purchaser to make over to the judgment-debtor the profits he realised from the property, having got hold of the property by an abuse of the Court's process.*

Quære:—*Whether the case falls within sec. 144 of the Code.*

BENI MADHO SINGH v. PRAN SINGH (1) *followed.*

SAFARADDI v. DURGA PROSAD SEN (2) *referred to.*

This was an Appeal from an order of A. H. Cumming, Esq., District Judge of Tipperah, dated the 21st of December 1911, reversing an order of M. Iradutulla, Munsif, 3rd Court of Comilla, dated the 11th of August 1911.

The facts of the case were as follows:—

Two tenures belonging to one Vilaya-

(1) 15 C. L. J. 187 (1911).
(2) 16 C. L. J. 83 (1912).

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tunnessa, an adjudged lunatic, were sold for arrears of rent and purchased by her daughter-in-law one Kurimunnessa who after her auction-purchase took delivery of possession and continued to be in possession for 5 years from 1308 to 1313 B. S.

The judgment-debtor Vilayatunnessa through her certificated guardian applied to have the sale set aside on the ground of fraud and other allegations and succeeded; fraud was found also against the auction-purchaser Kurimunnessa; the sale was set aside, the said order was also confirmed in appeal and the decretal amount having been paid off on her application the judgment-debtor was restored to the possession of the properties.

The judgment-debtor through her certificated guardian Amirunnessa then presented the present two applications for recovery of mesne profits from the auction-purchaser Kurimunnessa for the period of dispossession, *viz.*, 5 years. The applications purported to have been made under secs. 47 and 144 of the Civil Procedure Code and the claim was laid approximately at over Rs. 1,000 in one case and over Rs. 5,000 in the other.

The Munsif held that the applications were maintainable and directed an enquiry into the ascertainment of mesne profits overruling the objections of the auction-purchaser that the Petitioner could not bring the case within the provisions of secs. 47 and 144, Civil Procedure Code, and her remedy, if any, lay in a regular suit and that the claims being laid at beyond the Munsif's pecuniary jurisdiction the applications were incompetent.

On appeal by the auction-purchaser Kurimunnessa, the learned District Judge held that the proper remedy lay in a regular suit and that the present applications were incompetent as they did not come within the purview of secs. 47 and 144, Civil Procedure Code, and moreover, if allowed to be entertained by the Munsif, they would create serious anomalies as the claims were beyond the Munsif's jurisdiction and in this view he rejected the petitions and allowed the appeal.

Against the said decision of the District Judge these two appeals were preferred to this Court and two Rules *nisi* were also obtained by the Appellant to be heard, if necessary, along with the appeals.

Babu Upendra Kumar Roy for the Appellant submitted that the order for sale and the order confirming the possession of the properties of auction-purchaser, a stranger in this case, were orders which really came within the purview of sec. 47, C. P. C., although purported to have been passed under some other section of the Code, *e.g.*, Or. 21, rr. 64, 95 and 96 inasmuch as they related to the execution of the decree and were passed between the parties to the suit or their representatives. Auction-purchaser has been held in some cases to be the representative of the judgment-creditor within the meaning of sec. 244 of the old Code: *Manikya Odayan* v. *Rajagopala* (3), *Sandhu* v. *Hussain* (4), *Kasinatha* v. *Uthirmansa* (5). The test to be applied was whether the question related to the execution, satisfaction and discharge of the decree as between the parties to the suit or their representatives and the presence of the auction-purchaser was immaterial: *Prosunno Kumar* v. *Kali Das* (6), *Hira Lal* v. *Chunder Kanto* (7).

(3) I. L. R. 30 Mad. 507 (1907).
(4) I. L. R. 28 Mad. 87 (1904).
(5) I. L. R. 25 Mad. 529 (1901).
(6) I. L. R. 19 Cal. 683 (1892).
(7) I. L. R. 26 Cal. 539 (1899).

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These orders were not passed merely as a matter of routine and they did finally determine the rights of the parties. The auction-purchaser acquired a title in the properties and the judgment-debtor had nothing more to do with them. Looked at from this point of view this order for sale and that confirming the possession of the auction-purchaser were decrees within the meaning of sec. (2), cl. 2 of the Civil Procedure Code, though no appeal lay as from a decree as an appeal lay under Or. 43.

The subsequent order of the Court setting aside the sale on the ground of fraud, etc., had the effect of varying or reversing this decree, and the parties were entitled to be restored to *status quo* and the Petitioner was entitled to get back the properties and also to claim mesne profits under sec. 144, C. P. C.

[CHAPMAN, J.—Draws attention to the words "with or without interest" in Or. 21, r. 93.]

The wording of Or. 21, r. 93 did not imply that the auction-purchaser was to be exempted from making good the loss sustained by the judgment-debtor during the period of dispossession. This rather contemplates a set off as between the judgment-debtor's loss and what the auction-purchaser might recover by way of interest for the purchase money.

Even if sec. 144, C. P. C., was not applicable, the Appellant was entitled to relief under sec. 151 of the Civil Procedure Code and the Court in the exercise of its inherent jurisdiction should have granted the petitions. Reliance was placed on *Beni Madho Singh* v. *Pran Singh* (1), *Mookoond Lal* v. *Mahomed Sami* (8), *Raja Singh* v. *Kuldip Singh* (9), *Collector of Meerut* v. *Kalka Proshad* (10). A separate suit was unnecessary: *Garurdhaj* v. *Baiju Mal* (11).

The objection as to the pecuniary jurisdiction of the Munsif could not be entertained inasmuch as the jurisdiction of the Court trying the suit could not be ousted by the amount of mesne profits claimed in the Execution Department having been found in excess of the Court's pecuniary limit and in any case the decree could not be executed without paying full Court-fees. Reliance was placed on *Viraraghava* v. *Venkata* (12), *Balavantarav Oze* v. *Sadruddin* (13), *Rameswar Mahton* v. *Dilu Mahton* (14), *Arogya* v. *Appachi* (15), *Madho Das* v. *Ramji Patak* (16).

Babu Jatindra Mohan Ghose for the Respondents submitted, that the auction-purchaser could never have been the representative of the judgment-creditor or judgment debtor: *Maganlal Mulji* v. *Doshi Mulji* (17).

The claim of the Appellant for mesne profits against a *bonâ fide* purchaser at a Court-sale is not at all maintainable. The sale is not void but voidable and the purchaser cannot be regarded as a trespasser until the sale is avoided. Refers to the definition of "mesne profits."

[CHAPMAN, J.—Fraud has been found against the purchaser in this case.]

The Court's inherent jurisdiction cannot

(1) 15 C. L. J. 187 (1911).
(8) I. L. R. 14 Cal. 484 (1887).
(9) I. L. R. 21 Cal. 989 (1894).
(10) I. L. R. 28 All. 665 (1906).
(11) I. L. R. 28 All. 337 (1906)
(12) I. L. R. 16 Mad. 287 (1892).
(13) I. L. R. 13 Bom. 485 (1887).
(14) I. L. R. 21 Cal. 550 (1894).
(15) I. L. R. 25 Mad. 543 (1901).
(16) I. L. R. 16 All. 286 (1894).
(17) I. L. R. 25 Bom. 631 (1901).

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be invoked in a case like this: *Safaradii* v. *Durga Prosad Sen* (2), *President, etc., Magdalen Hospital* v. *Knotts* (18) per Lord Cairn. This jurisdiction has been styled vague and indistinct; Or. 21, r. 93 expressly safeguards the auction-purchaser.

Neither sec. 47 nor sec. 144 had any application to the case; the original decree had remained in-tact; it was not varied or reversed. The question did not relate to the execution or satisfaction of the original decree.

The order for sale and that of confirmation of possession cannot be decrees, because the auction-purchaser is not a party to the suit nor representative of either party, and, moreover, these orders did not finally determine any rights of the parties as contemplated by sec. 2, cl. 1, definition of "decree."

The cases referred to are cases in which the decree-holder himself is the auction-purchaser, but in the present case the purchaser is a stranger and all those cases refer to suits relating to possession of immoveable properties and the present case is quite different.

The case of *Beni Madho Singh* v. *Pran Singh* (1) is also a case in which the decree-holder purchased in the name of a third party who was his *benamdar*.

The purchaser cannot be liable for mesne profits.

The JUDGMENT OF THE COURT was as follows:—

One Syed Hossain Hydar Chowdhury obtained two decrees for rent against one Vilayatunnessa. Vilayatunnessa is a lunatic and was represented by her husband

(1) 15 C. L. J. 187 (1911).
(2) 16 C. L. J. 83, 84 (1912).
(18) 4 A. C. 324 at p. 334 (1878).

as her guardian. The tenures were sold in execution and were purchased by Vilayatunnessa's son's wife Kurimunnessa. Subsequently Vilayatunnessa's daughter Amirunnessa applied on behalf of Vilayatunnessa to have the sales set aside on the ground of fraud. She alleged that the former guardian, the decree-holder and the auction-purchaser were parties to the fraud. The applications were successful and the sales were set aside. Amirunnessa then applied on behalf of the luantic for mesne profits from the auction-purchaser during the period the latter was in possession. The first Court granted the application. These orders were set aside in appeal by the District Judge. The Applicant now appeals to this Court.

In support of the appeals, it has first been contended that sec. 144 of the Code of Civil Procedure applies. That section is to the effect that "where and in so far as a decree is varied or reversed, the Court of first instance" may cause restitution to be made to any party entitled to the benefit of restitution as the result of the variation or reversal. It is contended that having regard to the definition of the word "decree" in sec. 2 (2) of the Code an order for sale is a decree. We are not satisfied that the case falls within the terms of sec. 144. What was set aside was the sale itself—the transfer of the property. It is difficult to say that a transfer is a decree.

It is not, however, necessary to decide this point, for we are of opinion that the case falls within the provisions of sec. 151 of the Code. The auction-purchaser was held to be privy to the fraud. He was guilty of an abuse of the process of the Court. Sec. 151 says that the Court has an inherent power to prevent abuse of its processes. It has already been held in

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the case of *Beni Madho Singh* v. *Pran Singh* (1) that a Court has power under sec. 151 to order restitution in a case of this kind when a sale in execution is set aside. It is true that the correctness of the decision has been rendered open to doubt by the decision in the case of *Safaraddi* v. *Durga Prosad Sen* (2), but the present case is indistinguishable from the case of *Beni Madho Singh* v. *Pran Singh* (1) and we are bound by the latter decision.

It is true that it is not strictly correct to use the term mesne profits in this connection. The sale was not void. It was only voidable. The auction-purchaser was not in wrongful possession. But clearly the Applicant is entitled to be restored to the position in which he would have been if the fraud had not been perpetrated. He is entitled to an order to that effect. The amount of compensation will be assessed accordingly in the subsequent proceedings in the Court of first instance.

The appeals are allowed. The orders of the District Judge are set aside. The Appellant is entitled to orders for compensation to be assessed upon the principles set forth.

The Appellant is entitled to his costs in all Courts. We assess the hearing fee in this Court at three gold mohurs—a single fee for the two appeals.

[At the conclusion of the arguments and after judgment had been pronounced but not signed, an objection was taken that in the view their Lordship took a second appeal was incompetent. Their Lordships intimated that they would consider the point and when the judgment was signed were pleased to hold that the appeals were competent.]

Appeals allowed with costs.

(1) 15 C. L. J. 187 (1911).
(2) 16 C. L. J. 83 (1912).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1169 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 7, May. 1914. Judgment, 26, May.	DINANATH GHOSH and another, Plaintiffs, Appellants, *v.* HRISHIKESH PAL and anr., Defendants, Respondents.

Hindu widow—Pilgrimage to Gaya—Feast given after return from Gaya, whether legal necessity—Reversioner—Suit for declaration that alienation was without legal necessity—No offer to reimburse money spent on legal necessity—Suit whether maintainable.

A Hindu widow is competent to alienate her husband's estate for expenses in connection with a feast given to Brahmins, etc., after return from pilgrimage to Gaya.

MAKHAN LAL *v.* GYAN SING (1) *not followed.*

Quære.—*Whether a declaratory suit can be maintained by a reversioner who does not offer in the plaint to reimburse the purchaser to the extent that the sale was for necessity.*

This was an Appeal from a decision of R. N. Dutta, Esq., District Judge, Birbhum, dated the 20 h March 1911, modifying that of Babu Kunja Behari Biswas, Munsif, Dubrajpur, dated the 21st December 1909.

The facts of the case so far as they are material for the purpose of this report are shortly as follows:—

One Issur Chandra Pal died in the year 1896 leaving behind a widow Felumony,

(1) I. L. R. 33 All. 255 (1910).

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Defendant No. 2 in the present case, and his nephews (sister's sons) Dinanath Ghosh and Girish Chandra Ghosh, the Plaintiffs in the present case. Felumony went to Gaya in 1908 for the performance of the *sradh* ceremony of her husband After returning from Gaya she could not defray the expenses of the feast to Brahmins and her relations from the income of the property and sold a portion of it to Defendant No. 1 for a consideration of Rs. 500 for the feast aforesaid and other necessary expenses. Plaintiffs instituted this suit for a declaration that the sale was inoperative beyond the lifetime of the widow. The learned Munsif found that Rs. 200 at least was spent in the feast, but he decreed the suit and gave the Plaintiffs the declaration sought on the ground that the widow could not spend such a large amount for the feast and that there was nothing in the Shastras to enjoin the performance of Gaya-feast at considerable expense. The Defendant No. 1 appealed before the District Judge of Birbhum who modified the decree and gave the Plaintiffs a declaration that they would be entitled to set aside the *kobala* after the death of Felumony on payment of a sum of rupees two hundred which was spent on legal necessity. Against this decision the Plaintiffs appealed.

Babu Khetra Mohan Sen for the Appellants.—Expenses for pilgrimage to Gaya and performing the *sradh* ceremony of the husband of the widow may be a legal necessity, but expenses incurred for a feast to Brahmins two years after return from Gaya cannot be legal necessity: *Makhan Lal* v. *Gyan Sing* (1).

Babu Bankim Chandra Mukerjee for the Respondents.—I submit that money spent for feast after return from Gaya is money spent for legal necessity and the widow is authorised to alienate a reasonable portion of the property for meeting such expenses. It is conceded that pilgrimage to Gaya for performing the *sradh* ceremony of the husband is a legal necessity. I submit that anything inseparably connected with the Gaya *sradh* is equally a legal necessity. In Raghunandan's Sraddhatattwa there is a passage relating to pilgrimage where it is laid down that on return from pilgrimage as also before one starts on pilgrimage, the Brahmins, the ancestors and the gods must be worshipped. See Raghunandan's Sraddhatattwa, pp. 641-642 (Bangabasi Edition). See also passages from शब्दकल्पद्रुम under heading तीर्थश्राद्ध where the same thing is to be found.

In Yogini-Tantra (pp. 206-209) it is stated that it is after giving a feast after return from Gaya that one reaps the full benefit of a Gaya *sradh*. Having regard to the texts cited above, I submit that the ruling in *Makhan Lal* v. *Gyan Sing* (1) should not be followed. Even assuming that the above point is decided against my client, I submit that it is customary to give such feasts on return from Gaya and hence if it be held that Gaya *sradh* is a legal necessity, money spent for a feast is also legal necessity. Compare *Churaman* v. *Gopi* (20).

Babu Khetra Mohan Sen was heard.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Plaintiffs in a suit for declaration that an alienation of part of the estate of their maternal uncle

(1) I. L. R. 33 All. 255 (1910).

(1) I. L. R. 33 All. 255 (1910).
(20) 10 C. L. J. 554 : s. c. 13 C. W. N. 994 (1909).

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by their maternal aunt is without legal necessity and will not bind them when the estate falls into their hands as reversionary heirs. Iswar Chandra Pal, the admitted owner of the property, died in 1896 and left a childless widow Felumony who is the second Defendant in this litigation. The reversionary heirs of Iswar Chandra Pal are the present Plaintiffs who are the sons of his sister. In 1908, the widow made a pilgrimage to Gaya to perform the *sradh* cremony of her husband, and on return home gave a feast to Brahmins. For this purpose, she had to raise money, as her husband had left only 29 bighas of rent-paying land, the income of which was just sufficient to enable her to maintain herself, to carry on the worship of a family idol and to pay the dues of the superior landlord. On the 2nd April 1909 she sold 9 bighas of land to her brother's son, the first Defendant in this suit, for Rs. 500, on the allegation that money was needed to meet the expenses of the Gaya *sradh* and feast and also to pay the rent which has fallen into arrears on account of bad years. This is the sale now impeached by the Plaintiffs. The Courts below have concurrently found that the conveyance represented a real transaction and that the purchaser paid the consideration in full. No question also arises as to the value of the property, because the purchaser paid Rs. 500 while the market value is stated in the plaint to be Rs. 299. The Court of first instance, however, held that the expenses of the feast following the *sradh* at Gaya did not constitute legal necessity such as could justify an alienation by the widow, and in this view decreed the suit. Upon appeal by the purchaser Defendant, the District Judge has reversed this decision. He has held that the expenses of the feast, which amounted to Rs. 200, constituted a legal necessity, that the sum spent was not unreasonable or excessive, but that the existence of arrears of rent had not been proved. The District Judge has accordingly modified the decree of the primary Court, and has given the Plaintiffs declaration that if they survive their maternal aunt and succeed to the estate of their maternal uncle as reversionary heirs, they will be entitled to recover the disputed property on payment of Rs. 200 to the purchaser. The Plaintiffs have appealed to this Court and have contended that the unconditional decree of the original Court should be restored, inasmuch as the expenses of the feast following the *sradh* at Gaya did not constitute legal necessity justifying alienation. In support of this view, reliance has been placed on a *dictum* in *Makhan Lal* v. *Gyan* (1) to the effect that a feast given on the return of a pilgrim cannot be said to be so intimately connected with the pilgrimage as to justify its allowance as money expended for legal necessity. In our opinion, the view taken by the District Judge in the Court below is correct.

In *Makhanlal* v. *Gyan Singh* (1), it does not appear that the pilgrimage had been undertaken for the performance of the *sradh* of the deceased owner, and it is well settled that a pilgrimage made for the widow's own spiritual benefit is not a necessary purpose [*Huro* v. *Auluck* (2), *Rama* v. *Ranga* (3), *Sambhu* v. *Sankar* (4)]. The learned Judges further stated, no authority had been cited to show that a feast given on return from pilgrimage

(1) I. L. R. 33 All. 255 (1910).
(2) 1 W. R. 252 (1864).
(3) I. L. R. 8 Mad. 552 (1885).
(4) [1885] P. R. 76.

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might be regarded as an integral element in the performance of the *sradh.* This circumstance takes away from the value of the opinion expressed, to which we would otherwise be disposed to attach considerable weight. It is well settled that the expenses incurred by a widow for a pilgrimage to Gaya and for the performance of *sradh* of her husband are legitimate expenses, for which she can alienate her husband's property: *Mahamed Ashraf* v. *Brojeswari* (5), *Muteeram Kowar* v. *Gopal Sahu* (6), *Chaudhuri Janmajoy Mallik* v. *Rasamayi* (7), *Rukhma* v. *Kamanrao* (8). As was observed by Chandravarkar, J., in *Ganpat* v. *Tulsiram* (9), the question in this class of cases is, whether the pilgrimage was for the spiritual benefit of the husband of the widow, undertaken in the performance of her duty to his soul, and whether the expenses incurred are reasonable and were made honestly, having regard to the estate, the status of the family and other considerations which it is customary for Hindus to take into account in accordance with their religious beliefs and usages. A widow must be allowed a reasonable latitude in the exercise of her powers, provided she does not act unfairly to the reversionary heirs. The only question is, whether the feast to the Brahmins, after the performance of the *sradh* ceremony at Gaya, is an essential incident which justifies reasonable expenditure. The question must be answered in the affirmative. In the Sraddhatattwa of Raghunandan, he quotes a passage from the Brahma-Purana :—

(1) योय: कश्चित् तीर्थ-यात्रां तु गच्छेत्,
सुसंयत: स च पूर्व्वं गृहे स्वे ।
कृतोपवास: शुचिरप्रमत्त:
संपूजयेद् भक्तिनम्रो गणेशम् ॥
देवान् पितॄन् ब्राह्मणांश्च साधून्
धीमान् प्रीणयम् भक्तिनम्रो यथेष्टम् ।
प्रत्यागतश्चापि पुनस्तथैव देवान्
पितॄन् ब्राह्मणां पूजयेच्च ॥

in which it is laid down that on return from pilgrimage, as before one starts on pilgrimage, the gods, the ancestors, and the Brahmins must be worshipped. Another passage

(2) तीर्थयात्रा-समारम्भे,
तीर्थात् प्रत्यागमेऽपि च ।
वृद्धि श्राद्धं प्रकुर्व्वीत,
बहुसर्पि समन्वितं ॥

is quoted from the Kurma-Purana, extracted by Halayuadha, that on return from pilgrimage as at the commencement thereof Vriddhi Sraddha must be performed accompained by *hom* with a large quantity of clarified butter. (For a description of the rules for the performance of this *sradh*, reference may be made to Sarbadhikari on Inheritance, p. 88.) This necessarily implies that the Brahmins have to be fed. To the same effect is a passage in the Aditya-Purana, quoted by Hemadri

(3) प्रत्यागतश्चात्म-गृहं पुनस्तु देवान्
पितॄन् ब्राह्मणान् पूजयेच्च ।
एवं कुर्व्वितस्तस्य तीर्थाद् यदुक्तं फलं
तत् स्यान्नात्र सन्देहकोऽस्ति ॥

in his Sraddha Khanda (Asiatic Society's Edition, page 1581), and a similar view is expounded in the Yogini-Tantra (pages 206, 209). The texts are also collected in the treatise on Gaya *sraddha* called Gaya-Sraddhadi-Paddhati by Professor Tara-

(5) 19 W. R. 426; 11 B. L. R. 118 (1873).
(6) 20 W. R. 187; 11 B. L. R. 416 (1873).
(7) 10 W. R. 309; 11 B. L. R. 418 (1868).
(8) [1889] 3 C. P. L. R. 74.
(9) I. L. R. 36 Bom. 88 (1911).

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Nath Tarkabachaspati of the Calcutta Sanskrit College, in the concluding portion of which it is pointed out that on return from pilgrimage from Gaya, *sradh* ceremony must be performed and the Brahmins fed and small presents given to them for the full realization of the spiritual benefit resulting from the pilgrimage. We hold accordingly that the feast which is given to Brahmins according to well established custom on return from Gaya after performance of the *sradh* there, must be deemed an essential part of the ceremony, and the widow is entitled to spend a reasonable amount on that account. We observe that in *Muteeram Kowar* v. *Gopal Sahu* (6) a sum of Rs. 1,800 was considered not unreasonable, while in *Rukhma* v. *Kamanrao* (8) Rs. 500 was deemed reasonable. In the case before us, the District Judge has held that the sum of Rs. 200 which was spent was not excessive, and we see no reason to differ from him on this point. The District Judge has consequently rightly held that the reversioners cannot claim to set aside the alienation except on repayment of this sum to the purchaser [*Deputy Commissioner* v. *Khanjan* (10), *Harikissen* v. *Bajrang* (11)].

We may add that we are not in a position to consider the form of the decree, as no cross-appeal has been preferred by the purchaser-Defendant. But there is a divergence of judicial opinion upon the question, whether in the event of a sale by a widow, partly for necessity and partly without necessity, a declaratory suit can be maintained by a reversioner who does not offer in the plaint to re-imburse the purchaser to the extent that the sale was for necessity. The cases of *Phoolchand* v. *Raghubons* (12), *Sugeram* v. *Juddoobans* (13), *Muteeram* v. *Gopal Sahu* (6), *Gobinda Singh* v. *Baldeo Singha* (14), *Singam* v. *Draupadi* (15), *Subramania* v. *Ponnuswami* (16) and *Gauri* v. *Tirumaya* (17) maintain the view that the suit for a declaratory decree should fail if offer of re-imbursement has not been made in the plaint. But the cases of *Garikipati* v. *Garikipati* (18) and *Vithu* v. *Mendri* (19) support the view that the omission of the reversioner to offer equitable restitution to the purchaser does not disentitle him to a decree. The view which has been taken by this Court in the cases mentioned is that inasmuch as the grant of relief by way of a declaratory decree is in the discretion of the Court, where a Plaintiff seeks an unqualified declaration which, upon the facts proved, cannot be granted to him, and does not offer in his plaint to make restitution to the Defendant, the Court may very well refuse to assist him by grant of a declaration which he has not sought.

The result is that as the Appeal of the reversioners fails, the decree of the District Judge will stand affirmed with costs.

Appeal dismissed.

(6) 20 W. R. 187; 11 B. L. R. 416 (1873).
(8) [1889] 3 C. P. L. R. 74.
(10) L. R. 34 I. A. 72: s. c. I. L. R. 29 All. 331; 5 C. L. J. 344 (1907).
(11) 9 C. L. J. 453 (1909).
(12) 9 W. R. 108 (1868).
(13) 9 W. R. 284 (1868).
(14) I. L. R. 25 All. 330 (1903).
(15) I. L. R. 31 Mad. 153 (1907).
(16) I. L. R. 8 Mad. 92 (1884).
(17) 18 M. L. J. 17 (1907).
(18) [1912] M. W. N. 1176.
(19) 5 N. L. R. 172.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 1798 OF 1910.

MOOKERJEE, J. BEACHCROFT, J. 1914, 28, January.	SATYA BHUSAN BANERJEE and others, Plaintiffs, Appellants, *v.* KRISHNA KALI BANERJEE and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), secs. 102, 115—Provincial Small Cause Courts Act (XV of 1882), Art. 41, Sch. II—Indian Contract Act (IX of 1872), secs. 69, 70—Contribution, meaning of—Suit for contribution, what is—Suit of the value of less than Rs. 500 cognisable by a Court of Small Causes, appeal in—Decree for rent obtained by co-sharer landlord against tenants—Deposit of decretal amount by purchaser from one of the tenants to prevent sale—Right of such depositor to be reimbursed.

The Plaintiffs purchased the interest of one of the Defendants in a tenancy held by them all. Some out of the entire body of landlords who claimed a half share in the superior tenancy obtained a decree for rent and in execution thereof were about to bring the property to sale when the Plaintiffs deposited in Court the necessary amount in satisfaction of the decree. The Plaintiffs brought an action for declaration that the Defendants were liable to pay the judgment-debt and they themselves had paid the money under circumstances which entitled them in equity to recover the same from the Defendants. The suit was described as one for contribution. The lower Courts dismissed the Plaintiffs' claim on the ground that as the decree had been obtained by co-sharer landlords, the interest of the Plaintiffs in the tenancy was not in jeopardy and the payment made by them must consequently be deemed voluntary. The Plaintiffs appealed to the High Court.

Held—*That contribution signifies payment by each of the parties interested of his share in any common liability. Consequently an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their shares.*

That the suit, as framed could not be deemed a suit for contribution: it was really a suit by the Plaintiffs for recovery of money paid by them for the benefit of the Defendants.

That Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act does not cover the present case. The suit was clearly one of a nature cognizable by a Court of Small Causes and as the sum claimed was less than Rs. 500, the appeal was incompetent under sec. 102, C. P. C., and must be dismissed.

That the view taken by the lower Courts that the payment made by the Plaintiffs was voluntary, as the decree for rent was obtained by co-sharer landlords who could not have executed it so as to prejudice the interest of the Plaintiffs, was erroneous. The question of the precise effect of a sale in these circumstances would at any rate be a matter for controversy and the party liable to be affected would consequently be entitled to satisfy the decree to protect himself from the apprehended injury to his right; he would also be entitled if he made the payment to be reimbursed under sec. 69 or sec. 70 of the Indian Contract Act.

Held, *however, as to the application of the Plaintiffs for the memorandum of appeal being treated as an application for revision, that the error committed by the lower Court being one of law and not affecting the jurisdiction of the Court, the High Court could not interfere in the exercise of its revisional powers.*

This was an Appeal preferred on the 14th July 1911, against a decree of S. C. Mallik, Esq., District Judge of Zilla

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Nadia, dated the 21st April 1911, affirming a decree of Babu Ashutosh Goswami, Munsif at Ranaghat, dated the 18th July 1910.

The facts of the case will sufficiently appear from the judgment.

Babu Dwijendra Nath Mookerjee for the Appellant.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal by the Plaintiffs in what is described as a suit for contribution. The circumstances antecedent to the litigation are not in dispute and may be briefly narrated. The case for the Plaintiffs is that the Defendants held a tenancy under Chandra Nath Ray and another person. In November 1907, the Plaintiffs purchased the interest of the first Defendant in that tenancy. The landlords sued the Defendants for rent due on account of the years 1311 to 1313 and obtained a decree. This decree was obtained by some out of the entire body of landlords who claimed a half share in the superior tenancy. The landlords took out execution of this decree and were about to bring the property to sale. The Plaintiffs thereupon deposited in Court the sum of Rs. 135-13 6 to satisfy the decree. The Plaintiffs then commenced this action for declaration that the Defendants were liable to pay the judgment-debt and that they themselves had paid the money under circumstances which entitled them in equity to recover the same from the Defendants. The suit, however, was described as one for contribution, though, according to the Plaintiffs, they themselves were not liable to bear any portion of the liability under the decree. The Defendants resisted the claim on various grounds which need not be stated for our present purpose. The Court of first instance found on the merits in favour of the Plaintiffs, but dismissed their claim on the ground that as the decree had been obtained by co-sharer landlords, the interest of the Plaintiffs in the tenancy was not in jeopardy, and that the payment made by them must consequently be deemed voluntary. Upon appeal this view has been accepted by the District Judge and the decree of dismissal has been affirmed by him. The Plaintiffs have now appealed to this Court.

The first question which requires consideration is, whether this Appeal is competent in view of the provisions of sec. 102 of the Civil Procedure Code. On behalf of the Appellants, it has been argued that the suit falls within the scope of Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act which excludes from the jurisdiction of Small Cause Courts all suits for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer. It has been contended that this is a suit for contribution of the description mentioned in Art. 41, because it has been commenced by the Plaintiffs who are co-sharers in a joint property and is in respect of a payment made by them of money due from the Defendants who are co-sharers of the Plaintiffs. In our opinion, this contention is manifestly fallacious. As is pointed out in the Oxford Dictionary (Vol. II, p. 923), contribution signifies payment by each of the parties interested of his share in any common liability. Consequently an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their shares :

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Moti Chand v. *Bajrang* (1), *Jognarain* v. *Badri Das* (2). Mutuality is thus the test of contribution. If A and B are jointly liable for a sum of money and A alone satisfied the whole debt, he is entitled to call upon B to contribute to the extent of his proportionate shares; and, conversely, if B alone pays the whole debt, he is entitled to call upon A to contribute. Judged by these tests, the present suit cannot correctly be described as a suit for contribution. In the case before us, the Plaintiffs deny that they were to any extent liable to satisfy the judgment-debt. Their case is that the money payable under the decree was justly recoverable from the Defendants alone. It is not a case of satisfaction of a joint liability, nor does the test of mutuality apply. The Plaintiffs do not admit that they could have been called upon to contribute, if the Defendants had paid the money; their theory on the other hand is that if the Defendants had made the payment, it would have been in satisfaction of an exclusive liability of the Defendants. The suit as framed cannot be deemed a suit for contribution: it is really a suit by the Plaintiffs for recovery of money paid by them for the benefit of the Defendants. A suit of that character is, under certain circumstances, maintainable in law; but it cannot properly be described as a suit for contribution. Consequently Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act does not cover the present case. The suit is clearly one of a nature cognisable by a Court of Small Causes, and as the sum claimed is less than Rs. 500, the Appeal is incompetent under sec. 102, C. P. C., and must accordingly be dismissed.

(1) 16 C. L. J. 148, 151 (1911).
(2) 16 C. L. J. 156 (1912).

It has finally been contended on behalf of the Plaintiffs that if the appeal is incompetent, the Court may treat the memorandum of appeal as an application for revision, and give the Plaintiffs such reliefs as they may deserve under all the circumstances. This prayer raises the question of the nature of the errors, if any, which we are invited to rectify. The Courts below have refused relief to the Plaintiffs, because the payment made by them was voluntary, as the decree for rent was obtained by co-sharer landlords who could not have executed it so as to prejudice the interest of the Plaintiffs. This view is clearly erroneous and is opposed to the decisions of this Court in *Suchand Ghoshal* v. *Baloram Mordana* (3), *Pankhábati Chowdhurani* v. *Nani Lal Singh* (4), *Prosunno Kumar Bose* v. *Jamaluddin* (5) and *Khettranath* v. *Mohamed Uzer* (6). The fact that the decree had been obtained by co-sharer landlords did not necessarily lead to the inference that the sale of the right, title and interest of the judgment-debtors would not have affected the interest of the present Plaintiffs, because, as was pointed out in the case of *Netai Behary* v. *Hari Gobind* (7), a sale of the right title and interest of the judgment-debtors in execution of a decree for rent obtained by a co-sharer landlord may, in certain circumstances, pass the entire tenancy. The question of the precise effect of a sale in these circumstances would at any rate be a matter for controversy and the party liable to be affected would consequently be entitled to satisfy the decree to protect himself from the apprehended injury to his right; he would also be en-

(3) I. L. R. 38 Cal. 1 (1910).
(4) 19 C. L. J. 72 (1913).
(5) 18 C. W. N. 327 (1912).
(6) 21 I. C. 102.
(7) I. L. R. 26 Cal. 677 (1899).

titled, if he made the payment, to be reimbursed under sec. 69 or sec. 70 of the Indian Contract Act: *Pankhabati* v. *Nani Lal* (4). The view taken by the Courts below must accordingly be deemed erroneous in law. But the error they have committed is one of law, and as it has not affected the jurisdiction of the Court, we cannot interfere in the exercise of our revisional powers: *Amir Hasan* v. *Sheo Baksh* (8), *Yusf Khan* v. *Abdul Rahman* (9).

The prayer of the Plaintiffs that the memorandum of appeal be treated as an application for revision must consequently fail.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1140 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 24 and 25, November.
Judgment, 25, November.

BYOMKESH CHACKRABARTTY, Petitioner,
v.
JATINDRA NATH ROY, and ors., Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 21, r. 90—Sale of immoveable property in execution of money-decree—Holder of another decree against the same judgment-debtor whose application for execution had been dismissed for non-prosecution prior to sale, if entitled to apply for setting aside the sale.

In execution of a decree for money the immoveable properties of the judgment-debtors were sold and purchased by the Opposite Party on 9th April 1912. The Petitioner who also held a decree for money against the same judgment-debtors had applied on the 13th March 1912 for execution of his decree; but his application was dismissed for non-prosecution on the 13th May 1912, and on the 20th May 1912, the Petitioner applied to the Court to have the sale set aside under r. 90, Or. 21, C. P. C., on the ground of fraud and material irregularity. The lower Court rejected this application holding that he was not entitled to make it.

Held—*That the dismissal of the Petitioner's application for execution of his decree on the 13th May for non-prosecution did not affect the right of the Petitioner to a share in a rateable distribution of the assets and on the date on which the application to set aside the sale was made under r. 90, it was made by a person entitled to a share in the rateable distribution of the assets and consequently should have been entertained by the Court.*

This was a Rule granted against an order of Babu Panna Lal Bose, Munsif, Jessore, dated the 6th January 1913, confirmed on appeal by H. C. Liddell, Esq., District Judge, Jessore, by his order dated the 3rd May 1913.

The facts of the case will sufficiently appear from the judgment.

Babus Provash Chandra Mitter and *Susil Madhab Mullick* for the Petitioner.

Babu Monmohan Dutt for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

We are invited in this Rule to set aside an order by which the Court of first instance has refused to entertain an application to set aside an execution sale under r. 90 of Or. 21 of the Code of Civil Procedure of 1908. The order was subsequently affirmed on appeal by the District Judge.

(4) 18 C. L. J. 72 (1913).
(8) I. L. R. 11 Cal. 6: s. c. L. R. 11 I. A. 237 (1884).
(9) I. L. R. 16 Cal. 749: s. c. L. R. 16 I. A. 104 (1889).

It appears that one Jatindra Nath Roy held a decree for money against Hiranmoyee Dasi and others. In execution of that decree the immoveable properties of the judgment-debtors were sold on the 19th April 1912 and purchased by the Opposite Party, Hemanta Kumar Das. Before the sale, the Petitioner who also held a decree for money against the same judgment debtors had on the 13th March 1912 applied for execution of his decree. On the 20th May 1912 he applied to the Court to have the sale set aside under r. 90 on the ground of fraud and material irregularity. This application was resisted by the auction-purchaser on the ground, amongst others, that as the application for execution made by the Petitioner had been dismissed for non-prosecution on the 13th May 1912, he was not entitled on the 20th May 1912 to make an application under r. 20. The Courts below have given effect to this objection, and the question for decision is whether the view taken by them is well founded in law.

R. 90 provides that where any immoveable property has been sold in execution of a decree, the decree-holder or any person, entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. The Petitioner claims to be a person entitled to share in a rateable distribution of the assets. To determine whether he is a person of this description, we must examine the provisions of sec. 73. That section lays down that where assets are held by a Court and more persons than one have, before the receipt of such assets, made applications to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons. In the case before us, the assets are held by the Court. It is also undisputed that more persons than one had before the receipt of the assets made application to the Court for execution of decrees for the payment of money passed against the same judgment-debtors. The assets were received on the 19th April 1912 and the 29th April 1912. On the date first mentioned, the auction-purchaser brought into Court one-fourth of the purchase-money and the balance was deposited on the date last mentioned. Consequently, it is clear that before the receipt of the assets, application for execution had been made by the Petitioner as also by the person at whose instance the sale had taken place. As these conditions were fulfilled, it became the duty of the Court to distribute the assets rateably between the persons mentioned. It has been contended, however, on behalf of the Opposite Party that inasmuch as the application of the Petitioner for execution had been dismissed for non-prosecution on the 13th may 1912, he was not, on the 20th May 1912, when he applied to set aside the sale, a person entitled to share in a rateable distribution of the assets within the meaning of r. 90. In our opinion, this contention is unsound. The dismissal of the application on the 13th May 1912 for non-prosecution did not affect the right of the Petitioner to share in a rateable distribution of the assets. It was the duty of the Court to grant him relief on the basis of his right which had accrued previously, for there is no suggestion that he had waived or abandoned his claim against the judgment-debtors. In our

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Contents.

NOTES.

Recent Privy Council Judgments.

The judgments of the Privy Council which for some time past have regularly appeared in this journal will satisfy even the most critically disposed of our readers that India is receiving her due share of attention from the Judicial Committee of His Majesty's Council. We recently noticed one of them, *viz.*, in the appeal of *Mrs. Annie Besant* v. *G. Narayaniah*, 18 C. W. N. 1089, but there have been other pronouncements of equal importance though not of the same dramatic character in their settings. Take for instance the case of *Maha Prosad Singh* v. *Ramani Mohan Singh*, 18 C. W. N. 994, a decision of the greatest importance to people in the Sonthal Parganas, which contrary to the views expressed by the High Court sets bounds to the jurisdiction of Civil Courts to entertain suits relating to immoveable property (including mortgage suits) in respect of which Settlement operations have not been concluded. Lord Moulton in arriving at this conclusion went through the Acts and Regulations affecting the administration of justice in the Sonthal Parganas with a degree of thoroughness and care which are a guarantee that the decision of the High Court has not been lightly set aside.

Sir John Edge in *Bhaiaji Thakur* v. *Jharula Das*, 18 C. W. N. 1029, makes it plain that to deprive a *shebait* of his share of surplus income from offerings is not necessarily to deprive him of his office. It must, when the wrong-doer is an outsider not competent according to Hindu law to perform the duties of a *shebait*, be regarded as an individual act of trespass giving rise to an action for damages. Lord Parker's judgment in *Raghunath Das* v. *Sundar Das Khetri* (18 C. W. N. 1058) affirms what has been the settled law of the Province, *viz.*, that an attaching creditor does not merely by reason of his prior attachment secure precedence over the Official Assignee in whom since the attachment the property has vested by reason of the judgment-debtor's insolvency. But the decision is important for laying down generally that attachment prevents private alienation but does not invalidate alienations by operation of law, and also for indicating in one direction at least the limits beyond which that much-misunderstood judgment of Lord Hobhouse in *Malkarjun* v. *Narahari*, L. R. 27 I. A. 216, must not be pushed. It is not clear whether in his Lordship's view non-service of notice makes the sale void or voidable only, though the approval expressed in respect of *Gopal Chunder* v. *Sunamoni*, I. L. R. 20 Cal. 370, would seem to favour the former alternative. It is clear, however, that an attaching creditor who knowingly pursues an irregular course should not according to their Lordships be allowed to take shelter behind the occasionally cryptic utterances of Lord Hobhouse in *Malkarjun's* case.

In *Ma Nhin Bwin* v. *U. Shwe Gone*, 18 C. W. N. 1121, Lord Shaw not merely decides a disputed question of succession under Burmese Buddhist law, but in order to do so satisfactorily examines the political history of Burma for over a century and ascertains the value as sources of law of the *Dhammathats*—a matter of supreme importance to Burmese Buddhists. The recital of facts in the judgment also throws interesting sidelights into social conditions in Burma—the existence side by side of a patriarchal system of society which yet does not prevent daughters of the family freeing themselves from its trammels at will and setting up as independent traders. The truth appears to be that the patriarchal system exists in Burma in theory or in tradition only and has in practice, (in its main essentials) broken down. Nowhere in British India, do females enjoy the position of independence that they do in Burma, and nowhere, in consequence, outside Burma, are females more self-reliant.

The Rt. Hon'ble Mr. Ameer Ali's judgment in *Ram Chandra* v. *Vinayak*, 18 C. W. N. 1154, setting out the limitations under which *bhinna-gotra sapindas* or *bandhus* succeed to property under the Mitakshara Law coincides with the generally accepted opinion of scholars in this country. The assumption upon which the judgment of the Calcutta High Court in *Babu Lal* v. *Nankaram*, I. L. R. 22 Cal. 339, proceeded, *viz*., that the rule of the Mitakshara enunciated in the *Achara-kanda* relative to *sapinda*-relationship in respect of marriage applies to inheritance as well is now accepted by the Privy Council as correct in law—notwithstanding the criticisms of Shastri Golap Chandra Sarkar that that decision and the earlier one in *Umaid Bahadur* v. *Udoi Chand*, I. L. R. 6 Cal. 119, represents Dayabhaga views rather than the doctrines of the Mitakshara. His Lordship who had been a colleague of Mr. Justice Gurudas Banerjee (one of the Judges who interpreted the law in *Babu Lal's* case) is absolutely right in saying that this "distinguished Judge and erudite Sanskrit scholar" "was not likely to allow his mind to be confused by Dayabhaga conceptions in determining a case under the Mitakshara Law."

Of the very greatest importance is the elaborate and erudite judgment of Lord Sumner in *Raja Srinath Ray* v. *Dinabandhu Sen*, 18 C. W. N. 1217. The question in the case was one which has long troubled Judges and writers of text-books in this country imbued with the learning of the English law of waters. The Crown which owns the bed of a navigable river and necessarily also the fishery rights in its waters to-day grants the exclusive fishery rights by way of permanent settlement to a private individual. To-morrow the river shifts its course so that the river now passes over the zemindari of another private individual. According to English law, if the river is a navigable river, the right of the public to use the river for purposes of navigation would continue in the new channel, but the grantee's fishery rights which are part and parcel of the freehold in the bed terminates to the extent to which the river has shifted on to the land of a riparian owner. The Indian cases have, however, as a rule allowed the grantee of fishery rights to "follow the river" along its new course and Lord Sumner holds that the departure is fully justified by the circumstances of Lower Bengal.

"In England," his Lordship observes, "the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river system and changes occur rarely by slow degrees and often with an almost cataclysmal suddenness." Lord Sumner in the course of his judgment has drawn a picture of the river which will be appreciated not only as a remarkable specimen of descriptive and literary art but will appeal to those who have seen the river as eminently realistic. In describing the condition of the river system of Lower Bengal his Lordship says: "The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees, sometimes a broad channel will shift and a new one open in a single night." To the argument that it would be unjust that a landowner should not only lose the use of his land but also the right to fish over his own acres his Lordship's reply is: "The waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own. . . . . In physical fact the landowner enjoys his land by the precarious grace of the river whose identity is so persistent, and whose character is so predominating, as almost to amount to a personality." In other words, it is *kismut*. So it is. Those who know the country will feel assured that his Lordship has not missed the local colouring without which administration of law according to pure logic becomes sheer pedantry.

CURRENT INDIAN CASES.

(CIVIL.)

Mortgage.

TOTA RAM *v.* KISHORE SINGH, I. L. R. 36 All. 141.

A second mortgagee purchased the property at a sale in execution of a decree obtained by himself. A prior mortgagee then brought a suit making the second mortgagee a party.

Held—That the second mortgagee could not contest the suit on the ground that the mortgagor was incompetent to execute the mortgage.

(CRIMINAL.)

Confession—Sec. 30 of the Evidence Act.

EMPEROR *v.* GANGAPPA, I. L. R. 38 Bom. 156.

When a confession made by a co-accused affecting himself and the other accused is proved, the Court is entitled to take it into consideration as against the other accused.

"Confession" in sec. 30 cannot be restricted to an unretracted confession.

The High Courts in India have laid down the rule of practice that a conviction should not be based only on an uncorroborated confession. This rule deserves all the reverence of law so that it ought to be observed by Judges when exercising their discretion under sec. 30.

Criminal Procedure Code—Dismissal of complaint—Revival—Jurisdiction of Magistrate.

RAUR BHORAS, I. L. R. 36 All. 129.

A complaint of assault on one B was lodged by B's brother and was dismissed under sec. 203. B lodged a fresh complaint before the same Magistrate who ordered the Police papers and the papers on the former complaint to be put on a certain date before which he was succeeded in his post by another officer.

Held—That the succeeding Magistrate had jurisdiction to deal with the complaint.

Criminal Procedure Code, sec. 250—Compensation.

GHURBIN KOERI, I. L. R. 36 All. 132.

The Magistrate in discharging an accused person called upon the complainant in the order of discharge to show cause against an order for compensation and four days later on hearing the complainant made the order under sec. 250.

Held—That the proceedings were not without jurisdiction.

Allahabad High Court—Letters Patent.

EMPEROR *v.* GHURE, I. L. R. 36 All. 168.

In an appeal preferred by the Local Covernment against an order of acquittal a preliminary objection to the hearing of the appeal was taken on behalf of the accused on the ground that there was no legally constituted High Court in the North-Western Provinces, the appointment of a sixth Judge to that Court being *ultra vires.*

Held—There is no force in the contention under 24 and 25 Vict. Chap. 104, sec. 16; the sovereign was authorised by Letters Patent to establish at any time thereafter a High Court of Judicature in the territories of India other than those comprised within the jurisdiction of the other High Courts. The only limit as to the number and qualifications of the Judges was as therein stated. By Letters Patent dated the 17th day of March of the twenty-ninth year of the reign of Queen Victoria Her Majesty was pleased to constitute a High Court for the North-Western Provinces. Sec. 2 of the Letters Patent was in these words:—

"And we do hereby appoint and ordain that the said High Court shall until further or other provision shall be made by us or our heirs and successors in that behalf in accordance with the said recited Act consist of a Chief Justice and five Judges."

Transfer of case by District Magistrate to Subordinate Magistrate.

BASHIR HUSSEIN *v.* ALI HUSSEIN, I. L. R. 36 All. 166.

Where a District Magistrate has referred a case for trial to a Sub-Divisional Magistrate the latter has no power to transfer it to any other Magistrate who may happen to be subordinate to him.

Cr. P. C., sec. 437.

EMPEROR *v.* KHARGA, I. L. R. 36 All. 147.

An order of further enquiry can be made under sec. 437, Cr. P. C., in a case in which an accused person has been discharged under sec. 119, Cr. P. C., in a proceeding under sec. 110, Cr. P. C.

Sec. 145, Cr. P. C.

EMPEROR *v.* RAM LOCHAN, I. L. R. 36 All. 143.

The Police reported that there was a likelihood of a breach of the peace between some of the servants of a lady who was the proprietor of a market and another person who had been appointed Chaudhuri of the market about the collection of certain dues. Proceedings under sec. 145, Cr. P. C., were drawn up and the Magistrate made an order to the effect that the Chaudhuri was in possession of the market dues in his capacity as Chaudhuri and the servants of the proprietor should not disturb his possession unless he was evicted therefrom in due course of law.

Held—That the dispute in this case admittedly does not concern any tangible immoveable property. It can only come within the scope of the section if cl. 2 of sec. 145 covers the case. Land is said to include "markets" and "the rents or profits of any such property." It would be unduly stretching the definition to make it cover this case.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE No. 2601 OF 1912. RAJA DURGA PROSAD SING, Defendant, Appellant, *v.* HARI RAM MAHATO, Plaintiff, Respondent. 28th August 1914.

Chota Nagpur Tenancy Act, secs. 20 (3), 139 (6)—Rent-collector, if may acquire occupancy right—Suit by headman to recover land, if lies in Civil Court, when wrongfully dispossessed.

The Plaintiff's case was that he with his father has been in possession of the disputed land over 35 years. This suit was brought for declaration of his paternal *jamai* right to and recovery of the *khas* possession of the land in dispute. The land was originally *jore danga* and was reclaimed on or about 1876. On the Plaintiff's refusal to pay increased rent, the Plaintiff was dispossessed by the Defendant. It was argued, *first*, that the Civil Court had no jurisdiction to entertain the

suit in view of cl. (6) of sec. 139, Chota Nagpur Tenancy Act, as the Plaintiff was the headman of the village; *secondly*, that the Plaintiff could not acquire occupancy rights as he was the *ijaradar* of the village under cl. (3), sec. 20, Chota Nagpur Tenancy Act; and *thirdly*, that the District Judge had imported personal knowledge into the case and therefore the case ought to be remanded; and *fourthly*, the onus was wrongly thrown upon the landlord-Defendant to prove the character of the holding. The cases in 13 C. L. J. 250, 38 Cal. 153, 9 C. W. N. 144, were referred to.

The Respondent was not called upon.

Held—That the cl. (6) of sec. 139, Ch. N. T. Act, contemplates suits brought by Plaintiff in his character of a headman; that under sec. 6 of the Rent Law of 1859, the Plaintiff who was a rent-collector and not an *ijaradar* as contemplated in the Ch. N. T. Act could acquire occupancy rights and (without expressing any opinion on the case in 38 Cal. 153) the principle of that case was not applicable in the present case.

Babus Karunamay Ghose and *Lalit Mohan Ghose* for the Appellant.

Babu Dwarka Nath Chakerbutty for the Defendant.

K. M. G.

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BYOMKESH CHACKRABARTTY *v.* JATINDRA NATH ROY.

opinion, on the date on which the application to set aside the sale was made under r. 90, it was made by a person entitled to share in the rateable distribution of the assets and consequently should have been entertained by the Court.

The result is that this Rule is made absolute and the orders of the Courts below discharged. The record will be transmitted to the Court of first instance in order that the application under r. 90 may be investigated. The Petitioner is entitled to his costs both here and in the Court of appeal below; the costs in the Court of first instance will abide the result. We assess the hearing fee in this Court at two gold mohurs.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN.	BIRAJ NOPANI, since
LORD MOULTON.	deceased (now repre-
SIR JOHN EDGE.	sented by MALIRAM
MR. AMEER ALI.	NOPANI), and another,
1914,	Appellants,
Heard, 21 and	*v.*
22, April.	SREEMUTTY PURA
Judgment,	SUNDARI DASSEE,
11, May.	Respondent.

Deed, interpretation of—Conveyance by executor who also erroneously believes himself to be beneficiary—Conveyance purporting to be of all his right and title, if would pass title as executor.

P bequeathed a house absolutely to his daughter K and appointed three persons executors, of whom the only surviving executor in 1900, H (who was a son of K), conveyed the house to the Defendants in order to find money to pay off mortgage-debts for which as executor he was liable, and on discharging which he would have the right to be indemnified out of the estate. At the date of the conveyance K had died leaving, besides H and two other sons, two unmarried daughters who would according to Hindu Law succeed to her stridhan *properties to the exclusion of their brothers. H and his brothers however believed at the date of the conveyance that they and not their sisters were the heirs of K and joined in the conveyance as beneficial owners. All the vendors, moreover, purported to convey all the title and right that they possessed in the property. It was urged by the Plaintiff, one of the daughters of K, that although H was in a position validly to convey the house to the Defendants as executor and did purport to convey the property, he did not effectively do so, because the deed showed that he intended only to convey as a beneficial owner of the property, being under the erroneous impression that he and his brothers, his co-vendors, were beneficially entitled to it as heirs to their mother to the exclusion of their sisters:*

Held—*That as it appeared from the deed that all the vendors conveyed all the title and right that they possessed in the property, that would undoubtedly include the right and title which one of them possessed as executor, even if there were no direct evidence (such as there was in this case) that the conveyance was by him in his capacity as executor as well as beneficial owner.*

It is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense.

It would be contrary to settled principles of law as well as most unjust to bonâ fide *purchasers if the Courts were to allow the plain legal interpretation of a conveyance to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some*

BIRAJ NOPANI v. SREEMUTTY PURA SUNDARI DASSEE.

or all of the parties to the conveyance at the date of its execution.

This was an appeal against an appellate judgment of the Calcutta High Court.

The facts of the case will sufficiently appear from their Lordships' judgment.

The appeal turned upon the interpretation of a deed of conveyance and the question was whether by it one of the executants merely purported to transfer his supposed beneficial interest only in the property conveyed or also his title as executor. The conveyance was in the following terms :

This Indenture made this 12th day of December in the year of Christ one thousand and nine hundred between Hemendra Nath Bysack, Makhan Lal Bysack and Noni Lal Bysack of No. 7 Roy's Lane in the town of Calcutta by caste Tantubay sons of Sambhoo Nath Bysack deceased landholders hereinafter called the Vendors of the first part Baroda Sundary Dassee of No. 20/1 Boseparah Lane in Calcutta aforesaid widow of Kristo Lall Bysack deceased by caste Tantubay of the second part and Bijraj and Dawlatram both of No. 45 Strand Road in Calcutta aforesaid sons of Hriseycase deceased by caste Agarwalla Bania traders hereinafter called the purchasers of the third part Whereas one Prem Chand Bysack was seised or otherwise well and sufficiently possessed free from incumbrances of the messuage land hereditaments hereinafter described and intended to be hereby conveyed and whereas the said Prem Chand Bysack died on the 23rd day of June one thousand eight hundred and eighty-six possessed of amongst other things the said messuage land and hereditaments and leaving a Will in the English language and character bearing date the twenty-fourth day of October one thousand eight hundred and eighty-four whereby he gave and devised amongst other things the house No. 8 Sobharam Bysack's Street being the said messuage land and hereditaments to his surviving daughter Sreemutty Katyani Dassee and her heirs absolutely subject to the charges therein mentioned to be paid by her and her heirs executors and administrators out of the monthly rent and profits of the said house No. 8 Sobharam Bysack's Street and also bequeathed the sum of Rupees twenty a month to her daughter-in-law Baroda Sundary Dassee and his grandson Hiralal Bysack the widow and infant son respectively of his second son Kristo Lal Bysack deceased and their heirs for maintenance for sixteen years and (also) Rupees twenty per month to his first daughter-in-law Sonamoni Dassee for the term of her natural life and after that to such of her sons as should not then have attained their full age till they have all passed an age of twenty-one years and he declared that the said sums of Rupees twenty and twenty or altogether Rupees forty should form a charge on the said house No. 8 Sobharam Bysack's Street and he thereby appointed the said Sambhoo Nath Bysack Hemendra Nath Bysack and Ratan Lal Bysack his executors and whereas on the thirty-first day of August one thousand eight hundred and eighty-six the said executors applied to the High Court Calcutta for probate of the said Will but the said Sonamoni Dassee and Baroda Sundary Dassee having filed caveat the application was set down as a contentious suit (being suit No. 15 of 1887) and on the twelfth day of July one thousand eight hundred and eighty-seven probate was finally granted to the said executors and whereas the said Katyani Dassee died on the eighth day of April one thousand eight hundred and ninety-one leaving her surviving five sons namely the said Hemendra Nath Bysack, Ratan Lal Bysack, Makhan Lal Bysack, Noni Lal Bysack and Mihir Lal Bysack and three daughters Maya Sundary Dassee, Kanak Munjury Dassee and Pooroo Sundary Dassee (the latter two of whom were born after the death of the said Prem Chand Bysack) and whereas the said Ratan Lal Bysack also died on the seventh day of September one thousand eight hundred and ninety-one unmarried and whereas the said Mihir Lal Bysack also died on the twelfth day of September one thousand eight hundred and ninety-five unmarried and whereas the said Sambhu Nath Bysack also died on the ninth day of January one thousand eight hundred and ninety-nine and whereas on the fourth day of September one thousand and nine hundred the said Hemendranath Bysack obtained an order whereby amongst other things referred to the Registrar of the said High Court to enquire and report whether there was any necessity for the sale of the said house No. 8 Sobharam Bysack's

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Street and what provisions should be made to secure the payment of the legacies mentioned in the said Will out of the rents and profits of the said house No. 8 Sobharam Bysack's Street and whereas the said Hemendra Nath Bysack the sole surviving executor of the said Will has since paid all the debts liabilities and legacies mentioned in the said Will and whereas the said Sonamoni Dassee has filed a suit against the said Hemendra Nath Bysack for amongst other things a declaration of her rights under the said Will of the said Prem Chand Bysack and whereas the vendors have taken upon themselves the responsibility of entering satisfaction in the said suit so brought by the said Sonamoni Dassee as also of satisfying the claim (if any) of their sisters the said Sreemutty Maya Sundary Dassee and Kanak Munjury Dassee who are both married and of the infant Pooroo Sundary Dassee who is still unmarried (and the latter two of whom are precluded from succession being born after the death of the testator as aforesaid and with that view has abandoned and will not proceed with the reference contemplated by the said order of the fourth day of September one thousand and nine hundred) and whereas the vendors have contracted with the purchasers for a sale to them of the messuage land and hereditaments for the sum of Rupees thirty-five thousand on the treaty of such sale it has been agreed by and between the parties hereto that Rupees ten thousand shall remain with the purchasers to secure the sum of Rupees twenty a month to the said Sonamoni Dassee and her heirs being one set of annuitants mentioned in the said Will after which or after the settlement with the said Sonamoni Dassee for principal and costs (or deposit into Court) the said sum of Rupees ten thousand (or the balance thereon) shall be paid back to the vendors or their heirs and representatives by the purchasers their heirs and representatives and that the other annuitant Baroda Sundary Dassee shall be paid off on her joining in the conveyance hereinafter appearing and whereas the vendors have paid off the said Baroda Sundary Dassee the sum of Rupees seven hundred and eight in full satisfaction of the balance of her claim against the said land messuage and hereditaments and have produced her receipt to the purchasers and have also deposited with them the sum of Rupees ten thousand to secure the annuity of the said Sonamoni Dassee and her heirs Now this Indenture witnesseth that in pursuance of the said contract and in consideration of the said sum of Rupees twenty-five thousand at or before the execution of these presents paid to the vendors by the purchasers and in further consideration of Rupees ten thousand so deposited with the purchasers by the vendors as aforesaid (the two sums making together the said purchase-money of Rupees thirty-five thousand) the receipt whereof they the vendors do and each of them doth hereby admit and acknowledge and of and from the same and every part thereof do and doth acquit release and for ever discharge the purchasers their heirs representatives and assigns as well as the said messuage land and hereditaments they the vendors do and each of them doth hereby with the privity and consent of the said Baroda Sundary Dassee testified by her being a party and executing these presents grant sell and convey unto the purchasers their heirs representatives and assigns all that partly two-storeyed and partly three-storeyed messuage tenement or dwelling-house together with the piece or parcel of land whereon the same is erected and built containing by estimation six cottahs and eleven chittacks situate lying and being North Division Block No. XIII Holding No 14 and premises No. 8 Sobharam Bysack's Street in the town of Calcutta and butted and bounded in manner following that is to say on the north by Sobharam Bysack's Street on the east by a passage separating this property from No. 9 Sobharam Bysack's Street belonging to the Debutter Estate of Bhagabati Dasi deceased (the said passage being joint to both the houses) on the south by the house of Shedmall Gomtia and on the west by a public lane and the Government Revenue whereof is Rupees two per annum or howsoever otherwise the same may be butted bounded known or described together with all erections paths passages privileges water-courses and appurtenances whatsoever to the said messuage land and hereditaments or premises hereby granted belonging or in any wise appertaining or usually held or occupied therewith or reputed to belong or to be appurtenant thereto and all the estate right title interest claim and demand whatsoever of the vendors unto and upon the said messuage land hereditaments and premises and every part thereof and also all deeds papers and writings solely

relating to the said premises or any part thereof now in the custody of the vendors or which they can procure without suit to have and to hold the said messuage land and hereditaments and premises hereby granted or otherwise conveyed and assured or intended so to be with their and every of their rights members and appurtenances unto and to the use of the purchasers their heirs representatives and assigns for ever and the vendors do for themselves and himself their and his heirs and representatives do and each of them doth hereby covenant with the purchasers their heirs representatives and assigns in manner following that is to say that the vendors at the time of sealing and delivery of these presents are lawfully rightfully and absolutely possessed of and in the said messuage land and hereditaments hereinbefore granted and conveyed as an estate equivalent to fee simple in possession free from incumbrances and that the vendors now have in themselves full power and absolute right title and authority by these presents to grant and convey the said messuage land hereditaments and premises unto and to the use and behoof of the purchasers their heirs representatives and assigns in manner aforesaid according to the true intent and meaning of these presents and that it shall be lawful for the purchasers their heirs representatives and assigns from time to time and at all times hereafter peaceably and quietly to enter into and upon and hold occupy possess and enjoy all and singular the said messuage land hereditaments and premises hereinbefore granted and conveyed or intended so to be with its rights members and appurtenances receive and retain the rents issues and profits thereof to and for their own use and benefit without any let suit eviction or any manner of hindrance claim and demand whatsoever of or by the vendors their heirs and representatives or any person or persons now or hereafter lawfully claiming any estate right title charge and interest at law or equity into out of or upon or concerning the said messuage land hereditaments and premises or any part thereof through under or in trust for them or any of them and that the vendors have not at any time done or executed or knowingly suffered or been party or privy to any act deed matter or thing whereby or by means whereof the said messuage land hereditaments and premises hereby granted or assured or expressed so to be or any part thereof are can or may be incumbered or prejudicially affected in title estate or otherwise howsoever or whereby the vendors are in any way hindered from granting conveying or assuring the same or any part thereof in manner aforesaid and the vendors their heirs and representatives shall and will at all times hereafter save defend and keep the purchasers their heirs representatives and assigns harmless and indemnified against all actions suits proceedings costs damages claims and demands or losses and specially of the said Sonamoni Dasi and her heirs and the said three sisters Mayasundari Dasi, Kanak Munjury Dasi and Pooroo Sundari Dasi and their heirs respectively which may be incurred or sustained by the purchasers their heirs representatives and assigns by or by reason of the defect if any in the title of the vendors to the said messuage land hereditaments and premises or any part thereof and moreover that the vendors, their heirs and representatives shall and will from time to time and at all times hereafter upon every reasonable request and at the costs and expenses of the purchasers their heirs representatives and assigns make do acknowledge execute and perfect or cause and procure to be made done acknowledged executed or perfected with all proper despatch all such further and other lawful and reasonable acts deeds conveyances matters and things whatsoever for the better and more perfectly and absolutely granting conveying and assuring the said messuage land hereditaments and premises with its rights members and appurtenances unto and to the use of the purchasers their heirs representatives and assigns as by him or them shall be reasonably required. In witness whereof the vendors have hereunto set and subscribed their respective hands and seals the day and year first above written.

Stephen, J., before whom the case was heard in the first instance found in favour of the purchasers. In the course of his judgment, his Lordship observed as follows :—

"Under these circumstances I have to consider whether there is anything in this case to prevent the application of the general rule summarized in Norton on Deeds (1906 Ed.), p. 271 : 'A conveyance * * * * of all the estate, right, title or interest of the grant-

or in property to a purchaser for value passes every interest of the grantor, although not vested in him in the character in which he is made a party to the conveyance.' The case of *Drew* v. *The Earl of Norbury* (1) is authority for the proposition that when a person having several estates and interest in a denomination of land joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance. The case of *Taylor* v. *The London and County Banking Co.* (2) goes to show that *A fortiori* the same rule must be applied where the vendor had only one estate or interest in the property in question and made out that he was entitled to a larger interest than he was entitled to in the conveyance to the purchaser. In *Rooper* v. *Harrison* (3), the application of the rule to persons holding in *autre droit* is considered and the opinion of the Court was expressed that an exception to the general rule occurred in the case of persons holding estates per *autre droit*; and that an assignment by a person of all his goods and chattels would not pass those he held as executor unless he had none of his own, a limitation on the exception to the general rule that seems applicable to the present case, if we substitute for all his goods and chattels his right, title and interest in the premises affected. The facts before the Court were the converse of those in the present case, the conveyance being by executors and the question being whether this included the estate which one of them held for his own purposes and in his own right; but this does not seem to affect the application of the principle on which the opinion of the Court was expressed.

"It has been argued before me that the general rule is not applicable to the present case, because the vendor purports to act as absolute heir and (the deed) contains recita's which constitute a denial of his character of executor. In the cases I have mentioned however I find nothing to support this contention. The vendors made out a title as did the vendor in the present case, but that did not prevent their being considered to have exercised rights which were not disclosed. In this case it is true that the title they acted on is inconsistent with that under which it is sought to enforce their action and which is in fact denied; but the question cannot be decided on their representations made in the recitals, but on the rights which they must in fact be held to have exercised. If the evidence shewed that the purchasers were in any way cognisant of the existence of the mortgage which I have taken as evidence of the continuance of the executorship, I might be able to treat the conveyance as a collusive act; but the only evidence of this is the close connection between the conveyance and the mortgage and though this is suspicious, I cannot take it as conclusive. It may be argued that in the present case the vendor does not make out a good title, because the facts recited disclose the absolute rights of the Plaintiff to what she claims. The covenant to protect the purchasers against the claim of the Plaintiff also goes to show that the purchasers were aware of a defect in the title put forward. But the fact that the purchasers were content with a defective title does not of itself

(1) [1846] 3 J. & L. at p. 267.
(2) [1901] 2 Ch. 231.
(3) [1855] 2 K. & J. 86 at p. 112.

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affect the question of the capacity in which the vendors acted."

The decision of Stephen, J., was reversed, on appeal, by Jenkins, C. J. (Woodroffe, J, concurring). In the course of his judgment his Lordship observed as follows :—

"The deed proceeded on the assumption that Hemendranath and his brothers were absolutely entitled to the property: it is however now admitted that this was not so, but that on Katyani's death it devolved, as her *stridhan* property, on the unmarried daughters, so that the present Plaintiff became entitled to the moiety she now claims in this suit. It is however urged by way of defence to her claim that Hemendranath as the surviving executor of Prem Chand's will was in that capacity enabled to create a title that would defeat the Plaintiff's and in this connection special reliance was placed on the general words whereby the vendors purported to convey all their estate, right, title, interest, claim and demand in the property. Cases were cited to us in support of this contention, but the law is clear: it is the true interpretation of the deed that has to be ascertained. Hemendranath is not expressed to be a party to the deed as executor, on the contrary he was made a party of the first part together with his surviving brothers, and they were together described as vendors, and the recitals point to the theory that he and his brothers were regarded as together absolutely and beneficially entitled to the property. Then the consideration-money is expressed to be paid not to him alone, as would have been the case had he been selling as executor, but to him and his co-vendors. And finally not only are the covenants for title such as are appropriate to a conveyance by absolute owners, but the vendors undertook to keep the purchasers and their heirs indemnified against all claims and demands by Sonamoni, an annuitant under the will, or by their sisters, of whom the present Plaintiff was one. This all goes to show that Hemendranath and his brothers joined in the transfer as beneficial owners. But matters do not rest there, for there are indications in the deed which go to negative the theory that Hemendranath was conveying as executor. Thus it is recited that all debts and legacies mentioned in the will had been paid and, as I have already said, the consideration-money is expressed to be paid to the three vendors. If Hemendranath was selling as executor, his hand alone should have received the purchase-money, and it was the purchaser's duty to have paid it to him and him alone. And this is more than a technical objection, for the money having been paid as it was to the three vendors, as though it was their own it is not unreasonable to assume that they dealt with it as such, and what has now become of it does not appear. Certainly there is nothing to suggest the inference that any part of it has reached the Plaintiff, so that it might be a serious detriment to her to regard the transaction as one carried out by Hemendranath as executor.

"It comes then to this that not only is the Defendants' contention opposed to the natural meaning of the document but it involves a payment of the purchase money in a mode not sanctioned by the relationship that this contention assumes. It in no way helps the solution of this case to cite decisions in which it has been held that by virtue of general words an interest may pass that is not specifically mentioned in a deed, as they merely proceed on the principle that a document

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should be so interpreted as to carry into effect the intention of the parties. But from a general consideration of the present conveyance it is to my mind clear that Hemendranath did not intend to join and did not in fact join in it as an executor.

"It follows from this that the Defendants' title cannot prevail against the Plaintiff and that her suit should not have been dismissed."

Hence this appeal.

Sir R. Finlay, K. C., and *Mr. Bhugwandin Dube* for the Appellant submitted that the trial Judge was right. The Appellants were *bonâ fide* purchasers for value. The title to the premises on the 12th December 1900 was in the sole surviving executor. The purchase price went to discharge the mortgage and the annuities which the executor was bound to pay and for which the premises were liable. Between the three of the vendors, they intended to convey a complete title. Reliance was placed on *Preonath* v. *Surja Coomar* (4).

Mr. L. DeGruyther, K. C., and *Mr. Dunne* for the Respondents contended that all executorship and administration of the estate had come to an end by 1900. The terms of the conveyance shewed that the vendors sold as beneficial owners—as heirs of Katyani—but they were not her heirs under the Dayabhaga Law. The title of the Respondents must prevail unless it was defeated by the conveyance. The conveyance does not purport to be made as an executor. There were circumstances which shewed that Katyani was recognized as the owner of the premises. The executor had no title in December 1900 as he had apparently assented to the legacy long before. Even the trial Judge thought that the vendors seemed to sell as heirs. The general clause was not sufficient to convey the executor's interest when he purported to sell as beneficial owner or heir only.

Sir. R. Finlay, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—This is an Appeal in a suit brought by the Respondent against the Appellants for a declaration of her title to an equal undivided half part or share in a certain house and premises known as 8, Sobharam Bysack's Street, Calcutta, and for recovery of the premises from the Appellants, in whose possession they were at the commencement of the suit, with an inquiry as to mesne profits. The facts of the case, so far as they are material, are not now in dispute, and are as follows :—

The house and premises originally belonged to Prem Chand Bysack, who died on the 13th June 1886, leaving a Will dated 25th October 1884. By his Will the said testator devised and bequeathed the said house and premises "to his daughter Katyani Dassee and her heirs absolutely," subject to two charges of 20 rupees per month, payable to two of his daughters-in-law and their children as and for periods specified in the Will. He appointed as executors Shambhoo Nath Bysack (the husband of his daughter Katyani Dassee), and two of her sons, Hemendra Nath Bysack and Ratanlal Bysack. On application for probate of this Will, the executors found that a caveat had been entered by some of the relations of the deceased testator, who alleged that the Will was a forgery. This led to a suit, where, after a prolonged inquiry, the Court, on the 16th May 1887, pronounced the Will to be genuine and

(4) I. L. R. 19 Cal. 26 (34) (1891).

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granted probate of it, and directed that the costs of the executors should be paid out of the testator's estate.

It would appear that the executors had no funds in hand out of which they could meet the costs of this litigation, and they therefore mortgaged the property for a sum of Rs. 3,950 to Dwarka Nath Dutt, who had been their attorney in the probate suit, in order to secure the payment of his costs, which amounted to Rs. 3,400, the balance, Rs. 550, being treated as a loan to them. Katyani Dassee was made a party to the mortgage bond apparently to put on record her wish that no portion of the estate should be sold to defray these costs. The term of the mortgage was 10 years.

Shambhoo Nath Bysack died in 1889, and Ratanlal Bysack died in 1891, leaving his brother Hemendra Nath Bysack surviving executor. In 1891 Katyani Dassee also died, leaving four sons and two unmarried daughters, of whom the Respondent was one.

In 1900 the heirs of Dwarka Nath Dutt, who had died in the meanwhile, instituted a suit against Hemendra Nath Bysack as sole surviving executor for sale of the property under their mortgage, and at the same time the two annuitants brought suits against him for arrears of their annuities. To meet these demands it was determined to sell the property, and accordingly by a deed dated the 12th of December 1900 the property was sold to the Appellant Bijraj Nopani, one of the Appellants, and Dowlatram, since deceased. The other Appellants are sued as the executors of his last Will and testament, one of them being Bijraj Nopani himself. It is on the interpretation of this deed of conveyance that the question now in issue depends, and in order to make clear the contentions of the two parties it is necessary to explain its form and to state how the dispute has arisen before discussing the construction of the deed.

The deed is made between Hemendra Nath Bysack and his two surviving brothers of the first part, Baroda Sundary Dassee, one of the annuitants of the second part, and Bijraj and Dowlatram of the third part. It recites that the property originally belonged to Prem Chand Bysack, that he devised it to his daughter Katyani Dassee and her heirs absolutely, subject to a charge for annuities of Rs. 20 per month, to Baroda Sundary Dassee and Sonamoni Dassee, respectively, and that he appointed Shambhoo Nath Bysack, Hemendra Nath Bysack and Ratanlal Bysack executors of such Will. It then recites the obtaining of probate of the Will after suit. It then recites the death of Katyani Dassee on the 8th day of April 1891, leaving five sons and three daughters, and the death of two of the sons unmarried, and also the death of Shambhoo Nath Bysack on 9th January 1899.

There next comes a recital that Hemendra Nath Bysack on the 4th day of September 1900 obtained an order whereby it was referred to the Registrar of the High Court to enquire whether there was any necessity for the sale of the said house, and what provision should be made to secure the payment of the legacies mentioned in the said Will out of the rents and profits of the house. It next recites that—

"the said Hemendra Nath Bysack, the sole surviving executor of the said Will, has since paid all the debts, liabilities and legacies mentioned in the said Will."

Then follows a recital that Sonamoni Dassee has filed a suit against the said Hemendra Nath Bysack for, amongst

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other things, a declaration of her rights under the said Will, and that the vendors have taken upon themselves the responsibility of entering satisfaction in the said suit, as also of satisfying the claims of any of their sisters, and that therefore the petition will not be proceeded with. There next comes a recital that the vendors have agreed with the purchasers that Rs. 10,000 shall remain with the purchasers as security for the annuity to Sonamoni Dassee, and that the other annuitant has been paid off by a sum of Rs. 708 in full satisfaction of her claim against the property.

Here the recitals terminate and the Indenture goes on to witness that the vendors have sold the property to the purchasers for Rs. 35,000, of which Rs. 10,000 are to be retained by them as security as aforesaid. The vendors grant, sell and convey the property to the purchasers in ordinary form, together with "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon the said messuage, land, hereditaments and premises and every part thereof, and also all deeds, papers and writings solely relating to the said premises or any part thereof now in the custody of the vendors or which they can procure without suit."

Then follows a covenant in the following words:—

"The vendors do for themselves and himself, their and his heirs and representatives do, and each of them doth hereby covenant with the purchasers, their heirs, representatives and assigns in manner following, that is to say, that the vendors at the time of sealing and delivery of these presents are lawfully, rightfully and absolutely possessed of and in the said messuage, land and hereditaments hereinbefore granted and conveyed as an estate equivalent to fee simple in possession, free from encumbrances, and that the vendors now have in themselves full power and absolute right, title and authority by these presents to grant and convey the said messuage, land, hereditaments and premises unto and to the use and behoof of the purchasers, their heirs, representatives and assigns from time to time."

Finally there is a covenant to indemnify the purchasers against any loss at the suit of the annuitant, Sonamoni Dassee, or the three sisters (of whom the Respondent is one), which may be incurred by them by or by reason of the defect, if any, in the title of the vendors to the property.

The Appellants paid the purchase-money and took possession of the property under the conveyance, and remained in possession until the 22nd June 1897, when the Respondent brought the present suit, claiming that she was entitled to one-half share in the said house, because as she and her sister Kanak Manjuri Dassee were unmarried daughters, they were entitled to share equally her property, inasmuch as it was *stridhan*. She claimed that she was not bound by the said sale.

The Respondent's claim to a moiety of her mother's *stridhan* is admitted to be good in law, so that the only question in the suit is whether the conveyance was valid. It is plain that at the date of this conveyance the property was still in the hands of the sole surviving executor Hemendra Nath Bysack, and therefore he was competent as executor to sell it to the Appellants, who were *bonâ fide* purchasers for value. But the Respondent contends that although Hemendra Nath Bysack was in a position validly to convey it to the Appellants as such executor, and did purport to convey it, he did not effectively do so, because the deed shows that he intended only to convey as a beneficial owner of the property, being under the impression that he and his

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two brothers, the co-vendors, were beneficially entitled to it as heirs to their mother, and being ignorant or forgetful of the right of the sisters to inherit in preference to them. It is on this ground alone that the High Court decided in favour of the Respondent, reversing the decision of the Judge of the Court below, who had held that Hemendra Nath Bysack had by the deed conveyed all the right and title he possessed in every capacity, including that of sole surviving executor of the Will of Prem Chand Bysack.

Their Lordships are of opinion that the judgment of the Judge of first instance was right and ought to have been affirmed by the Court of Appeal. In the first place, the deed itself gives abundant evidence that the position of Hemendra Nath Bysack as sole surviving executor was viewed as material by the parties to the conveyance, inasmuch as there are careful recitals as to the original appointment of executors and as to the death of his co-executors. His position as sole surviving executor could have no bearing on the conveyance if it were not that it affected, or might affect, his title to convey. But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner), the deed makes it clear that all the vendors convey all the title and right that they possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor. That this would be the ordinary rule is admitted by the Judges of the Court of Appeal, who base their judgment on what they consider to be indications in the deed and in the conduct of the parties that the intention was that only the beneficial interest possessed by the vendors should be conveyed. Their Lordships are of opinion that this would be to contradict the deed itself; and moreover they are of opinion that the matters referred to would not support the conclusion drawn therefrom by the Judges of the High Court even if it was permissible to permit such considerations to affect the interpretation of the deed.

If the deed be considered from the point of view of the Appellants who were the purchasers and who were not otherwise concerned with the property or its history, the transaction as well as the deed which carries it out, become perfectly clear and intelligible. The property was by the Will charged with two annuities, and in order that the executor might procure the funds necessary to pay the costs of past litigation the property was under mortgage. This mortgage was being called in and the sale was to enable the mortgage money to be raised. The purchasers naturally desired a clear title free from entanglements. They therefore required that the mortgage should be paid off and the annuitants settled with or security given against their claims. For both these purposes it was necessary that Hemendra Nath Bysack as executor should be a party to the deed, because the original mortgage was effected by him for the purpose of securing the costs for which he was of course liable, and on his discharging the indebtedness as to costs he would become entitled to claim for the same as against the estate including the house in question. Moreover, it is abundantly clear from the executor's accounts and from all the facts appearing in the record that the house still fromed part of the undivided estate and that therefore he would be liable to pay the annuitants the amount of their

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annuities from time to time, as he had been doing for years past. The purchasers would not be likely to trouble themselves as to the question of whether or not the property would ultimately go to the sons or daughters, but would take care that all the persons in whom title could in any wise exist should join in the conveyance, and that they should be guaranteed against claims from those who did not do so. This is what the deed shows to have been done, and it would be entirely contrary to settled principles of law as well as most unjust to *bonâ fide* purchasers if the Courts were to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution. The deed states plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense. From this wholesome rule their Lordships see no reason for departing in the present case.

Their Lordships will therefore humbly advise His Majesty that this Appeal should be allowed and that the judgment of the Court of Appeal should be set aside, with costs, and the judgment of the Judge of first instance restored. The Respondents will pay the costs of this Appeal.

Solicitors: *Barrow, Rogers* and *Nevill* for the Appellants.

Solicitors: *Burton, Yeates* and *Hart* for the Respondents.

B. D. *Appeal allowed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

CHAUDHURI, J. 1914, 19, June. | BALCHAND and another *v.* TARAK NATH SADHU.

Oaths Act (X of 1873), sec. 13—Omission to record deposition as on solemn oath or affirmation—Presidency Court of Small Causes, enquiry by Registrar, as to proper service of summons, if judicial proceedings—Sanction to prosecute for false personation in service of summons—Criminal Procedure Code (Act V of 1898), sec. 195.

Before the Registrar of the Presidency Court of Small Causes at Calcutta whose duty it is to enquire into the proper service of summons and to take evidence in this behalf, it transpired that the Petitioners in this case by false representation had returned the summons as properly served and the Public Prosecutor at the instance of the Chief Judge made an application for sanction to prosecute the Petitioner under sec. 205 of the Indian Penal Code, which was granted by the said Registrar under sec. 195 of the Criminal Procedure Code and upon a Rule being obtained to question the propriety of the sanction,

Held—*That the proceedings before the Registrar were judicial proceedings and he was a judicial officer, that the sanction given by him to prosecute was properly given and the fact that it was not stated in the depositions recorded by the Registrar that they were taken on solemn oath or affirmation was a matter covered by sec. 13 of the Oaths Act.*

THE QUEEN *v.* SEWA BHOGTA (1) and QUEEN-EMPRESS *v.* SHAVA (3) *referred to.*

On the 17th April 1914, Counsel applied on behalf of the Petitioners for a rule upon the Public Prosecutor to show cause why sanction for the prosecution

(1) 14 B. L. R. 294 F. B. (1874).
(3) I. L. R. 16 Bom. 359 (1891).

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of Bal Chand under sec. 205, I. P. C., and Talim Chand under secs. 205 and 205 read with sec. 114, I. P. C., granted by the Registrar of the Calcutta Court of Small Causes on the 13th of January 1914 should not be set aside.

The material facts of this case are that on the 9th April 1913 the firm of Thermull Thurmull filed a suit in the Small Cause Court being suit No. 7019 of 1913 against the firm of Kaluram Chogmull for the recovery of Rs. 1,059-13-6. The Defendant firm consisted of 11 persons as partners. On the 3rd January 1914, the suit against the Defendants Nos. 1, 5, 9, 10 and 11 was allowed to be withdrawn and the summonses on the other Defendants were found to have been duly served. All these proceedings took place before the Registrar.

It is alleged tbat Bal Chand falsely personated Talim Chand in the said suit No. 7019 of 1913 and received the summons intended for Talim Chand and Talim Chand had falsely pointed out Bal Chand as Talim Chand on the occasion of service of the summons.

The rule came on for hearing on the 15th May 1914.

Mr. Jackson (with *Mr. K. N. Chaudhuri*) appeared for the Petitioners in support of the rule and contended that the Registrar, being only a ministerial officer, had no jurisdiction to grant a sanction under sec. 195, Cr. P. C, and that the Public Prosecutor could not legally make an application at the request of the Chief Judge of the Small Cause Court for the grant of sanction. The Registrar was wrong in acting on an unverified petition put in by the Public Prosecutor.

Mr. B. C. Mitter for the Public Prosecutor showed cause and argued that the Registrar is not merely a ministerial officer; he has judicial powers (see secs. 59 and 14 of the Presidency Small Cause Courts Act). Because the Public Prosecutor applied at the request of the Chief Judge, that cannot vitiate the proceedings. As regards the unverified petition on which the Public Prosecutor applied, he contended that no omission to take any oath or make any affirmation could invalidate any proceeding and referred to sec. 13 of the Indian Oaths Act, 1873.

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—I have taken some time to consider this matter, having regard to the way in which the matter was placed before me by the accused persons. Under the rules of the Small Cause Court the Registrar of that Court is the officer who is entitled to decide the question of service of summons, and in so doing, he is entitled to take evidence, and these proceedings are certainly in the nature of judicial proceedings, and therefore the matter strictly arises within his jurisdiction. It cannot be said that he was acting in a ministerial capacity, and I find from the petition itself that, so far as the proceedings relating to the services of summons are concerned, the whole of such proceedings were carried on before him. He makes out a list after the service is ready and the cases then go before the Judges.

In this matter he granted the sanction upon an application made by the Public Prosecutor who was apparently moved by the Chief Judge of the Court to make such an application. An objection was taken that in granting such sanction the persons upon whose statements the Registrar relied were not examined on oath. No doubt the statements as taken down do not shew that they were examined

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on oath. The words "S. O" or "S. A" are not to be found there, but yet under the Indian Oaths Act, sec. 13, if there was an omission to administer the oath, or affirmation, the irregularity, if any, is cured. There is ample authority for that proposition; amongst others see *The Queen* v. *Sewa Bhogta* (1) which was referred to in *Nundo Lal Bose* v. *Nistarini Dasi* (2)—but the point was not dealt with —and *Queen-Empress* v. *Shava* (3), it having been held that accidental or negligent omission in taking oath is saved by sec. 13 of the Oaths Act. It seems to me that there was no irregularity in granting such sanction, and under the circumstances, I must discharge the rule. In such matter, the application being of a quasi-criminal nature, I discharge the rule, but do not make any order for costs as against the Applicants.

Messrs. Fox & Mondal, Attorneys for the Petitioners.

The Public Prosecutor for the Opposite Party.

Rule discharged without costs.

(1) 14 B. L. R. 294 F. B. (1874).
(2) I. L. R. 27 Cal. 428, 434 (1900).
(3) I. L. R. 16 Bom. 359 (1891).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 656 OF 1912.

CHITTY, J. 1914, 8, July.

SRI LAL v. ARJUN DAS and others.

Arbitration—Award filed out of time—Agreement of parties not to dispute award—Civil Procedure Code (Act V of 1908), sec. 148, Sch. II, cls. 8, 15 and Or. XXIII, r. 3.

Where the Court granted time till the 28th of February 1914 for "filing" the award, and the arbitrators made an award in the Hindi language on that date and also signed the same, but instead of filing it on that day had the same rendered into English and filed the same on the 2nd of March following:

Held, *that the word "filing" in the Court's order was a clerical error and since the Hindi award was "made" within the time fixed by Court, it did not matter that the award rendered into English was prepared and filed two days later; the requirements of the law had been satisfied and the award was a good one.*

Quære—*Whether* SHIB KRISHNA v. SATISH CHANDRA, (1) *had been rightly decided having regard to the change in the law made by the wordings of sec. 148 and Sch. II, cls. 8 and 15 of the Code of Civil Procedure (Act V of 1908), which would seem to give the Court discretion to extend time even after the original time for making the award has expired.*

Whether having regard to the above changes in the law the decision of the Privy Council in RAJAH HAR NARAIN v. BHAGWUNT (2) *is of the same binding authority as before.*

Semble:—*As in this case while the award was being rendered into English the parties entered into a written agreement not to dispute the award, the Plaintiff was precluded from questioning the award. The agreement might be regarded as amounting to a fresh submission and acceptance of the English award as an award binding on all the parties to the agreement, or it might be regarded as a lawful adjustment of the suit which might be enforced as a decree under Or. XXIII, r. 3.*

In this case the original award was made by the arbitrators in Hindi on the

(1) I. L. R. 38 Cal. 522 (1911).
(2) I. L. R. 13 All. 300; s. c. L. R. 18 I. A. 55 (1891).

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last day, fixed by Court, *viz.*, the 28th February 1914, which was a Saturday. It was also signed by them, but it was not filed on that day. On Sunday and Monday the Hindi award was rendered into English and on the latter day, *i. e.*, on the 2nd of March 1914, it was filed. Before filing, the parties subscribed to an agreement that they would not dispute the award in any way. But subsequently Plaintiff took exception to the award. Thereupon followed three applications—one by the Plaintiff to set aside the award of the arbitrators in the above suit, on the ground that the award was filed after the expiration of the time, the two others made by the Defendants for enlarging the time, if necessary, for the filing of award, and for judgment on the award.

The material facts will appear from the judgment.

Mr. N. Sarkar with *Mr. S. Ghosh* for the Plaintiff.

Mr. H. D. Bose with *Mr. A. N. Chaudhuri* for the Defendants.

Mr. Sarkar.—The only award we have is the English award filed in this Court on the 2nd of March. The arbitrators were *functi officio* after the 28th of February [*Shib Krishna* v. *Satish Chandra* (1) and *Shib Krishna* v. *Satish Chhndra* (3) referred to]. Refers to *Digambari* v. *Joy Narayan* (4). Cl. 8 of Sch. II, C. P. C., 1908, corresponds with sec. 514 of the old Code. Therefore the ruling in *Rajah Har Narain* v. *Bhagwant* (2) has not in any way been affected by this new Code.

The time having expired on the 28th of February, the consent of the parties under the agreement of the 2nd of March could not give the arbitrators jurisdiction: *Ledgard* v. *Bull* (5), *Chuha Mal* v. *Hari Ram* (6).

Mr. Bose.—So far as *Shib Krishna* v. *Satish Chandra* (1) is concerned, it was wrongly decided.'

The award was made and signed in Nagri on the 28th of February which was Saturday and was afterwards rendered into English and filed on Monday the 2nd of March.

There is difference between r. 8 of Sch II of the present Code and sec. 514 of the old Code as also between r. 15, Sch. II, and sec. 521 of the old Code. The later was necessary because of the rulings in *Kali Prasanna* v. *Rajani Kanta* (7), so that it cannot be said that this Code has not affected the Privy Council ruling in *Rajah Har Narain* v. *Bhagwant* (2). The agreement at any rate amounted to a waiver.

The JUDGMENT OF THE COURT was as follows:—

CHITTY, J.—This suit was filed by Sri Lal on the 26th June 1912 against Arjun Das and his brothers for a declaration that he was entitled to a half share in several businesses, that the businesses should be dissolved and accounts taken. On 14th July 1913 all matters in dispute in the suit were referred to the arbitration of Daulatram Chokhani and Shib Prosad Garodia, and they were directed to make their award within ten weeks from the date of the delivery to them of the said order. The arbitrators were unable to

(1) I. L. R. 38 Cal. 522 (1911).
(2) I. L. R. 13 All. 300: s. c. L. R. 18 I. A. 55 (1891).
(3) I. L. R. 39 Cal. 822 (1912).
(4) 16 C. L. J. 573 (1912).
(5) L. R. 13 I. A. 134 (1886).
(6) I. L. R. 8 All. 548 (1886).
(7) I. L. R. 25 Cal. 141 (1897).

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proceed with the matter at once and so the ten weeks elapsed without an award being made.

On the 5th January 1914 I made an order allowing the arbitrators until 28th February 1914 within which to make their award. By a slip in the said order, instead of the word "make" the word "file" was used, but that appears to me to be a matter of little importance. The order purported to be one under Sch. II, para. 8, of the Civil Procedure Code, 1908, and the word should undoubtedly have been "make." The arbitrators held numerous meetings and eventually on 28th February 1914, the last day for making their award, they drew up and signed an award in Hindi. The 28th was a Saturday, and the award could not be filed on that afternoon. Accordingly on the Sunday the arbitrators saw Babu Debi Prosad Khaitan and asked him whether it would not be better that the award should be submitted to the Court in English. Babu Debi Prosad Khaitan accordingly put into formal English the Hindi award, which was read out to him by Shib Prosad Garodia. He did this partly on the Sunday and partly on Monday the 2nd March 1914. Though not a literal translation, the English award reproduces the Hindi award clause for clause and term for term. On 2nd March 1914 the arbitrators and the parties were all present in Babu Debi Prasad Khaitan's office when the English award prepared by Babu Debi Prosad Khaitan was signed by the arbitrators, as was also the letter from the arbitrators to the Registrar forwarding the award. In that letter they stated, "we met and signed our award on the said 28th day of February, but the same could not be filed in Court on the said day being a Saturday. We understand that the time to file the award having thus expired, the parties are going to apply to the Court for leave to file the same." On the advice of Babu Debi Prosad Khaitan an agreement was drawn up on an eight-anna stamp paper and signed by the parties on that day. It was to this effect—"We agree on and to the terms set forth in the award made by Babus Daulatram Chokhani and Shib Prosad Garodia which has been 'fully' explained us, and further agree not to raise any objections thereto as to its validity whether on the grounds of expiry of time or otherwise howsoever." The Plaintiff Sri Lal being dissatisfied with the award at first took up the position that he signed that agreement without knowing its contents and without understanding to what he was putting his name. That contention has been expressly withdrawn by his counsel and the Plaintiff now admits that when he signed that document, which was explained to him by Babu Debi Prosad Khaitan, he knew its contents and understood what he was doing. This, however, did not prevent him from taking steps at once to object to the award as having been filed out of time. I have before me three matters—(1) a petition now by the Plaintiff that the award may be set aside as having been filed out of time, (2) a petition by the Defendants that, if necessary, the time may be extended and that the Plaintiff may be at liberty to file the award, and (3) the Defendants' application that judgment be passed in accordance with the award. Plaintiff's counsel admits that there are no merits whatsoever in his client's contention. He could hardly do otherwise, as a more shameless attempt to get out of his agreement on a highly technical point can hardly be conceived. The Plaintiff relies upon the case of *Shib Krishna* v. *Satish*

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Chandra (1) in which Mr. Justice Harington held that the Court had no power to extend the time for filing an award, which had already been made before the application was presented. The learned Judge relied upon the case of *Har Narain Singh* v. *Bhugwant Kuar* (2), but that was a case decided under the Civil Procedure Code of 1882. Their Lordships of the Privy Council held that an award made out of time was invalid and that the arbitrators by such effluxion of time were *functi officio.* In so doing they followed the express words of sec. 521, which ran that "no award shall be valid unless made within the period allowed by the Court." With all respect to the learned Judge who decided the case in *Shib Krishna* v. *Satish Chandra* (1) it appears to me that he did not give sufficient weight to the change which was made in the wording of sec. 521 of the Code of Civil Procedure, 1882, in enacting para. 15 of the Second Schedule to the Code of Civil Procedure, 1908. As para. 15 runs, it appears to me to leave a discretion to the Court in deciding whether an award shall be set aside on the ground of its having been made after the expiration of the period allowed by the Court. I feel some doubt, therefore, whether the decision in *Shib Krishna* v. *Satish Chandra* (1) is correct in law. Sec. 148 of the present Code is in no way restricted, nor indeed is paragraph 8 of the second schedule. It might, therefore, be argued not without reason that they ought not to be restricted in the manner there held. It is, however, unnecessary to decide that point, because I am unable to see how in the face of his agreement of 2nd March 1914 the Plaintiff can possibly contend that he is not bound by this award. His objection is highly technical and it may be met in various ways. It may be said that that agreement operated as a fresh submission to arbitration and acceptance of the award as signed on that day by the arbitrators. It might also be said that it was a lawful adjustment of the suit which might be enforced by a decree against the Plaintiff under the provisions of Or. XXIII, r. 3. It might further be said that the Plaintiff is precluded from putting forward his present objection by the concluding words of his agreement not to raise any objection to the award or to its validity whether on the ground of expiry of time or otherwise howsoever. The difficulty might again be got over by directing that not the English award but the Hindi award which is in identically the same terms though not in the same language should be filed as the award of the arbitrators. It appears to me quite unnecessary to go through these formalities. It is abundantly clear that an award was made within time. The arbitrators decided to have the award drawn up in English, but before doing so they took an agreement from the parties not to raise any objection to this being done. I must, therefore, dismiss the application of the Plaintiff Sri Lal with costs and pass a decree in terms of the award.

Messrs. Dey and *Kshetri*, Attorneys for the Plaintiff.

Mr. S. C. Mukerjee, Attorney for the Defendants.

Decree upon award.

(1) I. L. R. 38 Cal. 522 (1911)

(2) I. L. R. 13 All. 300 : s. c. L. R. 18 I. A. 55 (1891).

[CIVIL APPELLATE JURISDICTION]
APPEAL FROM APPELLATE DECREE
No. 3004 OF 1911.

HOLMWOOD, J.
CHAPMAN, J.
1914,
Heard, 6 and 7, May.
Judgment, 7, May.

HAKIMULLA and another, Defendants, Appellants,
v.
NABIN CHANDRA BARUA, Plaintiff, Respondent.

Lunatic, suit against—Ex parte *decree against unrepresented lunatic—Ignorance of Court as to fact of lunacy—Jurisdiction of Court—Fraudulent purchase by* de facto *manager of lunatic—Rights of purchasers from such fraudulent purchaser.*

One N was a lunatic not adjudged as such. During his lunacy a suit for rent was brought by the landlord for two plots of land belonging to the lunatic and two rent decrees were obtained ex parte *against the lunatic who was not at all represented in the suit. The fact of the lunacy was not brought to the notice of the Court. At the auction-sales in execution of the decrees the properties were purchased by a person who was the lunatic's* de facto *manager who again sold them to other persons who purchased with full knowledge of the lunacy*:

Held—*That as the lunatic or his estate was not represented in the rent-suit, the sales under the decrees of the Court therein obtained were nullities and the purchaser acquired no title by his purchase. The purchaser, being besides a fraudulent purchaser who had acted deliberately in breach of his trust as* de facto *manager of the lunatic, could not in any case be allowed to take advantage of the Court-sales even if they had been made with jurisdiction.*

As he had no title whatever the purchasers from him also acquired no title.

RASIK LAL DATTA *v.* BIDHUMUKHI DASSI (1) *relied on.*

KHAIRAJ MAL *v.* DAIM (2) *doubted.*

This was an Appeal from a decree of Babu Jagan Mohan Sarkar, Subordinate Judge, 2nd Court of Zilla Chittagong, dated the 26th of July 1911, confirming a decree of Babu Ananda Kishore Dutta Roy, Munsif, 2nd Court of Chittatong, dated the 31st May 1910.

The facts of the case material to this report will appear from the Judgment.

Mr. Z. R. Zahid and *Babu Khitish Chandra Sen* for the Appellants.

Mr. J. M. Sen Gupta and *Babu Sahai Ram Basu* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

HOLMWOOD, J.—This Second Appeal arises out of a suit, brought by a lunatic, named Nabin Chandra Barua, through his next friend, guardian and sister, Sreemutty Shantim, against several Defendants, of whom the Defendants Nos. 1, 2, 3 and 4 are the only Defendants with whom we are concerned in this appeal. It appears that the Defendant No. 2 was another sister of the lunatic and the wife of the Defendant No. 1, Isap Ali. During the lunacy of the Plaintiff (which is found as a fact notorious and known in the neighbourhood where he lived and had his property) a suit was brought by the landlord, for the rent of two plots, Nos. 1 and 2 in the schedule of the present plaint, and two rent-decrees were obtained, *ex parte*, against the lunatic, who was not at all represented in the suit. Both the Courts below have held that as in the decrees and auction-sales Nobin was not properly represented, his right was not affected by the sales; that, as the Defendant No. 1 was the *de facto* manager of Nobin, he acquired no title by his purchase as against Nobin; and that, as the sales were

(1) I. L. R. 33 Cal. 1094 (1906).

(2) I. L. R. 32 Cal. 296, at p. 315 (1904).

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nullities and inoperative, so far as Nobin was concerned, the other Defendants, who are purchasers from Isap Ali with full knowledge of the lunacy and knowing everything about the family affairs, have also acquired no title.

We think that the judgments and decrees of the lower Courts must be supported.

It has been argued in appeal before us that the Plaintiff not having been adjudged a lunatic and the case falling under the provisions of the former Code of Civil Procedure by reason of the provisions of sec. 463 of that Code, the Court trying the rent suit had jurisdiction to pass a decree and to sell the property; and it is sought to be argued that the Court has such jurisdiction in every case, except the case mentioned in sec. 463 (the case of adjudged lunatics). Now that that is not the case has been clearly shown in the case of *Rasik Lal Datta* v. *Bidhumukhi Dassi* (1) where Mookerjee, J. (at page 1084) says :—"The Code therefore makes no provision for representation of lunatics, who may be Plaintiffs or Defendants, but who have not been adjudged as persons of unsound mind. Under such circumstances I must hold that the Court in which a suit has been instituted by or against such a person, has an inherent power to determine whether the party who is alleged to be a lunatic is really so, and if he is found to be a lunatic, to make an order for the appointment of a next friend or guardian *ad litem*. If any other view were maintained, the consequences might be extremely inconvenient and there might be a failure of justice; for instance, during the pendency of the proceedings under Act XXXV of 1858, the right to sue of the lunatic may become barred by limitation; or if the lunatic is proposed to be made a Defendant, the intending Plaintiff would be obliged to take recourse to proceedings under the Lunacy Act before he could be permitted to institute his action." Where, therefore, through the ignorance of the Court, the Court assumes jurisdiction over a lunatic, it appears to us that that proceeding is a nullity; and that is what had been laid down by their Lordships of the Judicial Committee in the case of *Khairaj Mal* v. *Daim* (2). It is true that was a case of minors; but their Lordships deal with the observations of Lord Hobhouse, who laid down the rule which was pressed before us in this appeal, that where the Court in exercising its jurisdiction had made a mistake, the wronged party can only take the course prescribed for setting matters right, and that if that course is not taken, the decision, however wrong, cannot be disturbed. But the Privy Council say that the case where the Judge accepted, without question, the statement on the record that the minor was legally represented and Alahnawaz was his guardian and never applied his mind to the matter, where the proceedings were cut short by the agreement for reference and other matters, and where, therefore, there was no adjudication on the question of whether the estate was represented or not —was not the case of an erroneous decision, ruling or exercise of discretion of the Judge in a matter in which the Court had jurisdiction. They held that the estate of Nauras was not represented in law or in fact in either of the suits and that the sale of his property was therefore without jurisdiction and null and void, and that is precisely the case here. The fact that it was not brought to the notice of the

(1) I. L. R. 33 Cal. 1094 (1906).

(2) I. L. R. 32 Cal. 296 at p. 315 (1904).

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Court that the Defendant was a lunatic left the Court entirely without jurisdiction. The lunatic was never represented at all; and his estate certainly was not represented in the rent-suits. The sales under the decree of that Court were nullities. The Defendant No. 1 therefore, in any case, acquired no title by his purchase, he being, in fact, found to be a fraudulent purchaser, who had acted deliberately in breach of his trust as *de facto* manager of Nobin. He could not, in any case, have been allowed to take any advantage whatever of the Court-sale, even if it had been made with jurisdiction. As he had no title whatever, the purchasers from him have also acquired no title. The lower Appellate Court has gone so far as to hold, as a fact, that the Defendants Nos. 3 and 4 were aware throughout of the lunacy of the Plaintiff and of the family affairs; and it has held that it was not a *bonâ fide* purchase for value. So that, in any case, they would have to make restoration by reconveyance, had anything passed to them. But we hold, on the principles we have already enunciated, that the sales were nullities and inoperative, and that nothing passed.

Nothing has been said to us regarding the right of the Defendants Nos. 3 to 8 to plot No. 1 in schedule 3, as tenants of the Plaintiff; nor does anything appear to have been said in the lower Appellate Court. We must therefore take it that the originial decretal order of the Munsif is the order in the suit which has been affirmed by the lower Appellate Court; and, as we are of opinion that both the lower Courts are correct in their decision, this appeal must be dismissed, with costs and the decrees of the lower Courts affirmed.

CHAPMAN, J.—I agree. A sale in execution of a decree obtained against a lunatic, who has not been properly represented is in my opinion a void sale, not merely voidable. In so far as the case of *Uma Sundari Dasi* v. *Ramji Haldar* (3) lays down any general rule to the contrary, I must respectfully dissent from it. The English cases there cited are no authority for any such general rule as that stated in the judgment.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 2910 OF 1909.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 15 and 16, May.
Judgment, 16, May.

AKHIL PRODHAN, Plaintiff, Appellant,
v.
MANMATHA NATH KAR and ors., Defendants, Respondents.

Suit for declaration that certain proceedings in Court held at Plaintiff's instance were fictitious and of no effect—Circumstances disentitling Plaintiff to protection in Court of equity—Circumstances entitling fraudulent confederate to retain property transferred to him in order to effect a fraud—Civil Procedure Code (Act XIV of 1882), sec. 317, if applies where suit fictitious—Agreement by fictitious decree-holder-purchaser to restore land—Suit if for specific performance—Limitation.

The Plaintiff as tenant held some lands under one K who in 1894 unsuccessfully sued to eject him as a trespasser. In this litigation the Plaintiff was assisted by one J in whose favour he executed a fictitious conveyance in 1898. In 1899 finding that J was unfaithful, Plaintiff induced K to institute a fictitious suit for rent which was decreed on the 7th November 1899. K took out execution of this decree and at the sale which followed purchased the holding on the 19th March 1900. According to

(3) I. L. R. 7 Cal. 242: s. c. 9 C. L. R. 18 (1881).

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Plaintiff's allegation K had agreed to execute a release of the holding in his favour, and although possession was formally delivered to K on 5th June 1900, Plaintiff continued in occupation of the land. In November 1906 K with the help of the Police took away the crops raised by the Plaintiff and on the 15th March 1907 Plaintiff brought a suit for declaration that the entire proceedings in the rent-suit of 1899 were fictitious and also for confirmation of his possession of the land:

Held—*That the suit was not one for specific performance of a contract and was not barred by limitation.*

That the case fell within the principle of the decision of the High Court in JADU NATH PODDAR *v.* RUP LAL PODDAR (1) *and of the Judicial Committee in* PETHERPERMAL CHETTY *v.* MUNIANDY SERVAI (2), *namely, that to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with and the Plaintiff was not disentitled to protection in a Court of equity.*

That sec. 317 of the Civil Procedure Code of 1882 did not apply to the present case.

Sec. 317, C. P. C., contemplates a real sale in execution of a real decree in a real suit.

This was an Appeal preferred on the 6th of December 1909 against the decree of E. E. Forester, Esq., District Judge of Zilla Midnapur, dated the 3rd of September 1909, reversing the decree of Babu Ambica Charan Mukherjee, Subordinate Judge, 1st Court of that District, dated the 31st of July 1908.

(1) I. L. R. 33 Cal. 967 (1906).
(2) I. L. R. 35 Cal. 551 (1908).

The facts of the case will appear from the judgment.

Babus Ram Chandra Majumdar and *Manmatho Nath Mukherjee* for the Appellant.

Babus Dwarka Nath Chakravartty, Surendra Nath Das-Gupta and *Sasadhar Roy* for *Babu Surendra Nath Roy* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal by the Plaintiff in a suit for declaration that the proceedings in a rent-suit brought against him by the first and second Defendants were fictitious and have not affected his title to the lands mentioned in the schedule to the plaint, and also for confirmation of possession of those lands. The circumstances under which the Plaintiff seeks relief are not now in controversy. The subject matter of litigation was held by the Plaintiff under the Kar Defendants as a tenant. In 1894, his landlord sued to eject him, on the allegation that he was a trespasser. This suit was dismissed by the Court of first instance and that decree was ultimately affirmed, on appeal, by this Court on the 20th July 1897. In this litigation, the Plaintiff was assisted by the Jana Defendants. Accordingly in 1898 he executed fictitious conveyances in their favour with a view to protect himself from further aggression on the part of the Kars. In 1899, he found that the Janas were unfaithful, and so to protect himself against the Janas, he induced his landlord to institute a fictitious suit for rent. That suit was decreed on the 7th November 1899. The Kars took out execution of this decree,

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the Janas thereupon preferred a claim which was disallowed on the 20th January 1900. The decree was subsequently executed and at the sale which followed, the Kars purchased the holding on the 29th March 1900. The Plaintiff alleges that possession was formally delivered to the Kars on the 5th June 1900, as a matter of fact he himself has ever since continued in occupation of the land. On the 10th April 1900, the Janas sued the Plaintiff and the Kars for declaration of their title on the basis of their conveyances; but on the 23rd July 1900 this suit was withdrawn. In 1906 the Kars turned against the Plaintiff, and with the help of the Police took away by force the crops raised by him. On the 15th March 1907, the Plaintiff commenced this suit for declaration that the entire proceedings in the rent suit of 1899 were fictitious and that the Kars did not acquire any title on the basis of their purchase at the execution sale. The Court of first instance found in favour of the Plaintiff and made a decree in accordance with the prayer in the plaint. Upon appeal that decree has been set aside by the District Judge on the ground that as the Plaintiff entered into this fraudulent arrangement with the Kars with a view to defraud the Janas, he is not entitled to any relief in a Court of equity. The District Judge has further found that the suit is in essence a suit for specific performance of a contract and is consequently barred by limitation. On the present appeal the decision of the District Judge has been assailed on two grounds, namely, first, that the suit is not barred by limitation and, secondly, that the conduct of the Plaintiff has not been such as to disentitle him to relief in a Court of equity. These points have been controverted on behalf of the Kar Defendants who have further urged that the suit is barred under sec. 317 of the Code of Civil Procedure of 1882. In our opinion, the decree of the District Judge cannot be supported.

In so far as the first ground is concerned, no question of limitation arises in this case. The suit is not one for specific performance of a contract. No doubt, the Plaintiff alleged that the Kar Defendants had agreed to execute a release and in the prayer clause of the plaint he asked for a decree for execution of such release by the Kars. But the suit is in essence one for declaration of title to land and for confirmation of possession. The Plaintiff seeks a declaration that the proceedings in the rent-suit were fictitious and did not operate to affect his title in any manner; he also prays for confirmation of possession. As the Kars turned against the Plaintiff and took away the crops grown by him in November 1906, and the suit was commenced on the 15th March 1907, it is amply in time. We hold accordingly that the suit is not barred by limitation.

In so far as the second ground is concerned, it is clear that the Plaintiff is not disentitled to relief in a Court of equity. It may be conceded that the fictitious suit for rent was instituted against him by the Kars at his instance with a view to make it impossible for the Janas to assert their claim under the conveyances. But the Janas cannot be said to have been defrauded unless it is established that they had a valid title. Upon this point, the Court of first instance found that the Janas who are said to have been defrauded paid no consideration for the conveyances in their favour; in other words, that the conveyances were

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fictitious documents which had been executed by the Plaintiff with a view to protect himself from any invasion of his right by the Kars. Under these circumstances, it is impossible to maintain the view that the Janas were defrauded. On behalf of the Kars, we have been pressed to remand the case for consideration of the question whether the Janas had any subsisting title; but we cannot accede to this request. It is plain from the grounds of appeal taken by the Kars before the District Judge that the findings of the Court of first instance upon this question were not specifically assailed and it is clear that if the point had been argued before the District Judge, there would have been a discussion of the evidence on this point in the judgment. It appears to have been assumed before the District Judge that the Janas were defrauded, because the effect of the execution sale was to make it impossible for the Janas to assert their title. But it appears to have been overlooked that if they had no real title to the property, they could not be defrauded. The case thus falls within the principle of the decision of this Court in *Jadunath Poddar* v. *Ruplal Poddar* (1), and of the Judicial Committee in *Petherpermal Chetty* v. *Muniandy Servai* (2), namely, that to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. The Plaintiff is consequently not disentitled to protection in a Court of equity.

The only other point which requires consideration is whether the suit is barred under the provisions of sec. 317 of the Code of 1882. That section provides that no suit shall be maintained against a certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of a man through whom such other person claims. The case before us is not a suit of this description; sec. 317 contemplates a real sale in execution of a real decree in a real suit. Here we find a fictitious suit for rent in which there was no controversy between the parties. In that fictitious suit a fictitious decree was made and the sale held in execution of that decree was equally fictitious. To a suit of this description the observation of Lord Brougham in *Bandon* v. *Becher* (3) applies: "A sentence is a Judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these qualities, not one takes place in the case of a fraudulent and collusive suit; there is no Judge but a person invested with the ensigns of a Judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party Defendant, no real interest brought into question" [see *Radhamadhab* v. *Kalpataru* (4)]. To a suit of this description sec. 317 cannot possibly have any application.

The result is that this Appeal is allowed, the decree of the District Judge set aside, and the suit decreed with costs in all the Courts in the manner following:

(1) I. L. R. 33 Cal. 967 (978) (1906).
(2) I. L. R. 35 Cal. 551 (1908).
(3) 3 Cl. and F. 479 (1835).
(4) 17 C. L. J. 209 (212) (1912).

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The decree will declare that the suit for rent (No. 369 of 1899) instituted against the Plaintiff by the Kar Defendants in 1899 and all proceedings based thereon were fictitious and have not affected his title in any manner; his possession will further be confirmed, or if he has meanwhile been dispossessed, he will be restored to possession in execution of this decree.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULES NOS. 41, 42, 43, 376 AND 144 OF 1914.

FLETCHER, J. RICHARDSON, J. 1914, Heard, 11, May. Judgment, 20, May.

ESHANI DASI, Decree-holder, Petitioner;
v.
GOPAL CHANDRA DEY and ors., Judgment-debtors, Opposite Party.

Married Women's Property Act (III of 1874), secs. 2, 4, 6—Hindu effecting a policy of life insurance for benefit of wife and children—Policy money if available for his debts on death—Statute, application of, leading to anomaly—Interpretation.

A policy of life insurance effected by a Hindu for the benefit of his wife and children is not governed by the provisions of sec. 6 of the Married Women's Property Act of 1874.

Per RICHARDSON, J.—*Although sec. 2 of the Act expressly provides that nothing in the Act applies to any married woman who at the time of her marriage professed the Hindu amongst other religions, or whose husband at the time of such marriage professed that religion and does not expressly exempt their children from the operation of the Act, the intention of the Legislature, taking the Act as a whole, is to exclude the children also from the benefits of sec. 6 of the Act.*

If the words of an Act are so plain that no other construction is reasonably possible, the anomaly must be accepted and effect must be given to the language which the Legislature has chosen to employ. But if the language is of doubtful import, the most reasonable construction of which it is fairly capable ought to be adopted:

Held—PER CURIAM—*That the money due under the policy in question formed part of the estate of the assured and was available for payment of his debts after his death.*

This was a Rule granted on the 12th January 1914 against an order of Babu Baroda Proshad Roy, Subordinate Judge of Hooghly, dated the 23rd Decemb r 1913.

The facts of the case will appear from the Judgment.

Babus Jadu Nath Kunjilal and *Jogendra Kumar De* for the Petitioner in Nos. 41, 42, 43 and 376.

Babus Sasi Sekhar Roy and *Rishendra Nath Sirkar* for the Petitioner in No. 144

Babus Ram Chandra Majumdar and *Guru Das Sinha* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—The only questions raised by these 5 Rules is whether a sum of Rs 2,000, payable by the Oriental Government Security Life Assurance Co, Ltd., under or by virtue of a policy of assurance on the life of one Radha Kishore De, numbered 24003, is available for the payment of the debts of Radha Kishore De. Radha Kishore De was a Hindu. He died in the month of January 1913. The Opposite Parties to these Rules are his heirs.

Radha Kishore in his life-time effected the policy in question on his own life

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for the benefit of his wife and children. The policy purports to be issued under the provisions of the Married Women's Property Act, 1874. The question for our determination is—does sec. 6 of the Married Women's Property Act, 1874, apply to a policy of assurance effected by a Hindu on his own life for the benefit of his wife and children? In the present case the assured has not purported to create any trust in respect of the money payable under the policy. Unless, therefore, sec. 6 of the Act applies, the contract of assurance being with Radha Kishore, the right to call for payment is vested in his representatives and forms a portion of his estate: *Cleaver* v. *Mutual Reserve Fund Life Association* (1). Different views have been taken in the High Courts in India as to whether sec. 6 of the Act authorises a married Hindu man to effect a policy of assurance in accordance with the provisions of the section.

The High Court at Bombay in the case of *Shankar* v. *Umabai* (2) take the broad view that the Act of 1874 does not apply to Hindus and therefore that a policy effected by a Hindu for the benefit of his wife and children is not governed by the provisions of sec. 6.

On the other hand, the High Court at Madras in the case of *Balamba* v. *Krishnayya* (3) have held that the provisions of sec. 6 of the Act apply to a policy effected by a Hindu on his own life for the benefit of his wife and children.

Now sec. 2 of the Act provides that—"Nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion or whose husband at the time of such marriage professed any of those religions.' And sec. 6 of the Act is in these terms—"A policy of assurance effected by any married man on his own life and expressed on the face of it to be for the benefit of his wife or his wife and children or any of them shall enure and be deemed to be a trust for the benefit of his wife or of his wife and children or any of them according to the interest so expressed and shall not as long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate." A policy effected under the terms of the section by a married man coming within the terms of the section for the benefit of "his wife or his wife and children or any of them" if they come within the terms of the section is a complete settlement as from the date of the policy on the wife and children.

Thus although there is no obligation on the husband to pay the premiums becoming due on the policy, the husband could not surrender the policy to the office and receive the surrender value thereof.

Now a wife of a Hindu married man seems to me to be obviously a married woman who or whose husband professes the Hindu religion. And in that view, in my opinion, sec. 2 of the Act, prohibits a Hindu married man from effecting a policy under sec. 6 for the benefit of his wife. I am unable to adopt the view that seems to have been expressed by Tyabji, J., that the policy would be a valid settlement on the children in case of a policy effected by a Hindu, although the wife is excluded by the terms of sec. 2 of the Act.

That view would involve reading into sec. 6 after the words "for the

(1) [1892] 1 Q. B. 147.
(2) I. L. R. 37 Bom. 471 (1913).
(3) 25 M. L. J. 65.

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benefit of his wife or his wife and children or any of them" the words "in case of a Hindu, etc., for the benefit of his children or any of them." But taking as I do the view that sec. 6 does not authorise a Hindu married man to effect a policy under the terms of the section for the benefit of his wife, it seems clear that sec. 6 does not apply to Hindus and that section stands on the same footing as the other sections of the Act. The view that the Act of 1874 does not apply to Hindus has been laid down more than once in judicial decisions in this country.

I agree with the view expressed by Scott, C. J., in the case of *Shankar* v. *Umabai* (2). These 5 Rules ought therefore to be made absolute with costs. We assess the costs in each case at one gold mohur. Let the records be sent down at once.

RICHARDSON, J.—I have come, upon consideration, to the same conclusion.

Section 2 of the Married Women's Property Act (III of 1874) contains the following saving clause :—

"Nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Muhammadan, Buddhist and Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of these religions."

Sec. 6, so far as it need be quoted, provides that "a policy of insurance effected by any married man on his own life and expressed on the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate."

Of the operative sections from 4 to 9 it is admitted that no section with the exception of sec. 6 can possibly apply to a married woman who at the date of her marriage professed the Hindu or any of the other religions specified in the saving clause. Sec. 6 is in Part III and, as already indicated, the only other section in that Part is sec. 5 which relates to policies of insurance effected by married women. That section clearly and admittedly does not apply to a policy taken out by a Hindu wife. It seems very unlikely therefore that sec. 6 should apply to Hindu wives or Hindu marriages or families. The scheme as a whole (including sec. 4 of the Succession Act) appears to be applicable only to marriages between persons governed by the Succession Act. At almost every step the Legislature is thinking of disabilities and inabilities imposed by English law at the time on married women subject to that law—disabilities and inabilities unknown to married women subject to the principal systems of family law prevalent in India. Such women may have their own disabilities and inabilities, but they were never subject to the rules peculiar to the English law on this topic.

But the argument can be carried further. As the Succession Act was passed, its sec. 4 was apparently of universal application. It was not subject to that part of sec. 331, quoted above, regarding the non-applicability of the Act to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist. As the Act stood, sec. 4 applied to all married persons whatever might be their religion. The only restriction was one of time. As already mentioned, it did

(2) I. L. R. 37 Bom. 471 (1913).

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not "apply to any marriage contracted before" the 1st January 1866. This restriction is also contained in sec. 331 and the form in which it is expressed should be noticed.

Now sec. 2 of the Married Women's Property Act (the extent and application section) contains not only the saving clause which has caused the difficulty, but certain other clauses or paragraphs. The last paragraph enacts positively that "the fourth section of the said Indian Succession Act shall not apply, and shall be deemed never to have applied to any marriage, one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion." This provision, important though it at first sight appears, is not mentioned in the somewhat elaborate preamble. The reason why it was not mentioned is probably that sec. 4 was never intended to apply to Hindu, Muhammadan and Buddhist marriages and had never been treated in practice as applicable to such marriages. It is the only section in a long Act which purports to affect Hindus, Muhammadans and Buddhits. If this result was due to some accidental error or omission in the framing of the saving clauses in sec. 331, it was very natural that the matter should be put right in the Married Women's Property Act. However that may be, if sec. 4 of the Succession Act had continued to be applicable to all married women, there might have been some ground for supposing that one or other of the sections of the Married Women's Property Act would or might have a similar extended application. But when we find Hindu, Muhammadan and Buddhist marriages expressly excluded from the operation of the principal enactment, it is unlikely that any of the supplementary and complementary provisions of the Married Women's Property Act should apply to such marriages. The suggestion that the benefit of sec. 6 of the latter Act was conferred by way of compensation for exclusion from sec. 4 of the former Act is hardly tenable. Reading sec. 6 with all the other provisions, it seems to me clear at least that it does not apply to married women of the specified denominations.

The question is whether this section applies to a policy taken out by a Hindu husband for the benefit of his wife and children.

It is argued that the section refers in terms to a "married man and not to a married woman" which is the expression used in the saving clause in section 2. This is a narrow foundation for the inference that the intention of the Legislature was to exclude sec. 6 from the scope of the saving clause and make it generally applicable to all married women whatever might be their religion. The section speaks not only of a "married man," but of his wife, and a wife is a "married woman." But then it is said, the saving clause at any rate does not extend to children and it would be attributing caprice to the Legislature to suppose that sec. 6 is applicable to the children, but not to the wife of a Hindu husband. It is urged that even at the cost of doing some violence to the language, a construction which has this capricious result must be rejected.

The argument of course, cuts both ways and the better opinion seems to be that when the wife or the husband was a Hindu at the date of the marriage, sec. 6 applies neither to the wife nor to her children.

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No doubt the peculiar form given to the saving clause creates a difficulty. Nothing in the Act is to apply to a married woman who, or whose husband, at the time of the marriage professed one or other of the religions specified. The saving clause in sec. 331 of the Indian Succession Act is in regard to its actual terms more widely expressed: "The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan, or Buddhist, the term Hindu including as is now recognised Jainas and Sikhs." It may be that the title of Act III of 1874, the Married Women's Property Act, has something to do with the way in which the saving clause is drawn. But apart from that, the Act must be read with reference to the object which it had in view and it must be read as a whole. It must also be read with sec. 4 of the Indian Succession Act. That section is the principal enactment to which the provisions of the Married Women's Property Act are supplementary and subsidiary.

Sec. 4 of the Indian Succession Act runs thus :—"No person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried."

Now, as appears from the preamble, the purpose of the Married Women's Property Act was two-fold. It aimed, firstly, at extending the protection afforded to women by sec. 4 of the Succession Act and, secondly, to put it briefly, at extending in certain ways the liability of married women for their debts incurred before or after marriage. The extension of their liabilities was a necessary or reasonable complement to their enlarged rights of property. The first of these two objects which the Legislature had in view was carried out in Parts II and III of the Act, headed respectively "Married Women's Wages and Earnings" and "Insurances by Wives and Husbands." Part II consists of one section, sec. 4, which in effect extends the protection of sec. 4 of the Succession Act which applied only to marriages contracted on or after the 1st January 1866 to the Wages and Earnings of women married before the 1st January 1866. Part III comprises secs. 5 and 6 which make provisions for insurances on lives by persons married before or after the same date. The second object is carried out by Part IV containing secs. 7 and 8 and headed "Legal Proceedings by and against Married Women" and by Part V containing sec. 9 and headed "Husband's Liability for Wife's Debts."

This is the whole of the Act with the exception of certain paragraphs in sec. 2 to which I have not yet referred. Sec. 1 gives the short title, and sec. 3, a commencement clause, has been repealed.

As to the power given by sec. 2 to the Governor-General in Council to exempt the members of any race, sect or tribe from the operation of all or any of the provisions of the Married Women's Property Act, it has been suggested that the existence of that power enables the Governor-General in Council, if necessary, to take Hindus, Muhammadans and Buddhists out of the operation of sec. 6 and is therefore an indication that *primâ facie* they come within the section. It is obvious however that this provision, like the corresponding provision in sec. 332 of the Succession Act, was never intended to apply to members of the Hindu, Muhammadan and Buddhist communities

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In both Acts these communities are specially dealt with by special saving clauses and the Governor-General in Council has in regard to them no power either of exemption or inclusion. The terms "race," "sect" and "tribe" are used with reference to communities which cannot be described as Hindu, Muhammadan or Buddhist, such as communities of Indian Christians, the Jewish community in Aden, hill tribes and others. No argument either way can therefore be drawn from the existence of this power of exemption. The extent to which Hindus, Muhammadans and Buddhists are affected or excluded depends on the special clauses relating to them and not on the power given to the Governor-General in Council in regard to other communities.

If it be taken as established that sec. 6 of the Married Women's Property Act does not apply to wives who come within the words of the saving clause, it would be an anomalous state of things if the sections were found to apply to the children of such wives. If the words of the Act are so plain that no other construction is reasonably possible, the anomaly must be accepted and effect must be given to the language which the Legislature has chosen to employ. But if that language is of doubtful import, the most reasonable construction of which it is fairly capable ought to be adopted. No doubt, children are not mentioned in the saving clause, but in the case of the exempted religions both parents are excluded from the operation of the principal enactment. With the possible exception of sec. 6 neither parent is affected by anything in the Married Women's Property Act and sec. 6 does not apply to the mother. Regard being had to the whole scope of the legislation it is evident that the Legislature was dealing with the legal aspects of marriage of a particular kind, namely, marriages between persons subject to the Succession Act. The reference to children in sec. 6 is quite incidental and in my opinion the only children contemplated by sec. 6 are children born of marriages of the kind to which the rest of the Act relates. This conclusion is strengthened by the difficulties which would attend the application of the section to the children of Hindu, Buddhist, or Muhammadan marriages. Take the case of the married daughter. She is a married woman and would come within the words of the saving clause. Take the case of a policy effected by a Hindu for the benefit of children unborn at the date of the policy.

The result in my opinion is that sec. 6 does not apply to the policy before us and the money due upon it forms part of the estate of the assured : *Oriental* v. *Vanteddu* (4), *Shankar* v. *Umabai* (2). I concur in the order proposed.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 284 OF 1914.

COXE, J.
BEACHCROFT, J.
1914,
28, May.

RATAN CHAND DHARAM CHAND Plaintiff, Petitioner,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, and another, Defendants, Opposite Parties.

Civil Procedure Code (Act V of 1908), sec. 80, Or. 7, r. 11 (d)—Secretary of State for India in Council, suit against—Notice to "Collector" means notice to Collector of District in which suit instituted—Suit for damages for breach of

(2) I. L. R. 37 Bom. 471 (1913).
(4) I. L. R. 35 Mad. 162 (1911).

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contract, notice if necessary of—Defective notice, suit if to be dismissed or plaint only to be rejected —Appearance of Defendant if precludes latter—Defendant taking exception to Court's jurisdiction if acquiesces in trial if he does not apply for transfer.

The notice contemplated in sec. 80 of the Civil Procedure Code must be served on the Collector or one of the Collectors of the District in which the suit is to be brought.

A suit brought in the Court at Sealdah, after notice served on the Collector of Purneah, is not in compliance with sec. 80, C. P. C.

Such a notice is required even in a case arising out of a contract.

MANINDRA CHANDRA NANDI v SECRETARY OF STATE (1) *followed.*

SECRETARY OF STATE v. RAJLUKCI (2) *referred to.*

Where it was stated in the plaint that notice under sec. 80, C. P. C, had been duly served, but after Defendant had entered appearance it was discovered that the notice had not been duly served

Held—*That it was too late to reject the plaint under Or. 7, r. 11; and that there was also no statement in the plaint which suggested that the suit was barred.*

A Defendant who takes exception to the jurisdiction of the Court is not bound to apply for a transfer of the suit to the proper Court, and does not acquiesce in the trial of the suit by not so applying.

This was a Rule granted on the 2nd of March 1914 against an order of the Small Cause Court Judge of Sealdah, dated the 15th December 1913.

The facts of the case will appear from the judgment.

(1) 5 C. L. J. 148 (1907).
(2) I. L. R. 25 Cal. 239 (1897).

Babu Probodh Chandra Roy, for the Petitioner.

Babus Ram Charan Mitter, Mohendra Nath Roy and Ambika Pada Chowdhury for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—The Plaintiff in this case sued for damages on the allegation that he had booked 44 bales of cotton at a station in the E. B. S. Ry. in the Purneah district for transmission to Howrah and that 40 bales only were delivered. He made the Secretary of State the first Defendant as representative of the E. B. S. Ry. and the E. I. R. Co. the second Defendant. The suit has been dismissed. The Plaintiff has obtained this Rule on the Defendants to show cause why the order of dismissal should not be set aside.

The Rule must, I think, be discharged. The suit was brought at Sealdah, though the cause of action arose partly in Purneah but mainly at Howrah, and the place of business of the second Defendant is at Howrah. The Small Cause Court Judge has held that the suit must fail against the 1st Defendant, because no notice was served in accordance with sec. 80 of the Code. A notice was served on the Collector of Purneah, but the suit was not instituted at Purneah and reading sec. 80 as a whole I think the term "district" must mean the district in which the suit is instituted and that the notice must be given to the Collector or to one of the Collectors of that district.

It has been argued that no notice is necessary in cases arising out of contract and reference has been made to the case of *Manindra Chandra Nandi* v. *Secretary of State* (1).

(1) 5 C. L. J. 148 (1907).

The terms of the section, however, as they stand seem to me to show that notice is necessary in every case and this is the view taken in *Secretary of State* v. *Rajlucki* (2) from which the decision in *Manindra Chandra Nandi* v. *Secretary of State* (1) does not dissent.

Then finally it was argued that the suit ought not to have been dismissed, but the plaint should have been rejected under O. 7, r. 11 (d). That Rule obviously has no application, for there was no statement in the plaint which suggested that the suit was barred. On the contrary it was specifically stated that notice under sec. 80 had been served on the "Collector" without specifying the district. The defect was not discovered till after the Defendants had entered appearance and it was then too late to reject the plaint.

As against the 2nd Defendant the suit has been dismissed on the ground that the Court had no jurisdiction. This view is evidently right. The 2nd Defendant objected at once to the jurisdiction. It is argued that as he did not apply for a transfer, he must be taken to have acquiesced in the trial of the suit at Sealdah. I dissent altogether from this contention. So it was the duty of the Plaintiff when this substantial objection was taken to take the necessary steps to meet it and the Defendant was not in any way bound to have the defect that he had pointed out cured for the Plaintiff's benefit.

A suit at Sealdah based on a notice to the Collector of Purneah and on a cause of action arising mainly at Howrah against Defendants one of whom carries on business at Howrah seems to me wholly untenable. I think, this suit was rightly dismissed and would discharge the Rule with costs. I assess the hearing fee at 1 gold mohur for each Defendant.

BEACHCROFT, J.—I agree.

Rule made absolute.

(1) 5 C. L. J. 148 (1907).
(2) I. L. R. 25 Cal. 289 (1897).

CRIMINAL REVISIONAL JURISDICTION.

REV. No. 1156 OF 1914.

SHARFUDDIN, J. TEUNON, J. 1914, 12, August.	BIRENDRA NATH DAS-GUPTA, Petitioner, v. THE EMPEROR, Opposite Party.

Penal Code (Act XLV of 1860), sec. 193—Order to prosecute—Case pending before Court of Session—Alleged perjury—Propriety of prosecution by Committing Magistrate.

Where a Committing Magistrate had ordered the prosecution of a witness under sec. 193, Indian Penal Code, while the case in which he had deposed was pending before the Court of Sessions, the High Court set aside the order.

The impropriety of taking proceedings against a witness while the case is still pending commented on.

This was a Rule granted on the 6th July 1914 against an order of Babu Hara Chandra Ghose, Sub-Divisional Magistrate of Narail, Jessore, dated the 15th June 1914, directing the prosecution of the Petitioner for perjury.

The facts of the case appearing from the petition to the High Court were as follows:—

The Petitioner who lived with his father and brothers had a dispute with certain co-sharers. On the night of the 12th March 1914 there was a fight between the two parties. Later on the same night, the Police raided the Petitioner's house and gave a severe beating to him

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and to his father. In the early hours of the morning the Petitioner laid an information at the thana, and as his father was lying mortally wounded, he came away without reading over the statement recorded by the Police-officer. His father died the same day. Subsequently, the Petitioner came to learn that in the statement as recorded by the Police, it had been made to appear that his father had been wounded by the co-sharers and not by the Police. He thereupon made two petitions before the Sub-Divisional Magistrate pointing out the error and he was examined on oath by the Magistrate. Subsequently, the Police treating the statement of the Petitioner as recorded by the Police as the first information started a case of culpable homicide against the co-sharers. In that case, the Petitioner was examined as a witness before the Sub-Divisional Magistrate on the 18th May 1914. After the deposition had been taken down, while other witnesses were being examined, the Petitioner was taken to another room by the Peshkar of the Court who read over the statement to the Petitioner. Subsequently the Magistrate committed the case to the Sessions and on the 15th June 1914 purporting to act under sec. 476, Cr. P. C., he ordered the prosecution of the Petitioner for perjury inasmuch as his statements in Court were inconsistent with those taken down in the first information. Thereupon the Petitioner moved the High Court and obtained the present Rule on the grounds—(vi) that the deposition not having been lawfully read over to him, no prosecution under sec. 193, I. P. C., could be had and (ix) that no prosecution could be ordered till the disposal of the case in the Court of Session.

The District Magistrate, Mr. R. C. Hamilton, submitted an explanation in the course of which he stated as follows :—

"The object of petitioner's making such deliberately false allegation is obvious; his legal advisers wishing to make his case appear to be on all fours with the case of *Kamatchinathan Chetty v. Emperor* (1), put him up to make, at no risk to himself or them, an intentionally false affidavit alleging that the same circumstances or events took place in this particular case as in that case."

Babu Narendra Kumar Basu for the Petitioner.—The District Magistrate in his explanation has permitted himself to use language which no one in his position ought to use. He has made an attack on members of the profession in a document which he knows cannot be used against him. He has made a statement which is not supported by facts.

[TEUNON, J.—Has the case terminated at the Sessions?]

Yes. The Petitioner virtually repeated the statements there and the jury in accordance therewith has found the accused persons "not guilty" and the Judge agreeing has acquitted them.

The JUDGMENT OF THE COURT was as follows :—

In this case it appears that one Birendra Nath Das-Gupta, the Petitioner before us, was examined as a witness in the Court of the Sub-Divisional Magistrate of Narail on the prosecution of one Rasiklal Das-Gupta and others on charges relating to the death of the Petitioner's father Parbati Nath Das-Gupta. The accused in that case were committed to take their trial before the Court of the Sessions Judge. While the case was still pending in the Court of Session the Sub-

(1) I. L. R. 28 Mad. 308 (1904).

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Divisional Magistrate of Narail directed the prosecution of the Petitioner under sec 193, I. P. C., with reference to a certain statement made by him in the course of his deposition. These statements refer to the first information which he had lodged before the Police in the case and in them he alleged that the Sub-Inspector who took his first information recorded it incorrectly. He thereupon moved this Court and obtained the present Rule calling upon the District Magistrate of Jessore to show cause why the order directing his prosecution should not be set aside. We granted the Rule mainly on the ground that the case in which he had deposed was still pending in the Sessions Court. No one appears to show cause, but the District Magistrate has submitted an explanation in which he says that the point at issue, namely, whether the substance of the information has been correctly recorded by the Sub-Inspector is comparatively so little connected with the charge of causing death now before the Court of Session that it is unnecessary to await the result of the trial. We are unable to take this view. It is clear that the question whether the first information in the case has been correctly recorded is necessarily one of great importance at the trial and in any case the impropriety of taking proceedings against a witness while the case is still pending cannot be too strongly insisted upon.

For these reasons we make the Rule absolute and set aside the order directing the prosecution of the Petitioner. If he repeated the statements alleged to be false before the Sessions Judge it will be for the Sessions Judge to consider whether or no his prosecution is advisable.

In conclusion we have further to observe with regret that in his explanation in dealing with the 6th ground set out in the Petitioner's application the District Magistrate has used language of unnecessary and unbecoming violence, and that his aspersions on the legal advisers of the Petitioner, obviously made on no material, are highly improper. We trust that we shall have no occasion to repeat this censure.

C. C. B. *Rule made absolute.*

[END OF VOL. XVIII.